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IN THE
CIRCUIT COURTS OF APPEALS AND
DISTRICT COURTS OF THE
UNITED STATES

APRIL—MAY, 1915

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OF THE

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CASES

ARGUED AND DETERMINED

IN THE

UNITED STATES CIRCUIT COURTS OF APPEALS AND THE DISTRICT COURTS

FARMERS' & MERCHANTS' BANK OF PHOENIX, ARIZ., v. ARIZONA
MUT. SAVINGS & LOAN ASS'N et al.

(Circuit Court of Appeals, Ninth Circuit. February 1, 1915. Rehearing Denied March 8, 1915.)

No. 2425.

1. EQUITY ~~429~~—DECREE—EXPIRATION OF TERM—SUBSEQUENT VACATION.
After the end of the term at which a decree is rendered it becomes an absolute finality; the court having no power to change, revise, or grant other relief against it in the cause or proceeding in which it was rendered, except that it may do so for errors of law appearing on the face of the decree which rendered it void.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 1020–1033; Dec. Dig. ~~429~~.]

2. EQUITY ~~430~~—DECREE—VACATION AFTER TERM—INVALIDITY.

Where a decree in a stockholder's action to recover the assets of an insolvent corporation was not within the issues presented by the bill and erroneously awarded a personal judgment in favor of certain stockholders, who were assuming to act for all, excluding from its benefits all other stockholders, who if they had knowledge of the proceeding would be entitled to assume that the suit would be carried to a decree which would protect all stockholders alike, the court after the term was justified in setting it aside and entering a new decree, rectifying the errors and providing for a just distribution of the corporation's assets.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 1034–1047; Dec. Dig. ~~430~~.]

3. EQUITY ~~460~~—BILL OF REVIEW—PETITION OF INTERVENTION.

Where a decree in a stockholder's suit for the benefit of the corporation and all other stockholders similarly situated was erroneous on its face and granted relief not within the issues, a petition of intervention, filed within the time allowed for taking an appeal, seeking to set aside the decree, could be properly sustained as a bill of review.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 1117–1123; Dec. Dig. ~~460~~.]

4. EQUITY ~~454~~—BILL OF REVIEW—APPLICATION TO FILE.

Permission of the court is not required to file a bill of review to set aside a decree for errors of law.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 1110; Dec. Dig. ~~454~~.]

5. EQUITY ~~114~~—INTERVENTION—RIGHT TO INTERVENE.

Where a suit was brought for the benefit of all stockholders of an insolvent corporation, including petitioners, though they were not named

~~429~~ For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes
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as parties, it was not an abuse of the trial court's discretion to deny their application for leave to intervene.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 275-279; Dec. Dig. ☞114.]

6. APPEAL AND ERROR ☞95—ORDERS APPEALABLE—RIGHT TO INTERVENE.

An order denying petitioner's right to intervene is not appealable, unless it is a practical denial of certain relief to which intervenor is fairly entitled, and which he can only obtain by intervention, and the permission to intervene is not discretionary.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 649-654; Dec. Dig. ☞95.]

Appeal from the District Court of the United States for the District of Arizona; Wm. W. Sawtelle, Judge.

Suit by Charles W. Clark against the Arizona Trust Company, in which the Arizona Mutual Savings & Loan Association and others were permitted to intervene. From a decree marshaling the assets and providing for the distribution of assets of the Loan Association, and denying the application of the Farmers' & Merchants' Bank of Phoenix, Ariz., to intervene (217 Fed. 640), it appeals. Affirmed.

Charles W. Clark, a stockholder in the Arizona Mutual Savings & Loan Association, hereinafter called the Loan Association, on July 15, 1912, filed a bill of complaint for that association and its stockholders, alleging that he was one of the many stockholders of the Loan Association; that the officers of that association, knowing it was insolvent, without the knowledge of the plaintiff and many others similarly situated, entered upon a fraudulent and corrupt agreement with certain persons for the organization of the Arizona Trust Company for the purpose of taking over the assets and property of the Loan Association, and that in consideration of 1,300 shares of the stock of the Trust Company, the Loan Association agreed to deliver to the Trust Company all of its assets and property; that the scheme was unlawful and corrupt; that the assets of the Loan Association were impressed and charged with a trust for the benefit of its stockholders; that the officers of the Trust Company dealt with the assets of the Loan Association for their own private and selfish ends, and without the slightest benefit to the Loan Association or the stockholders thereof; that the said transfer of the assets was fraudulent and void; that at the time of the transfer the Trust Company had no assets or property; that the 1,300 shares of stock in that company had no value whatever; that the assets of the Loan Association were intermingled with the assets of the Trust Company in an attempt to obtain the same at a sacrifice of the rights of the stockholders of the Loan Association; that to determine the rights and equities of the complainant and other stockholders an accounting between both corporations and the officers and directors thereof was necessary; and that the complainant's bill was brought in his own behalf and in behalf of all others similarly situated. The prayer of the bill was that the transactions between the corporations be declared void, that a restitution of the assets of the Loan Association be decreed, that an accounting be had between the corporations, and between the Loan Association and its stockholders, that a receiver be appointed for the Loan Association, and that the rights and equities of the complainant and all the parties therein concerned be determined, and the affairs of the Loan Association be wound up and its assets distributed.

Thereafter other petitions in intervention were filed by intervening stockholders, and on February 27, 1913, a decree was entered, finding that the transfer of the assets of the Loan Association to the Trust Company was unlawful and invalid, and not binding upon the intervenors, or upon the other outstanding and nonexchanging stockholders in the defendant Loan Association, and finding that the Trust Company had so confused and mingled

the assets received from the Loan Association that it was impossible to direct and enforce a retransfer of all of the original properties and assets so derived by the Trust Company and the profits thereon. In the decree the court set forth a list of stockholders of the Loan Association who had not exchanged their stock for stock in the Trust Company, together with the amounts each had paid in to the Loan Association, and also set forth a list of the interveners who had exchanged their stock, together with the amount which each had paid into the Loan Association, and decreed that all said sums be repaid to said stockholders and interveners, and that the assets in the hands of the receiver, if any remained after paying off in full the moneys so paid by the said stockholders into the Loan Association, remain in the Trust Company. On July 15, 1913, a large number of other stockholders of the Loan Association intervened, and petitioned that the decree of February 27, 1913, be set aside, and that they be allowed to intervene. They alleged in their petition that they had been stockholders of the Loan Association, and had been induced to surrender their stock therein by false and fraudulent representations made to them by the Trust Company and the Loan Association, and that they had no knowledge of the appointment of the receiver, and were not aware that the corporations were in the hands of a receiver or insolvent until some time in the month of February, 1913; that they were kept in ignorance of the affairs of the company; that no notice was given them of the suit of Clark or the interveners against the corporations until after the final decree of February 27, 1913; and the petitioners prayed that the decree of February 27, 1913, be set aside, and the case reopened, and that they be allowed to intervene to the end that their rights might be protected.

On July 29, 1913, the appellant herein, the Farmers' & Merchants' Bank of Phoenix, filed a petition in intervention, alleging that on July 12, 1913, it had obtained a judgment in the superior court of the state of Arizona for Maricopa county, against the Trust Company, for the sum of \$18,500; that at the time when the judgment was entered the assets of said corporation were in the hands of a receiver; and it prayed that the receivership be extended for its benefit, and for the benefit of other judgment creditors of the Trust Company; and the petition proceeded to allege that the approximate value of the assets of both corporations was in the neighborhood of \$70,000, that the liens established and fixed by the final decree of February 27, 1913, were about \$50,000, and that, in addition to the assets then in the hands of the receiver, assets of the Trust Company to the extent of many thousand dollars should be recovered by it from the former officers and directors, who, it was alleged, had made unlawful appropriation of the money to their own use in large sums, and had also made unlawful preference payments to certain stockholders while the companies were insolvent, and had pledged assets of the Loan Association to secure a loan to the Trust Company, and the petition set forth other acts and misconduct of the officers of the Trust Company for which it was said they were liable to that company in large amounts.

On March 12, 1914, the court entered another decree setting aside the decree of February 27, 1913, holding that that decree had been entered without notice and opportunity to the stockholders to present their claims to the assets of the company, or to show their interest in the property, and without referring the case to a master, as prayed in the bill, to determine the rights and equities of all parties concerned, holding that the decree was erroneous in that the stockholders named therein were relieved from all participation in any losses of the Loan Association, and giving them a lien upon its assets to the exclusion of other stockholders, that the decree was not responsive to the pleadings, that, so far as it attempted to vest the title of the assets of the Loan Association in the Trust Company, it was beyond the issues of the case made by the pleadings, and the court exceeded its powers on the pleading and proof when it gave a lien to the intervening creditors on the assets of the Loan Association in the hands of the Trust Company for the amount they had paid in, and compelled the parties who were interested in the assets of the Loan Association to bear all the losses

incurred by that Association in the conduct of its business; and the decree ordered that all assets which had been transferred to the Trust Company by the Loan Association be restored to the Loan Association or to its receiver, that all contracts, conveyances, or agreements made by the Loan Association or its agents or officers be vacated and annulled, that the Trust Company transfer and deliver to the receiver all property received by it from the Loan Association, or received by it from the use and investment or other disposition of the assets of the Loan Association, that the cause be referred to a master to take an accounting between the two corporations, to ascertain the amount due from the Loan Association to each of its stockholders, that notice be given requiring all persons claiming to be stockholders in said Loan Association to file their claims with proof, that the master report as to the rights of the Loan Association in any assets now in the hands of persons not parties to the suit, and to report what sum of money or other assets of the Loan Association were unlawfully used by any officer of either corporation. It was further ordered that all petitioners for intervention be allowed to intervene and present their claims to the master for adjudication.

From that decree, and from the order of the court below denying it the right to intervene, the Farmers' & Merchants' Bank appeals.

Paul Renau Ingles, of Phoenix, Ariz., for appellant.

George J. Stoneman and Reese M. Ling, both of Phoenix, Ariz., for Arizona Mutual Savings & Loan Ass'n and others.

R. E. Morrison, of Prescott, Ariz., and J. E. Morrison, Benton Dick, and O. T. Richey, all of Phoenix, Ariz., for appellees Waring and others.

William M. Seabury, of Phoenix, Ariz., for appellees who are interveners named in decree of February 27, 1913.

Before GILBERT and ROSS, Circuit Judges, and WOLVERTON, District Judge.

GILBERT, Circuit Judge (after stating the facts as above). The decree of February 27, 1913, denies the rights of a large number of stockholders who are not named therein and unjustly distributes the money of the insolvent Loan Association contrary to the pleadings and the purpose of the suit. The decree of March 12, 1914, rectifies the errors of the former decree and provides for a just distribution of the assets of the corporation. The appellant says that the latter decree should not stand, that it is a nullity, because its effect is to set aside a decree after the expiration of the term at which it was rendered, and that it operates to the prejudice of the appellant, because the latter had by its judgment acquired a vested property right in the surplus remaining in the possession of the Trust Company after the execution of the decree of February 27, 1913, and that it gave to the stockholders of the insolvent Trust Company, at whose instance the original decree was set aside, rights in the assets of that company prior and superior to those of the appellant as a judgment creditor.

[1] It is unnecessary to cite authorities to the general rule that after the expiration of the term at which a judgment is rendered the judgment becomes an absolute finality, forever binding upon the parties and their privies, and the court is without power to change, revise, or grant other relief against it in the cause or proceeding in which it was rendered. But there are exceptions to the general rule, and one is the

case in which such errors of law appear upon the face of the decree as to render it void. In the present case the original suit was brought by a stockholder of the Loan Association, an insolvent corporation, for the benefit of himself and all similarly situated, to secure a proper winding up of the corporation, and a distribution of its assets, on the ground that the officers of that corporation refused to act for the benefit of the stockholders, and had entered into a scheme for the fraudulent disposition of the Loan Association's assets. In such a suit all the stockholders of the Loan Association were entitled to a pro rata distribution of the assets, and all were required to share pro rata in the losses, and all were obligated to join in the payment of attorney's fees allowed by the court in such proceedings. The decree of February 27, 1913, does none of these things. It takes no accounting. It arbitrarily decrees the repayment to certain named stockholders of the amounts which they had paid in to the Loan Association, regardless of the losses, debts, and obligations of the Loan Association, excludes from the benefits of the decree a large number of stockholders who had not appeared therein, and to whom no notice had been given, and leaves the remainder of the Loan Association's property in the hands of the Trust Company, notwithstanding that the bill alleged, and the court found, that all the assets of the Loan Association had been fraudulently transferred to the Trust Company.

[2] In brief, the decree is the entry of a personal judgment in favor of certain stockholders who were assuming to act for all, and it excludes from its benefits all other stockholders who, if they had knowledge of the proceeding, may be taken to have assumed that the suit would be carried to a decree in pursuance of its avowed purpose to protect all stockholders alike. That decree was not within the issues presented by the bill. Money recovered in such a suit belongs to all the stockholders, and not to the complaining stockholder. In *Lewis v. Clark*, 129 Fed. 570, 573, 64 C. C. A. 138, 141, this court said:

"The shareholders in associations of this character are not in the ordinary sense creditors, and if deemed creditors in any sense they are necessarily subject to all equities existing between themselves."

In *Towle v. American Bldg., L. & Inv. Soc. (C. C.)* 61 Fed. 446, Judge Grosscup, discussing the right of a stockholder in an insolvent building and loan association, said:

"Th first question is whether he is entitled to a credit for the amount of assessments paid upon his stock. I think not. Such a credit practically would be paying par on his stock, a preference over other stockholders, to which clearly he is not entitled. Neither do I think he should be allowed credit for fines paid in. They are the result of his personal delinquencies, and, eo instante, become the common property of all the members of the association."

Although the record contains no allegation that loans were made to the stockholders of the Loan Association, we are authorized to assume, in view of the purposes of the association, that such loans had been made and were outstanding at the time of the transfer of the assets to the Trust Company. No account is taken in the decree of February 27, 1913, of the rights and equities of the parties arising out of such

loans. In *Riggs v. Capital Brick Co.* (C. C.) 128 Fed. 491, it was held that, in the settlement of accounts between an insolvent building and loan association and a borrowing member, payments made by the latter on account of premium on his loan are to be credited as payments on the loan, and not on his stock, since such premium arose out of his contract as a borrower, and not out of his contract or relationship as a stockholder. And in *Gunby v. Armstrong*, 133 Fed. 417, 66 C. C. A. 627, it was held that where a building and loan association becomes insolvent, and proceedings are instituted for winding up its affairs, the court, as a matter of necessity, may require the borrowing stockholders to pay forthwith amounts due from them, although they are not in default and their obligations are not due by their terms.

In *Reynolds v. Stockton*, 140 U. S. 254, 11 Sup. Ct. 773, 35 L. Ed. 464, the question involved was the jurisdiction of a court, in a stockholders' suit brought to secure the reconveyance of personal property from another corporation, to enter a judgment adjudging the return of real property as well as the personal property involved in the issues. The court said:

"The rule is universal that where a defendant appears and responds only to the complaint as filed, and no amendment is made thereto, the judgment is conclusive only so far as it determines matters which by the pleadings are put in issue."

And the court held that, to constitute jurisdiction to adjudicate concerning the subject-matter in a given case, there are three essentials. The court said:

"First, the court must have cognizance of the class of cases to which the one to be adjudged belongs; second, the proper parties must be present; third, the point decided must be, in substance and effect, within the issue. That a court cannot go out of its appointed sphere, and that its action is void with respect to persons who are strangers to its proceedings, are propositions established by a multitude of authorities. A defect in a judgment arising from the fact that the matter decided was not embraced within the issue has not, it would seem, received much judicial consideration. And yet I cannot doubt that, upon general principles, such a defect must avoid a judgment."

In *Standard Oil Co. v. Missouri*, 224 U. S. 270, 32 Sup. Ct. 406, 56 L. Ed. 760, Ann. Cas. 1913D, 936, the court said:

"The federal question is whether, in that court, with such jurisdiction, the defendants were denied due process of law. Under the fourteenth amendment they were entitled to notice and an opportunity to be heard. That necessarily required that the notice and the hearing should correspond, and that the relief granted should be appropriate to that which had been heard and determined on such notice, for even if a court has original general jurisdiction, criminal and civil, at law and in equity, it cannot enter a judgment which is beyond the claim asserted, or which, in its essential character, is not responsive to the cause of action on which the proceeding was based."

In view of the foregoing considerations, it would seem that there is ground for holding that the court below was not without jurisdiction, either upon its own motion or upon the suggestion of parties interested, to set aside its former decree, notwithstanding that the term at which it was rendered had expired, and to enter the decree appropriate to the issues, which ought to have been entered in the first instance

[3] But, even if the errors of law are not such that they might thus have been corrected, the case is clearly one in which those results could have been obtained by a bill of review, and for that purpose we think that the petition filed on July 15, 1913, which was filed within the time allowed for taking an appeal from the prior decree, may properly be regarded as a bill of review.

[4] As the errors complained of and pointed out were all errors of law, there was no necessity for first obtaining permission of the court to file such a bill. Ricker v. Powell, 100 U. S. 104-109, 25 L. Ed. 527; Lewis v. Holmes, 194 Fed. 842, 116 C. C. A. 408. The petitioners, although they were not named as parties to the original suit, were in equity parties thereto, for the reason that the suit was brought for the benefit of all stockholders. They were denied the relief to which they were entitled and consequently were aggrieved by the decree. Their petition was addressed to the court, it was duly verified, and it pointed out specifically the errors of the former decree, and contained a prayer for a decree in accordance with the rights of all parties, a decree such as was thereafter rendered by the court.

In Kaw Drainage Dist. v. Union Pac. R. Co., 163 Fed. 836-838, 90 C. C. A. 320, 322, there was a similar petition to correct a decree. The court said :

"We think the petition presented to the trial court may be regarded as a bill of review. That it was called a petition does not determine its true character, and that it was informal in other respects may be disregarded, in the interest of substantial justice. It was filed within the time allowed for a bill of review, was addressed to the judges of the Circuit Court, and contained a statement in ample detail of the parts of the decree objected to, with the grounds of objection, followed by a prayer for specific and general relief and a verification."

And the court cited Knox v. Columbia Liberty Iron Co. (C. C.) 42 Fed. 378, in which a petition for rehearing was treated as a bill of review, because the relief sought could only be granted upon a bill of that character.

[5] We find no error for which the decree of March 12, 1914, should be reversed. In that decree the rights of the appellant are fully protected, and provision is made for the presentation of its claim to the master in chancery to be paid out of the available funds which may remain in the Trust Company. Provision is also made therein for the ascertainment and recovery of assets in the hands of persons not parties to the suit. There was no abuse of the discretion of the court below in denying the appellant's application for leave to intervene.

[6] An order denying the right to intervene is not appealable unless it is the "practical denial of certain relief to which the intervenor is fairly entitled, and which he can only obtain by intervention, and where the intervention is not discretionary with the chancellor." Credits Commutation Co. v. United States, 177 U. S. 311, 20 Sup. Ct. 636, 44 L. Ed. 782; Ex parte Cutting, 94 U. S. 14; Thomasson v. Guaranty Trust Co., 159 Fed. 126, 86 C. C. A. 514; United States Trust Co. v. Chicago Terminal T. R. Co., 188 Fed. 292, 110 C. C. A. 270.

The decree of March 12, 1914, is affirmed.

CENTRAL NAT. FIRE INS. CO. OF CHICAGO, ILL., v. BLACK.

(Circuit Court of Appeals, Ninth Circuit. February 1, 1915.)

No. 2395.

1. TRIAL ~~140~~—CREDIBILITY OF WITNESSES—IMPEACHMENT—QUESTION FOR JURY.

Whether defendant had succeeded in impeaching one of plaintiff's witnesses was for the exclusive determination of the jury.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 334, 335; Dec. Dig. ~~140~~.]

2. INSURANCE ~~668~~—LOSS—VALUE OF PROPERTY—QUESTION FOR JURY.

Where, in an action on a policy, there was evidence that the aggregate value of the property destroyed was greater than the amount of the policy, but there was some testimony and some circumstances tending toward the contrary conclusion, the amount of the loss was for the jury.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1556, 1732-1770; Dec. Dig. ~~668~~.]

3. INSURANCE ~~548~~—FIRE POLICY—EXAMINATION.

There was no failure on the part of insured to comply with a provision of the policy that he submit to an examination under oath before a person named by the insurer, where it appeared that no such person had been designated for the purpose.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1354; Dec. Dig. ~~548~~.]

4. INSURANCE ~~544~~—LOSS—BOOKS OF ACCOUNT—VOUCHERS—PRODUCTION.

Where insured's books of account, bills, invoices, and vouchers were burned by the fire which destroyed the insured property, his right to recover on the policy was not barred by his failure to produce for examination all books of account, etc., or certified copies thereof, if the originals were lost, at such reasonable places as were designated by the insurer or its representative.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1348; Dec. Dig. ~~544~~.]

In Error to the District Court of the United States for the Southern Division of the Western District of Washington; Edward E. Cushman, Judge.

Action by William Black against the Central National Fire Insurance Company of Chicago, Ill., a corporation. Judgment for plaintiff, and defendant brings error. Affirmed.

Cole & Cole, of Portland, Or., for plaintiff in error.

J. J. Brumbach, of Ilwaco, Wash., and Elmer M. Hayden, Maurice A. Langhorne, and F. D. Metzger, all of Tacoma, Wash., for defendant in error.

BEFORE GILBERT, ROSS, and MORROW, Circuit Judges.

ROSS, Circuit Judge. This action was brought by the defendant in error against the plaintiff in error upon a policy of fire insurance issued by the latter, insuring Black against all direct loss or damage by fire, with certain exceptions not important to be mentioned, to an amount not exceeding \$5,000 "on his stock of merchandise, consist-

~~For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes~~

ing principally of wines, liquors, cigars, beer, soda and mineral waters, and all other goods, wares, and merchandise not more hazardous, kept for sale by assured, while contained in two-story, shingled roof, frame building, and adjoining and communicating additions thereto, while occupied as saloon, and situated on lot 6, block 6, Tinker's North addition to Long Beach, Pacific county, Wash." That the saloon building and its contents were completely destroyed by fire during the life of the policy is not disputed.

The insurance company by its amended answer set up in defense that the value of the plaintiff's stock of goods did not exceed \$1,000 in value at the time of the fire; that the fire "was caused by the act, design, or procurement of the plaintiff and not otherwise"; that the proof of loss made by the insured, which was sworn to by him, did not comply with the requirements of the policy, and that in and by such proof of loss the insured falsely and fraudulently represented that he had on hand in his saloon at the time of the fire wines, liquors, mineral water, and cigars of the value of \$7,378.85, which he claimed was covered by the policy, and made and attached to such proof of loss a written statement setting forth various articles of certain specified values, which he claimed were destroyed by the fire, some of which articles did not in fact exist, and the values of those that did exist were falsely sworn to by the assured as being much larger than they really were, and further that there were included in the statement of loss certain specified articles which were not covered by the policy. The defendant company also set up in its amended answer a violation of the terms and provisions of the policy, in that the plaintiff "refused to produce for the examination of this defendant any bills, invoices, or other vouchers of any goods, or certified copies thereof, or any inventory thereof."

The case was tried with a jury, there being much evidence given on behalf of each side. The trial resulted in a verdict for the plaintiff for the full amount of the policy.

The policy was issued June 18, 1912, and was countersigned by the company's local agent at Long Beach, one Kayler. The fire occurred the 27th of the same month. That the company suspected some fraud in respect to the matter is abundantly shown by the evidence, the first item of which is the following telegram, sent by its agent at Long Beach to its agents in Portland, Or.:

"Long Beach, Wn., June 27, '12.

"Davenport, Dooley & Co., Portland, Ogn.: Risk covered by policy 590757 burned this morning prosecuting attorney on spot investigating. Total loss.

"1:11 p. m.

P. Kayler, Agent."

The suspicions of the company are further indicated by the visit of its adjuster to Long Beach shortly after the fire without seeing or endeavoring to see Black, although he went there to inquire into the matter of the fire. The record shows that a few days after the fire occurred the plaintiff in the case wrote to the company's agents at Portland this letter:

"Wm. Black, Long Beach, Wash.

July 3rd, 1912.

"Davenport Dooley Co., Portland, Or.—Dear Sir: I have meet with a loss on June 27 with doubtles you have been notified. Now I wish you to send adjuster or represtative as I wish to Clean up premises in order to rebuild.

"Yours Respect.,

Wm. Black."

To which letter no reply appears to have been received, and on August 19, 1912, the plaintiff wrote to the company's adjuster as follows:

"Long Beach, Wash., Aug. 19th, 1912.

"Mr. W. G. Lloyd, Portland, Ore.—Dear Sir: I have been waiting since June 27 for you to come down & inspect the site of my building that was burnt on that date. I wish to clear up the rubbish from place but do not want to touch anything till you have been it. Mr. Whalley of the New Hampshire Ins. Co. refers me to you hence this letter. I wish you would make it a point to come as soon as possible.

"Yours Respect'y,

Wm. Black."

What purports to be an answer to the latter letter, although as printed in the record it is without signature, is as follows:

"August 20th, 1912.

"Mr. Wm. Black, Long Beach, Wash.—Dear Sir: I have your letter of August 19th, relative to purported claim by reason of fire, and in reply I beg to advise as follows: If you have a claim under Pol. No. 590757 issued to you by the Central National Fire Ins. Co. of Chicago, Ill., and Pol. No. 2661130 issued to you by the New Hampshire Fire Ins. Co. of Manchester, N. H., both of which companies I represent and on behalf of said companies I desire to call your attention to the terms and conditions as set forth in lines from 67 to 112, inclusive. You are hereby required to submit proofs of loss as set forth and in accordance with instructions thereby given in said policies, within sixty days of the fire. Upon compliances I will give the matter attention. The said insurance companies, above referred to, hereby neither admit nor deny liability.

"Very truly yours."

August 23, 1912, the plaintiff wrote to the adjuster as follows:

"Wm. Black, Long Beach, Wash.

"Long Beach, Wash., Aug. 23, 1912.

"Mr. Lloyd, Portland, Ore.—Dear Sir: Enclosed please find proofs of loss as requested.

"Yours respect'y,

Wm. Black."

And again, on August 29, 1912, as follows:

"Wm. Black, Long Beach, Wash.

"Aug. 29th, 1912.

"Davenport Dooley Co., Portland, Or., Agents of Central National Fire Insurance Comp. of Chicago, Ill.—Dear Sir: I hold Policy No. 590757 on this Company and have been awaiting for a settlement of policy since June 27 and think I have been treated veary rotен; have had no one to come here to adjust my loss or give me any information. Now I demand an emeadite settlement or I will at once take steps to colect it.

"Yours truly,
please let me here from you at once."

Wm. Black.

Under date August 31, 1912, but, as shown in the record, without signature, appears this letter:

"August 31st, '12.

"Mr. Wm. Black, Long Beach, Wash.—Dear Sir: I am in receipt of your favor of the 23d, enclosing papers purporting to be proofs of loss under policy No. 590757 and policy No. 2661130 issued to you by the Central National Fire Ins. Co. and the New Hampshire Insurance Co. The same will be given consideration and you will be advised further at the earliest possible moment.

"Very truly yours."

Under date September 10, 1912, also without signature, appears the following:

"September 10th, 1912.

"Mr. Wm. Black, Long Beach, Wash.—Dear Sir: We are in receipt of your favor of August 23d, enclosing papers purporting to be proofs of loss under policy No. 590757 issued to you by the Central National Fire Insurance Company, making claim for loss by fire alleged to have occurred on June 27th, 1912. The said papers cannot be accepted as satisfactory, for the following among other reasons which may subsequently be made to appear. The list of articles enumerated is only a memorized list and also contains articles which are not items of stock. The amount set forth in said list as representing the value are grossly in excess of the true sound value of said articles, alleged to have been destroyed. Under the terms and conditions of your policy you are required to exhibit the last authentic inventory taken of your stock or a certified copy thereof. You will also supply bills of purchases of stock since the last said inventory, or if said bills of purchases have been destroyed then certified copies of the original bills. You are also required to supply a record of your sales made of stock since the date of inventory above referred to. The said papers cannot therefore be accepted as satisfactory and are held subject to your order. This company hereby neither admits nor denies any liability to you.

"Very truly yours."

To the latter letter the following appears to have been sent:

"Wm. Black, Long Beach, Wash.

"Sept. 12th, 1912.

"Mr. W. G. Lloyd, Adjuster Fire Losses, Portland, Or.—Dear Sir: Your letters of Sept. 10th have been referred to my lawyers.

"Yours truly,

Wm. Black."

Under date October 9, 1912, also without signature, appears the following:

"October 9th, 1912.

"Mr. Wm. Black, Long Beach, Wash.—Dear Sir: On September 10th, 1912, we wrote you requesting further data and information relative and supplemental to papers filed by you under policy No. 590757 issued to you by the Central National Fire Insurance Co. To this you replied on September 12th, 1912, that you had referred the matter to your lawyers, and since which time nothing further has been heard. If you intend making any claim, we notify you that you comply with our request of September 10th, 1912, above referred to."

To which latter letter the plaintiff replied as follows:

"Wm. Black, Long Beach, Wash.

"Oct. 11th, 1912.

"W. G. Lloyd, Portland, Ore.—Dear Sir: What has struck you? I have complied with the law. Send you with proof of loss which you refuse to receive as such and claimed in your letter that it was a memorized list. As far as I am or was concerned that letter closed the matter between you and me. I have been treated rotten by you. You have never called on me and I never saw you. This has been my first fire and I have had no experience in

maters of this kind and want no more. I inshured payed my money and have meet with a loss and want mine and I am going to have it; and take it from me I have furnished you with everything covering this my loss.

"Wm. Black.

"Say you had better save your stamps I will get them just the same with a 2 cent stamp or do you take me for a farmer."

The policy provided, among other things, that the insurer should not be liable beyond the actual cash value of the property at the time of its loss or damage, and that the policy should be void "in case of any fraud or false swearing by the insured touching any matter relating to this insurance or the subject thereof, made before or after a loss." The policy also contained, among others, these further stipulations and conditions:

"If fire occur the insured shall give immediate notice of any loss thereby in writing to this company, protect the property from further damage, forthwith separate the damaged and undamaged personal property, put it in the best possible order, make a complete inventory of the same, stating the quantity and cost of each article and the amount claimed thereon, and, within sixty days after the fire, unless such time is extended in writing by this company, shall render a statement to this company, signed and sworn to by said insured as to the time and origin of the fire, the interest of the insured and of all others in the property, the cash value of each item thereof, and the amount of loss thereon. * * * The insured, as often as required, shall exhibit to any person designated by this company all that remains of any property herein described, and submit to examinations under oath by any person named by this company, and subscribe the same, and, as often as required, shall produce for examination all books of account, bills, invoices, and other vouchers, or certified copies thereof, if originals be lost, at such reasonable place as may be designated by this company or its representative, and shall permit extracts and copies thereof to be made."

[1] In the list of the property destroyed by the fire, and claimed to have been covered by the policy, furnished by the assured to the company, were some bottles, towels, etc. It appears from the evidence that the proof of loss was prepared for the assured by Kayler, and although in doing so Kayler was not acting as agent for the insurance company, as the trial court very properly instructed the jury, yet the latter might very well have concluded, as from its verdict it evidently did, that if Black had intended any fraud in the inclusion of those articles in the list of property lost, he would not have been likely to select the local agent of the insurance company for that purpose. The property, as described in the policy, is "wines, liquors, cigars, beer, soda and mineral water, and all other goods, wares and merchandise not more hazardous," etc. Kayler was questioned, and answered in respect to that matter, as follows:

"Q. Now, Mr. Kayler, in making out this proof of loss, there is some items included that do not seem to be covered by the policy, such as bottles and towels and so on. A. I supposed it was all a part of the stock when I put it down. I never made out any proof of loss. My business is to write it up; the adjuster did that work generally. Q. You sent the proof of loss to the company or adjuster? A. Yes, sir. Q. At the time you included those goods, did you believe that those articles I have called your attention to, that they were covered by the policy? A. Sure. Q. Did you or Mr. Black include them?"

"Mr. Cole: We object to that. It is very plain they are not covered by the policy.

"Mr. Langhorne: I do not dispute that. I am not saying that they are covered by the policy.

"(Objection overruled. Exception allowed.)

"Q. When you included these articles, was there any intention on your part to defraud the company? A. No, sir; I supposed everything inside of that saloon was covered."

The plaintiff's testimony was to the same effect. It is true that the defendant company undertook to impeach the veracity of both plaintiff and Kayler, but those were matters for the exclusive determination of the jury.

[2] In respect to the value of the insured property that was destroyed, there was testimony tending to support that of the plaintiff to the effect that in the aggregate it was then of greater value than the amount of the policy. True, there was some testimony and some circumstances tending the other way; but that also was a question for the determination of the jury.

It is not contended that there was any direct evidence to the effect that the fire "was caused by the act, design, or procurement" of the plaintiff, or that there was any fraud in the matter of the fire. The most that can be claimed in that direction is that there were some circumstances tending to support the contention of the defendant company in that regard, the most notable being the fact that the fire occurred nine days after the policy was issued; the testimony on the part of the company tending to show that the insured property was at the time of the fire of considerably less value than the amount of the policy, and that the door of the saloon was unlocked when the fire occurred. But as against that was the evidence on the part of the plaintiff which satisfied the jury of his innocence of wrongdoing in the particulars mentioned, as is evidenced by the verdict.

[3] The further contention is made on behalf of the plaintiff in error that the policy in suit was rendered invalid by the failure of the assured to perform the other conditions of the policy required to be performed on his part. Those conditions have already been set out. The loss of the insured property having been total, there is, of course, no case for the application of the provisions respecting a loss that is only partial. Nor does it appear that the assured refused to submit to examination under oath before a person named by the defendant company, for, so far as is shown, no such person was so designated for that purpose.

[4] It is insisted, however, that the assured failed and refused to comply with that provision of the policy which required him to "produce for examination all books of account, bills, invoices or other vouchers, or certified copies thereof, if originals be lost, at such reasonable place as may be designated by this company or its representative, and shall permit extracts and copies thereof to be made." A sufficient answer to the contention, in our opinion, is that made by the court below to the effect that the defendant company never designated any representative or any place for such examination. The correspondence that has been set forth shows, as we have said, that the company not only suspected the assured of having either directly burned the insured property or been in some way concerned therein, but also of having sworn falsely in respect to the proofs of loss that he made.

The only objections to those proofs of loss which appear to have been made prior to the institution of the suit are set forth in the letter of September 10, 1912, as follows:

"The list of articles enumerated is only a memorized list and also contains articles which are not items of stock.

"The amount set forth in said list as representing the value are grossly in excess of the true sound value of said articles, alleged to have been destroyed.

"Under the terms and conditions of your policy you are required to exhibit the last authentic inventory taken of your stock or a certified copy thereof. You will also supply bills of purchases of stock since the last said inventory, or if said bills of purchases have been destroyed then certified copies of the original bills.

"You are also required to supply a record of your sales made of stock since the date of inventory above referred to."

In his reply to the affirmative matter set up in the defendant's amended answer, the plaintiff alleged that all of his books of account, bills, invoices, and other papers connected with his business were burned by the fire that destroyed the insured property, and there was testimony given tending to show the truth of those averments. We have examined the record attentively, and do not find in any of the rulings of the trial court, nor in its instructions to the jury, any error for which the judgment should be reversed. Such of the requested instructions as correctly stated the law, and which the court refused to give, were covered by the charge of the court, which, though much too long, as often happens, stated the case fairly to the jury.

The judgment is affirmed.

SOUTHERN PAC. CO. et al. v. GOLDFIELD CONSOL. MILLING & TRANSPORTATION CO.

(Circuit Court of Appeals, Ninth Circuit. February 1, 1915. Rehearing Denied March 8, 1915.)

No. 2467.

1. COMMERCE ~~91~~, 95—INTERSTATE COMMERCE—UNREASONABLE RATES—REPARATION—ENFORCEMENT.

Where plaintiff paid freight at an alleged unreasonable rate, reparation, applied for and awarded by the Interstate Commerce Commission, was not a penalty, but could only be recovered as damages, and, on the carrier's refusal to pay, an action at law was essential for the recovery thereof, as authorized by Interstate Commerce Amendatory Act June 29, 1906, c. 3591, § 5, 34 Stat. 590 (Comp. St. 1913, § 8584), providing that such actions shall proceed in all respects like other civil suits for damages, except that on the trial thereof the findings and order of the commission shall be *prima facie* evidence of the facts therein stated.

[Ed. Note.—For other cases, see *Commerce*, Cent. Dig. §§ 143, 145; Dec. Dig. ~~91~~, 95.]

2. COMMERCE ~~94~~—INTERSTATE COMMERCE—REPARATION—COMPLAINT.

Where a complaint against an interstate carrier to recover for freight paid at an unreasonable rate set forth at length all the facts stated in the findings of the Interstate Commerce Commission, including a finding that the rate was unreasonable, and that plaintiff was entitled to recover reparation in the sum of \$447, together with interest, etc., it was not de-

fective, because it did not expressly allege that plaintiff had been damaged by the excessive rate.

[Ed. Note.—For other cases, see Commerce, Dec. Dig. ☞94.]

In Error to the District Court of the United States for the Second Division of the Northern District of California; Wm. C. Van Fleet, Judge.

Action at law by the Goldfield Consolidated Milling & Transportation Company against the Southern Pacific Company and the Tonopah & Goldfield Railroad Company. Judgment for plaintiff, and defendants bring error. Affirmed.

Hugh H. Brown, of Tonopah, Nev., and C. W. Durbrow, of San Francisco, Cal. (Wm. F. Herrin, of San Francisco, Cal., of counsel), for plaintiffs in error.

Brown & Baer, of San Francisco, Cal. (Charles L. Brown, of San Francisco, Cal., of counsel), for defendant in error.

Before GILBERT and ROSS, Circuit Judges, and WOLVERTON, District Judge.

ROSS, Circuit Judge. The defendant in error on the 9th day of August, 1912, filed with the Interstate Commerce Commission a complaint against the Chicago & Erie Railroad Company et al., alleging that it had been charged an unreasonable rate for the transportation of a car load of steel window sash from Youngstown, Ohio, to Goldfield, Nev., and asking reparation; it being alleged in the complaint that the rate of \$3.44 per 100 pounds, published and charged by the carriers for transporting that commodity between the points mentioned, was unreasonable, and praying that an order be entered by the Commission declaring \$1.95 a reasonable rate for such service, and that the carriers be required to assess their charge on that basis. A hearing of the matter was duly had before the Commission, which thereafter rendered its decision holding that the rate complained of was unreasonable, and that the rate of \$1.95 was a reasonable rate for the service, and entered an order directing the carriers to publish the latter rate for such transportation, and, finding that the complainant in that proceeding was entitled to an award for reparation against the Southern Pacific Company and the Tonopah & Goldfield Railroad Company in the sum of \$447, with interest at the rate of 7 per cent. per annum from November 25, 1910, ordered the said named railroad companies to pay to the said Goldfield Consolidated Milling & Transportation Company, on or before July 1, 1913, the said sum of money, with such interest.

The Commission having denied a petition for a rehearing that was filed by the carriers, and the plaintiffs in error here having refused to make the payment as ordered upon demand duly made by the present defendant in error, the latter commenced this suit in the court below to recover the amount of \$447, with interest thereon at the rate of 7 per cent. per annum, so awarded by the Commission, together with attorney's fees in the sum of \$250.

The answer filed in the court below by the plaintiffs in error to the suit so brought denied that the sum of \$250 is a reasonable attorney's fee for the bringing and prosecution of such suit, and set up, among other things, that no evidence was introduced or offered before the Commission, and none heard by it, sufficient to justify its findings and decision, specifying in the answer the various particulars in which the evidence was claimed to be insufficient, and also set up various circumstances and facts which they contended justified the charge that had been published by the carriers and collected for the transportation of the commodity in question.

The case coming on for trial before the court below—a jury having been duly waived by the parties—the plaintiff in the cause introduced in evidence the findings, conclusion, and order of the Interstate Commerce Commission, and also Exhibits Nos. 2, 3, 4, 5, and 6, set out in the bill of exceptions. Upon the conclusion of the plaintiff's case, the counsel for the defendants announced to the court:

"We have no evidence to offer at all, your honor, with the exception that I ask to have the entire transcript and exhibits which were before the Commission introduced and considered in evidence in support of the allegations of our answer"

—which was agreed to. The case, being thus closed, was submitted to the trial court, which gave judgment in favor of the plaintiff in the action for the sum of \$447, with interest thereon at the rate of 6 per cent. per annum from November 25, 1910, and for costs, together with an attorney's fee in the sum of \$150. It is from that judgment that the present writ of error was taken.

The findings, conclusion, and order of the Commission (omitting formal parts) are as follows:

"In October, 1910, complainant shipped over defendants' lines from Youngstown, Ohio, to Goldfield, Nev., a car load of steel window sash, and parts, of the weight of 21,399 pounds, for which transportation charges were collected at a rate of \$3.44 per 100 pounds, on a minimum of 30,000 pounds, amounting to \$1,032. There was no joint through rate applicable to the traffic, and the charges were made up of a commodity rate of \$1.30 from Youngstown, to Sacramento, Cal., and a class rate of \$2.14 from Sacramento to Goldfield. At the time the shipment moved there was a published commodity rate of 65 cents per 100 pounds on wooden window sash in car loads from Sacramento to Goldfield, which rate is still in force. Complainant contends that the charges were unreasonable to the extent that they exceeded charges that would have accrued at a through rate of \$1.95 per 100 pounds, made up of \$1.30 to Sacramento and 65 cents thence to Goldfield, or, in other words, that the rate on steel window sash should not exceed the rate on wooden window sash.

"In transcontinental tariffs, steel sash and wooden sash are carried at the same car load rates, both west-bound and east-bound. Official Classification names each article fifth class, in car loads, and Southern Classification sixth class. Western Classification accords iron or steel window sash fourth class and wooden window sash fifth class. The former article loads heavier than the latter.

"Defendants say the wide difference in the rates from Sacramento to Goldfield is due to the fact that the wooden sash rate applies to forest products generally, including blinds, door sash, moldings, etc. Considering the two commodities from a transportation viewpoint, and the fact that both are carried at the same rates in transcontinental tariffs and in the Official and Southern Classifications, the explanation offered is not convincing.

"Upon the facts of record, we are of opinion, and find, that the rate from Sacramento to Goldfield, charged as part of the through rate from Youngstown to Goldfield, was unreasonable to the extent that it exceeded the rate contemporaneously in effect on wooden window sash in car loads, from and to the same points, and a rate not to exceed the wooden sash rate will be prescribed for the future.

"We further find that complainant made the shipment in accordance with the above statement of facts, and paid charges thereon at the rate herein found to have been unreasonable; that complainant has been damaged to the extent of the difference between the amount paid and the amount which it would have paid at a combination through rate of \$1.95 per 100 pounds, made up of \$1.30 to Sacramento, Cal., and 65 cents beyond, and that complainant is therefore entitled to an award of reparation against the Southern Pacific Company and Tonopah & Goldfield Railroad Company, in the sum of \$447, with interest from November 25, 1910. An order will be entered accordingly. * * *

"It is ordered that defendants Southern Pacific Company and Tonopah & Goldfield Railroad Company be, and they are hereby, notified and required to cease and desist, on or before July 1, 1913, and for a period of two years thereafter to abstain, from charging, demanding, collecting, or receiving as a part of the through rate from Youngstown, Ohio, to Goldfield, Nev., their present rate for the transportation of steel window sash in car loads from Sacramento, Cal., to Goldfield, Nev., which rate is found in said report to be unreasonable.

"It is further ordered that said defendants Southern Pacific Company and Tonopah & Goldfield Railroad Company be, and they are hereby, notified and required to establish, on or before July 1, 1913, upon statutory notice to the Interstate Commerce Commission and the general public, by filing and posting in the manner prescribed in section 6 of the act to regulate commerce, and for a period of two years after said July 1, 1913, to maintain and apply to the transportation of steel window sash in car loads from Sacramento, Cal., to Goldfield, Nev., as part of the through rate from Youngstown, Ohio, to Goldfield, Nev., a rate not in excess of the rate contemporaneously in effect on wooden window sash in car loads from and to said points, which relation of rates is found in said report to be reasonable.

"And it is further ordered that said defendants Southern Pacific Company and Tonopah & Goldfield Railroad Company be, and they are hereby, authorized and directed to pay unto complainant, the Goldfield Consolidated Milling & Transportation Company, on or before July 1, 1913, the sum of \$447, with interest thereon at the rate of 6 per cent. per annum from November 25, 1910, as reparation on account of a rate charged for the transportation of a car load of steel window sash and parts from Youngstown, Ohio, to Goldfield, Nev., which rate so charged has been found to have been unreasonable, as more fully and at large appears in and by said report of the Commission."

Exhibit 2, above referred to, is the order of the Commission denying the petition for a rehearing; Exhibit 3 is a statement of the bill of the shipment in question; Exhibit 4 is a comparative statement of commodity rates on iron or steel window sash in certain classification districts, including Chicago to Denver, Omaha to Denver, New Orleans to Denver, Denver to Falls City, Neb., Sacramento, Cal., to Goldfield, Nev., and Youngstown, Ohio, to Goldfield, which statement plainly shows discrimination against Goldfield; Exhibit 5 is a statement showing that steel window sash and wooden window sash were classified alike in various classification districts of the United States; and Exhibit 6 is a statement filed before the Interstate Commerce Commission by the claimant, setting forth its position with respect to the alleged unreasonableness of the rate in question, and pointing out the various

tariff references, and per cent. per ton per mile earnings which the claimant contended sustained its position in the premises.

It clearly appears from the exhibits that the Transcontinental Freight Bureau provides the same rate for both steel and wooden sash, while the rate charged by the plaintiffs in error on wooden window sash from Sacramento, Cal., to Goldfield, Nev., is 65 cents, against the rate on steel window sash between the same points of \$2.14.

The only additional evidence introduced by either party before either the Interstate Commerce Commission or the court below is the testimony of the witness Bostwick, introduced by the plaintiffs in error, both before the Commission and the court below, in the endeavor to show that the difference in existing conditions in this Western Classification district were such as to justify the difference in the charge from Sacramento to Goldfield on the two classes of sash.

[1] It is entirely true that the reparation awarded the defendant in error by the Interstate Commerce Commission was not a penalty, but could only be recovered by it as damages growing out of the excess of charge by the carrier companies, and that in the event of the refusal of the latter to pay such damages an action at law was essential for the recovery thereof, which action, according to the express provision of section 5 of the amendatory act of June 29, 1906 (34 Stat. 590, c. 3591 [Comp. St. 1913, § 8584]), is required to "proceed in all respects like other civil suits for damages, except that on the trial of such suit the findings and order of the Commission shall be prima facie evidence of the facts therein stated," in which action the parties were manifestly entitled to a jury trial. In the present case, however, a jury trial was expressly waived by them and the cause tried before the court, as has been stated. Here, among the findings of fact made by the Commission is one to the effect that the defendant in error made the shipment in question in accordance with the specific facts set out in its findings and paid the charges thereon at the rate found by the Commission to have been unreasonable, and that the defendant in error was thereby—

"damaged to the extent of the difference between the amount paid and the amount which it would have paid at a combination through rate of \$1.95 per 100 pounds, made up of \$1.30 to Sacramento, Cal., and 65 cents beyond, and that complainant is entitled to an award of reparation against the Southern Pacific Company and Tonopah & Goldfield Railroad Company in the sum of \$447, with interest from November 25, 1910."

The fact that the defendant in error was damaged in the particulars specified, as well as the extent of such damage, was therefore expressly found by the Commission in the present case; and that finding of facts, like all other facts found by it, is, by the Interstate Commerce Act of February 4, 1887, as amended by the acts of March 2, 1889, and June 29, 1906 (24 Stat. c. 104, 25 Stat. c. 382, and 34 Stat. c. 3591 [Comp. St. 1913, § 8584]), expressly made prima facie evidence. Being introduced by the plaintiff on the trial in the court below, and there being nothing in any of the other evidence given on the trial in conflict therewith, it must be here taken that the plaintiff in the case was damaged by the unlawful act of the defendants below, plain-

tiffs in error here, to the extent and in the amounts for which the court gave judgment—the statute expressly authorizing an attorney's fee for the plaintiff in the event of such action.

[2] It is true, as urged on behalf of the plaintiffs in error, that the complaint in the present case does not in terms allege that the plaintiff was "damaged"; but it does set forth at large all of the facts stated in the findings of the Interstate Commerce Commission, and among other things alleged as follows:

"That on the 9th day of August, 1912, and within two years from the date of said shipment and its cause of action accrued, this plaintiff, as complainant, instituted a certain proceeding before the Interstate Commerce Commission at Washington, D. C., and filed its complaint therein, whereby the plaintiff, as such complainant, attacked the rate above mentioned applied upon the movement of said steel window sash and parts as unreasonable, to the extent that said charges exceeded the charge that would have accrued on said shipment upon the basis of wooden window and sash. That said petition before the Interstate Commerce Commission was docketed as No. 5064, and that said complainant in said proceeding, in addition to attacking said rate as unreasonable, also asked that the said Commission order the defendants to make reparation to this plaintiff in the sum of four hundred and forty-seven (\$447) dollars, together with interest thereon from November 25, 1910. That said defendants filed answers to said complaint before the Interstate Commerce Commission, and that issues were duly made and thereafter heard and tried, and that the said Interstate Commerce Commission thereafter, and upon the 8th day of April, 1913, duly decided said issue and filed its written opinion, being No. 2281, containing its conclusions and order, a copy of which is hereunto attached and marked 'Exhibit A' and made a part of this complaint.

"That said report and order were thereupon forthwith duly served upon the defendants Southern Pacific Company and Tonopah & Goldfield Railroad Company, and that the said defendants and each of them have failed, neglected, and refused, and still fail, neglect, and refuse, to comply with and obey said order of said Commission and pay over to this complainant the said sum of four hundred and forty-seven (\$447) dollars, together with interest thereon from November 25, 1910, and that said sum of four hundred and forty-seven (\$447) dollars, together with interest thereon, is still due, owing, and unpaid from the said defendants to this plaintiff.

"That the plaintiff has made demand upon the said defendants for the payment of said sum of four hundred and forty-seven (\$447) dollars, together with interest thereon, but said demand has been refused. That said plaintiff is compelled to resort to this action for the collection of said sum as provided by law, and that a reasonable attorney's fee for the bringing, prosecuting, and maintaining of this action is the sum of two hundred and fifty (\$250) dollars."

The prayer is as follows:

"Wherefore plaintiff prays judgment in favor of the plaintiff, Goldfield Consolidated Milling & Transportation Company, against the defendants Southern Pacific Company and Tonopah & Goldfield Railroad Company, for the sum of four hundred and forty-seven (\$447) dollars, together with interest thereon at the rate of seven (7%) per cent. per annum from the 25th day of November, 1910, and for all costs of this action, and for the further and additional sum of two hundred and fifty (\$250) dollars as and for an attorney's fee for the bringing, prosecuting, and maintaining of this action for the attorneys of record for the plaintiff herein, and for such other and further relief as may be just and proper in the premises."

It is thus seen that, while the word "damage" is not used in the complaint, the facts of the case are specifically alleged, as well as the plain-

tiff's right to reparation for the alleged wrongs committed by the defendants to the action, and a prayer for such reparation, the meaning of which includes "indemnification for loss or damage; satisfaction for any injury; amends." See the Century Dictionary and Cyclopaedia.

We agree with the court below that the complaint is sufficient. In the case of Lehigh Valley R. Co. v. Clark, 207 Fed. 717, 125 C. C. A. 235, so much relied upon by the plaintiffs in error, the complaint before the Interstate Commerce Commission involved the reasonableness of \$2 per gross ton on pyrites cinder over the lines of the defendant companies, from Buffalo, N. Y., to points in the states of Pennsylvania and New Jersey. After a hearing on behalf of the respective parties the Commission found and adjudged that the rate of \$2 was unreasonable, and fixed \$1.45 as a reasonable and proper rate, but refused reparation to the complainant for the difference between the two rates that it had paid. Subsequently the Commission granted a rehearing upon the question of reparation only, and upon that question additional evidence was taken and the parties heard in oral argument thereon—the Commission concluding its second report in these words:

"We now find that the rate of \$2 per gross ton, assessed and collected by the defendant on the shipments giving rise to complaint, was unjust and unreasonable to the extent that it exceeded the subsequently established rate of \$1.45 per gross ton. Complainant is entitled to reparation on all shipments moving within the period of the statute of limitations."

In that case, as was expressly stated by the court (207 Fed. 727, 125 C. C. A. 245), there was no finding, as there is here, that the complainant was damaged, and consequently no finding as to the character or extent of any such damage—the court saying, among other things:

"In the second report, in which reparation was awarded, the Commission states that additional evidence was taken and the parties were heard in oral argument. What this additional evidence was, or what were the facts which the Commission found established by it, is nowhere stated in the report. So that we have nothing in the way of the findings of facts required by the statute upon which the award of reparation by the Commissioners was made. The second report does not state that reparation was awarded upon any supposed findings of fact in the first report. Nor could it well have been, because the Commission, though finding the charge made by the defendant companies to be unreasonable, distinctly declined to find that plaintiffs were entitled to reparation. It is reasonable to conclude, therefore, that the award of reparation was made upon the facts established by the additional evidence. Section 14 of the Interstate Commerce Act, as amended [Comp. St. 1913, § 8582], is peremptory in its requirement that in such case the Commission should include in their report the findings of fact on which their award was made. But even if the reference to the first report were sufficient to incorporate all its statements and supposed findings of fact in the second report, yet the facts of which those statements or findings are the *prima facie* evidence are wholly insufficient to support the plaintiffs' claim for damages."

The case of Pennsylvania Railroad Company v. International Coal Company, 230 U. S. 184, 33 Sup. Ct. 893, 57 L. Ed. 1446, involved various transactions growing out of illegal rebates paid by the railroad company. In the ascertainment of the damages claimed many questions and considerations entered. We therefore think that case inap-

plicable to the present one, where, as has been seen, there was but a single transaction, the illegality of which was determined by the Interstate Commerce Commission, which expressly found as a fact that the complainant was damaged in a certain specified sum, which finding is by the statute made *prima facie* evidence, and which evidence was in no respect overcome by any other proof made in the case.

The judgment is affirmed.

STROECKER v. PATTERSON et al.

(Circuit Court of Appeals, Ninth Circuit. February 1, 1915.)

No. 2411.

1. MINES AND MINERALS ☞55—CONVEYANCE OF MINING CLAIM—RIGHT TO ROYALTIES.

Where the owner of an undivided interest in a mining claim, who had leased the entire claim from his co-owner under a lease providing that he should possess and work the entire claim, including his interest, under the terms of the lease, sublet the claim to another, reserving a percentage of the gross output, and thereafter conveyed his undivided interest to his wife, the wife did not thereby become entitled to all of the royalties reserved in the sublease, as against the trustee in bankruptcy of her husband's estate.

[Ed. Note.—For other cases, see *Mines and Minerals*, Cent. Dig. §§ 153–165; Dec. Dig. ☞55.]

2. BANKRUPTCY ☞303—ACTIONS BY TRUSTEE—EVIDENCE.

In a suit by a trustee in bankruptcy to set aside a conveyance by a husband to his wife as a fraud upon creditors, evidence *held* sufficient to cast upon the defendants the burden of showing the good faith of the conveyance, so that it was error to dismiss the suit at the close of the complainants' evidence.

[Ed. Note.—For other cases, see *Bankruptcy*, Cent. Dig. §§ 458–462; Dec. Dig. ☞303.]

Appeal from the District Court of the United States for the First Division of the Territory of Alaska; F. E. Fuller, Judge.

Suit by Edward Stroecker, as trustee of the estate of H. J. Patterson, a bankrupt, against Mariam A. Patterson and H. J. Patterson. Decree for the defendants, and complainant appeals. Reversed and remanded for new trial.

McGowan & Clark and Harry E. Pratt, all of Fairbanks, Alaska, for appellant.

A. R. Heilig, of Fairbanks, Alaska, for appellee Mariam A. Patterson.

Before GILBERT and ROSS, Circuit Judges, and WOLVERTON, District Judge.

ROSS, Circuit Judge. This suit was brought by the trustee of the estate of a bankrupt to set aside a conveyance made by him to his wife of an undivided one-fourth interest in a certain placer mining claim called Pat Daly Bench, situate on Ester creek, Alaska, on the ground of alleged fraud in the making of such conveyance, and also to restrain the defendants, husband and wife, from demanding and receiving from

☞ For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

the lessee of the entire claim 5 per cent. of the gross output of the gold thereof—the complaint alleging, among other things, in substance, that on the 27th day of November, 1911, the defendant H. J. Patterson, being then insolvent and unable to pay his then creditors, for the purpose of hindering, delaying, and defrauding them, executed to his wife, the defendant Mariam A. Patterson, a deed conveying all of his interest, to wit, an undivided one-fourth, of the mining claim mentioned, which his said wife took and since holds in trust for her husband, to aid him in cheating his creditors; that prior to that alleged fraudulent conveyance the husband held a lease of the whole of the said mining claim, which lease he, prior to his adjudication in bankruptcy, assigned for a valuable consideration to one H. C. Hamilton, who is still the owner and holder thereof, and under which he is mining the said claim upon the terms and conditions of the original lease thereof to H. J. Patterson, and of the sublease of the latter to him; that under such terms and conditions the defendant H. J. Patterson was entitled to receive from Hamilton's operations of the property 5 per cent. of the gross output of the ground; that the interest of the said H. J. Patterson under the lease has never been assigned to any one; that his wife, the said Mariam A. Patterson, claims to be the assignee of all benefits under the lease, and to be entitled to receive the said 5 per cent. of the gross mineral output of the claim, by virtue of the alleged fraudulent conveyance made to her by her husband of his undivided one-fourth interest in the claim; that on or about May 8, 1912, Hamilton made his first clean-up of the dump extracted by him from the claim during the spring of 1912, and that at the time of such clean-up the defendants Patterson demanded of him the payment of 5 per cent. of the gross output thereof, which demand was refused by the said Hamilton, who still has the said 5 per cent. of the output in his possession, and that the said Hamilton will, from time to time as the said winter dump is cleaned up, have other sums of money realized therefrom, 5 per cent. of which the defendants Patterson will claim and receive from the said Hamilton, unless restrained therefrom by the court; that the said Mariam A. Patterson is insolvent, and that if she secures possession of the said 5 per cent. of the gross output of the claim the same will be lost to the creditors of her husband and to the trustee, plaintiff in the suit; that the said Mariam A. Patterson has no right to or interest in any of the said gold, and that the plaintiff, as such trustee, is entitled to receive the said 5 per cent. of the gross output of the claim, to be applied towards the payment of the creditors of the said bankrupt. The prayer of the complaint is for the appointment of a receiver to take and receive the said 5 per cent. of the gross output of the claim until the title thereto can be determined, or that the same be ordered paid into the registry of the court; for a temporary order restraining the defendants Patterson, their agents, etc., from demanding or receiving any portion of the said 5 per cent. of the said gross mineral output; and for a decree adjudging the deed from the husband to his wife fraudulent and void, and that the defendant Mariam A. Patterson convey the said undivided one-fourth interest in the said claim to the plaintiff, as trustee of the creditors of the defendant bankrupt.

The husband and wife answered separately. The answer of the wife, among other things, denied that the deed from the husband to her was made for any fraudulent purpose, and in effect set up that on the 19th day of September, 1910, James Wickersham was the sole owner of the said mining claim, and on that day entered into an agreement with the said H. J. Patterson, whereby he agreed to convey to the said Patterson an undivided one-fourth interest in the claim, if Patterson would sink a hole upon the claim to bed rock, and do the assessment work thereon for the year 1910, to which conditions the latter consented, "but desired to use what money he had for other purposes, and therefore, with the knowledge and consent of the said Wickersham, agreed with this defendant (the wife) that, if she would pay with her own funds the expense of sinking such hole to bed rock and of doing said assessment work, she should be entitled to receive and would receive a conveyance of said quarter interest, instead of said H. J. Patterson"; that in pursuance of the agreement last mentioned the defendant Mariam A. Patterson did, at her own expense, cause to be sunk, on the 20th and 21st days of September, 1910, a hole to bed rock, and did cause to be done upon the said claim the assessment work for the year 1910, for all of which work she paid to the persons doing the same the sum of \$225, all of which was her separate property, in which her husband had no interest; that before Wickersham had time to execute a deed conveying a quarter interest in the claim, as he had agreed to do, he left Alaska, and did not return until late in the fall of 1911, at which time her husband requested him to convey the said quarter interest to her, "upon the ground that she had performed the conditions of said contract, but the said Wickersham preferred to, and did, make such deed to the said H. J. Patterson, without the knowledge or consent of this defendant (the wife), and delivered the same to said H. J. Patterson on or about the 10th day of November, 1911, but with the express understanding, had between the said Wickersham and the said H. J. Patterson, that the latter would convey the bare legal title to said quarter interest so received by him to this defendant (the wife); that thereafter, when this defendant learned that said deed had been made and delivered to said H. J. Patterson, she demanded from him a conveyance of the legal title to her in pursuance of his said agreement with her, whereupon said H. J. Patterson did, on the evening of November 27, 1911, by deed convey to this defendant the legal title to said quarter interest then held by him," which interest she has ever since owned, and now owns, and in which her husband never had any interest, except the bare legal title. The answer of the husband was substantially to the same effect. Both answers denied that the conveyance in question was made for any fraudulent purpose.

The record shows that on the coming on of the cause for trial the plaintiff introduced in evidence the contract between Wickersham and H. J. Patterson, the lease made by the former to the latter of the entire claim, the sublease of the claim by Patterson to Hamilton, the conveyance from H. J. Patterson to his wife, Mariam A. Patterson, and the oral testimony of H. J. Patterson and of two other witnesses, John Junkin and E. R. Peoples. Upon the conclusion of that evidence the

court below granted the defendants' motion to dismiss the suit, and in its judgment dismissing it appears the following respecting the 5 per cent. of the gross amount of gold taken from the claim by the lessee, Hamilton:

"And it further appearing from the records of this action that, on the 17th day of May, 1912, an order was made in this cause, directing H. C. Hamilton, as lessee of the Daly Bench, described in the complaint herein, [to] deposit with the clerk of this court 5 per cent. of the gross amount of gold mined by him upon said mining claim during the pendency of this action, as royalty accruing to the owner of the undivided one-fourth interest in said Daly Bench, the title to which is in controversy in this action, to be held to await the determination thereof, and that the value of the said 5 per cent. of the gross amount of gold so mined by the said Hamilton is \$5,174.66. It is further ordered that, in the event that, within ten days from the date of this judgment the plaintiff has not filed with the clerk of this court a supersedeas bond, approved by the court, for an appeal from this judgment, the clerk of this court pay to the said Mariam A. Patterson, or her attorney, A. R. Heilig, the said sum of \$5,174.66, if said gold dust or money has been deposited with him, and that, if the said Hamilton has deposited said gold dust with the American Bank of Alaska, then said bank pay said sum to the said Mariam A. Patterson, or her said attorney."

[1] The contract of September 19, 1910, between Wickersham and H. J. Patterson, after reciting the ownership and possession by Wickersham of the claim, and the desire of Patterson to prospect it and to take a lease thereof for its future working, provides, among other things, that:

"In consideration of the sinking of a hole from the surface to bed rock thereon, for the purpose of prospecting the said ground and determining its value, by the party of the second part [Patterson] at his own expense, the party of the first part [Wickersham] does hereby agree to make, sign, and deliver to the party of the second part a quitclaim deed to an undivided one-fourth interest in the said premises. The party of the second part undertakes hereby, in consideration of said agreement and transfer, to sink said hole upon the said premises, and to do the assessment work for the year 1910 without any expense whatever to the party of the first part. In further consideration of the rents, royalties, covenants, and agreements herein-after reserved, and by the said party of the second part to be kept, paid, and performed, the party of the first part does hereby grant, demise, let, and lease unto the said party of the second part the whole of the said premises together with all the appurtenances. * * * And in consideration of the said demise the said party of the second part does covenant and agree to and with the said party of the first part as follows, to wit: To enter upon said demised premises within a reasonable time after the signing and sealing of these presents, and to dig, excavate, bore, or otherwise sink one hole from the surface to bed rock upon said claim, for the purpose of prospecting the said ground and doing the assessment work for the year 1910."

Under and pursuant to that lease Patterson, according to the evidence, caused two holes to be sunk on the claim, the first to bed rock at a depth of 100 feet, and the second to a depth of 125 feet. He then left the Daly Bench claim and went elsewhere to work. Thereafter, and in the year 1911, the holders of a mining claim called Happy Home Association claim, which adjoined the Daly Bench claim, took possession of the latter, claiming it to be a part of their claim; and such was the condition of affairs on the return of Wickersham to Alaska; the dispute being compromised in and by a written agreement executed November 8, 1911, by the holders of the Happy Home location on the

one part, and by Wickersham and H. J. Patterson on the other, which compromise awarded to the Happy Home claimants a strip only of the Daly Bench claim.

Shortly before the execution of that compromise agreement, to wit, October 12, 1911, Wickersham had executed to H. J. Patterson a second lease of the Daly Bench claim for a term extending to October 12, 1915, reciting, among other things, the ownership by Wickersham of the undivided three-fourths thereof and the ownership by H. J. Patterson of the remaining one-fourth, and reciting that Patterson had applied to Wickersham for a lease covering the entire claim upon certain terms and conditions, which Wickersham thereby granted; the instrument further reciting, among other things, that:

"As part consideration of this lease the party of the second part [H. J. Patterson] agrees that his undivided one-fourth interest in said premises shall be covered and included in the terms of this lease, and shall also at all times be subject to any debts, defaults, or damages resulting from the working under this lease, or for violation thereof, and the said Daly claim shall at all times be worked and considered as a whole between the parties hereto, and all subject to the terms of this lease; and it is especially agreed that the party of the first part [Wickersham] shall have a first lien upon the whole of the output of the whole of the Daly claim, including the undivided one-fourth interest of the party of the second part, for the payment of the royalty reserved to the party of the first part and the performance of the terms of this lease."

The last-mentioned instrument further imposed upon the lessee the obligation to begin work upon the leased property within 30 days from its execution, and thereafter to continuously maintain possession of the property and mine the same in a good and minerlike manner, and, among various other terms and conditions, the following:

"And the party of the second part [H. J. Patterson] does hereby specially agree not to assign this lease or lay, or any interest therein or thereunder, and not to sublet or sublease the said demised premises, or any part thereof, nor to permit the same, nor any part thereof, nor any interest therein, to pass to any other person whatever, without the written consent of the party of the first part [Wickersham] had and obtained, and this prohibition shall extend to the undivided one-fourth interest belonging to the party of the second part as fully as to the interest belonging to the party of the first part."

The deed from Wickersham to H. J. Patterson of the one-quarter interest in the claim was made October 14, 1911, and contained this recitation:

"Said conveyance is made in consideration of the doing of the assessment work thereon by the vendee in the year 1910, in compliance with the United States statute."

That deed was recorded at the request of Patterson. The deed from the latter to his wife was made November 27, 1911, expressing a consideration of \$1 and quitclaiming to her "all his right, title, and interest, being an undivided one-fourth interest," in the Daly Bench claim. That deed did not purport to convey to the defendant Mariam A. Patterson any part of her husband's interest in the amount then due or afterwards to become due to him from Hamilton under the lease by which the latter worked the ground, and certainly did not convey to her any part of

the 5 per cent. of the gross mineral output which was derived from the undivided three-fourths of the claim owned by Wickersham. It is therefore impossible to sustain the judgment of the court below, awarding to the defendant Mariam A. Patterson the whole of the 5 per cent. of the mineral output of the claim realized by Hamilton in the working of the claim under the lease assigned to him.

[2] Besides, while the defendant H. J. Patterson testified that his wife paid out of her separate property for the sinking of the two holes on the Daly Bench claim, in consideration of which he had told her that she should have the quarter interest agreed by Wickersham to be conveyed to him, the testimony of the witnesses Peoples and Junkin clearly tended to sustain the contention of the complainant in the suit that the conveyance of that quarter interest by Patterson to his wife was for the purpose of defrauding his then creditors. Junkin testified, among other things, that he was working for the said H. J. Patterson during the spring and summer of 1911 on a claim situated on Engineer creek, during which time Patterson told him of the striking of pay ground by Horner & Co. next to the Daly Bench claim, and that he and Patterson at the time talked of working the latter claim in consequence of that strike; the witness, in answer to questions, saying:

"He [Patterson] talked about it quite often. Afterwards, I think in the latter part of October, or early in November, one day Mr. Peoples was out there—(interrupted). Q. What was Mr. Peoples' purpose there, if you know? A. I had an idea, but I didn't know for a fact. But Mr. Patterson did tell me that Peoples was out there and was pressing him for money. Q. Was what? A. Was pressing him for money. Q. Yes? A. And he said, if they kept on pressing him, that he would put the Eva creek property in his wife's name, and would let Mr. Peoples and the rest of his creditors do whatever they liked about it. But he said that he would guarantee the men's wages out of the Eva creek property, provided he couldn't make the Last Chance Association (on Engineer creek) lay pay. Q. When you said 'Eva creek property,' what property was mentioned? A. The Daly Bench. Q. Did he use the terms interchangeably, the Eva creek property and the Daly Bench? A. Sometimes he called it the Daly Bench, and sometimes the Eva creek property. Q. What did you say then? A. I asked him why he hadn't it in his wife's name long ago, if he expected they were going to make trouble for him. He said, if he put in his wife's name, it would hurt his credit still further."

And the witness Peoples, after testifying that H. J. Patterson was indebted to him in the sum of about \$4,000, further testified, among other things, as follows:

"On the 15th of November I received a check from Mr. Patterson for \$1,000, and we were unable to get it cashed. Well, Mr. Patterson at that time told us from the following clean-up that he would take that up. This he failed to do, and I should judge about a week later I had a conversation with him concerning other property that he had. Q. Had you in the meantime seen any record, or heard anything about any deed being recorded, conveying to him an interest in the Daly Bench on Eva creek? A. Yes, sir. Q. Now, where did the conversation take place? A. In the office of the store.

"Mr. Heilig: When was this that you saw the record? A. It was just a day or so, I judge, after, or a few days after, the conveyance to Patterson.

"Mr. Clark: Q. From Judge Wickersham? A. Yes, sir; I believe it was from the judge. Q. Who called your attention to the fact that the conveyance had been made?

"The Court: What conveyance?

"Mr. Clark: From Judge Wickersham to Patterson of an interest in the Daly Bench. Q. Who called your attention to the fact that a conveyance had been made? A. I noticed it in the paper, and Mr. Stroecker also called my attention to it. Q. Mr. Stroecker was then and is now in your employ? A. Yes. Q. And Mr. Stroecker is now trustee in bankruptcy in this H. J. Patterson matter? A. Yes, sir. Q. And is the plaintiff in this action? A. Yes, sir. Q. That was before the bankruptcy proceedings were instituted? A. Yes, sir. Q. Just tell what you did after you ascertained that that transfer had been made from Judge Wickersham to Mr. Patterson. A. I asked Mr. Patterson if he would not give us security on his interest in this ground. Q. What ground? A. The ground on Ester creek. Q. Do you mean Ester creek, or Eva creek? A. Of Eva creek, tributary of Ester creek. Q. Is that the Daly Bench that you are referring to? A. Yes, sir; and he informed me at that time that through an arrangement with Mr. Wickersham that he couldn't give any security on that ground or transfer it in any manner. That was the sum and substance of the conversation. Q. What did he say about the ownership of that interest? A. There was nothing said regarding that. Q. What did you say to him? Remember, as near as you can, the words you used to him in asking for security. A. I suggested to him that he had a quarter interest in that, and he should put it up as security. Q. Did he deny that he had a quarter interest? A. No, sir. Q. The reason he gave you for not putting it up was that he had a written agreement—(interrupted). A. With Judge Wickersham. Q. (continuing)—With Judge Wickersham whereby he couldn't incumber it? A. Yes, sir. Q. Did you talk with him anything about the possibility of that ground producing any money, or anything of that kind? A. I think not at that time. Q. Did you ever have any other conversation with him at any other time about that particular property? A. No, sir; that is, not that I remember of now. Q. Did you receive any information thereafter that he had conveyed that quarter interest to Mrs. Patterson? A. Yes, sir. Q. How long after that, if you remember? A. I should judge it would be two weeks after that. Q. Did you have any talk with him after you saw that he had conveyed it to Mrs. Patterson? A. No, sir. Q. Shortly after that, you instituted suit in this court against him, did you not? A. Yes, sir. Q. Then, thereafter, instituted an action to set aside the conveyance? A. Yes, sir. Q. And after this bankruptcy proceeding was instituted, that suit was practically abandoned, and a similar suit was instituted by the trustee in bankruptcy, the present plaintiff in this action? A. Yes, sir."

In view of the foregoing testimony, and of all of the circumstances of the case, we think it clear that the burden was thereby cast upon the defendants to show the good faith and honesty of the conveyance in question, and that the court below was therefore in error in dismissing the suit upon the conclusion of the complainants' evidence, for the law is well settled that entire fairness is required in dealings between husband and wife, so far as they affect the rights of creditors.

The judgment is reversed, and the cause remanded to the court below for a new trial.

GREAT LAKES COAL & DOCK CO. v. SEITHER TRANSIT CO.

(Circuit Court of Appeals, Eighth Circuit. January 12, 1915.)

No. 4159.

1. SHIPPING ☞150—CARRIAGE OF GOODS—FREIGHT—PERSONS LIABLE.

Defendant, which as owner of a coal dock and as agent for the owner and shipper received for storage and forwarding a cargo of coal, receipting for the same on a shipping bill or memorandum presented by the master of the ship, which showed the cargo to be consigned to the shipper in care of defendant, did not have such interest in the coal as rendered it liable for the freight.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 225, 226, 511; Dec. Dig. ☞150.]

2. SHIPPING ☞150—CARRIAGE OF GOODS—FREIGHT—PERSONS LIABLE.

Where, in such case, the shipping bill did not disclose the rate of freight, but defendant had been advised by the owner of the intended shipment and requested to pay the freight thereon at a specified rate, which it did, being reimbursed therefor by the owner, the fact that the owner had subsequently agreed with the carrier to pay a higher rate did not charge defendant with liability for the excess, in the absence of an agreement by it to pay the same.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 225, 226, 511; Dec. Dig. ☞150.]

3. CUSTOMS AND USAGES ☞11, 17—SCOPE AND EFFECT—VARYING TERMS OF CONTRACT.

A custom or usage is only admissible to explain the terms of a contract when they are uncertain, equivocal, or obscure. It is not admissible to make a contract, or to controvert or vary the plain terms of a contract when one exists.

[Ed. Note.—For other cases, see Customs and Usages, Cent. Dig. §§ 22, 34; Dec. Dig. ☞11, 17.]

Appeal from the District Court of the United States for the District of Minnesota; Page Morris, Judge.

Suit in admiralty by the Seither Transit Company against the Great Lakes Coal & Dock Company. Decree for libelant, and respondent appeals. Reversed.

H. A. Carmichael, of Duluth, Minn. (Washburn, Bailey & Mitchell and A. C. Gillette, all of Duluth, Minn., on the brief), for appellant.

H. R. Spencer, of Duluth, Minn. (Holding, Masten, Duncan & Leckie, of Cleveland, Ohio, on the brief), for appellee.

Before HOOK and CARLAND, Circuit Judges, and REED, District Judge.

REED, District Judge. The Seither Transit Company, a corporation duly enrolled and licensed by the United States for the carriage of freight upon the Great Lakes and their connecting waters in the United States, sued the Great Lakes Coal & Dock Company in admiralty to recover a balance of some \$2,450, with interest, alleged to be due it

upon a contract for the carriage of a cargo of coal weighing 6,108 tons and 700 pounds, from the port of Toledo, Ohio, to Superior, Wis., at the rate of 70 cents per ton. The libel alleges that the cargo was consigned to the Great Lakes Coal & Dock Company, and that it is liable to the Transit Company for the freight thereon at 70 cents per ton, of which it has paid only \$1,832.40. It also alleges a special agreement of the defendant to pay to the Transit Company the 70-cent rate; also a general custom, known to the defendant, for receivers of cargoes of coal upon the Great Lakes to pay the freight charges thereon.

The defendant admits the delivery of the cargo at its dock in Superior, but claims that it received the same only as agent of the White Oak Coal Company, to whom it was consigned in care of the defendant; that it paid the freight thereon, amounting to \$1,832.40, at the request of and as agent only of said White Oak Coal Company, and not otherwise, which amount that company repaid to it; and denies all other articles of the libel. The hearing resulted in a decree for the Transit Company for the amount claimed, and the defendant appeals.

The testimony shows without substantial dispute, that the appellant, which will be called the defendant, a Minnesota corporation, was in December, 1912, the owner of a dock upon Lake Superior, located at Superior, Wis., and there engaged in dealing in coal upon its own account and receiving consignments of coal from vessels navigating the Great Lakes for itself and others. About November 20, 1912, Mr. Becker, the manager of the boats of the Transit Company, made a verbal agreement with the L. C. Ayers Coal Company at Toledo, Ohio, as agent for the White Oak Coal Company, a corporation engaged in mining and shipping coal, for the shipment of a cargo of coal for the White Oak Coal Company from Toledo to Superior, Wis., in the steamer Grammer, a boat of the Transit Company, at 30 cents per ton. It was then contemplated that the cargo would be shipped before midnight November 30th, when insurance upon vessels navigating the Great Lakes would expire; and it was agreed that if the Transit Company paid additional insurance upon the vessel the Ayers Company would pay it. The boat was to be loaded as soon as it arrived at Toledo. It did arrive at that port about 6 o'clock in the afternoon of November 29th, but it was not loaded in time for the boat to clear for Superior until about noon of December 1st, for whose fault does not appear. When the boat was loaded a memorandum, made by the Railroad Company which brought the coal to the dock at Toledo, was delivered to the ship, reading as follows:

"Form 167.

"No. 634. O. C. 109.

Toledo, O., 12—1, 1912.

"Shipped in good order by W. O. C. Co., for account and risk of whom it may concern, on board the Grammer, whereof is master, now lying in the port of Toledo, Ohio, and bound for Superior, the following articles, to be delivered in like good order at the port of destination (the dangers of navigation, fire, collisions, and breakage of canals only excepted) unto the consignee named in the margin or to assigns.

"In witness whereof, the master of said vessel hath affirmed bills of

lading of this tenor and date, one of which accomplished, the other to stand void.

.....
 "White Oak Coal Co.
 % Grt. Lakes C. & D. Co.
 "Superior, Wis.
 "Cargo Recd.
 "Great Lakes Coal & Dock Co.
 "W. Somershield, Supt.
 "Other coal in hatches 1-3-8-10-12.
 "V. H. Palmer."

Who V. H. Palmer is does not appear. This memorandum, though not signed by either the C. L. Ayers Coal Company or the master of the vessel, was accepted by the master as a shipping bill of the coal. The master of the ship (Captain Burns) recognized the receipt thereon as the receipt given him for the cargo upon its delivery at the dock of the defendant company in Superior. After the boat cleared for Superior, another writing was prepared in the office of the C. L. Ayers Coal Company, of Toledo, reading as follows:

"The C. L. Ayers Coal Company,
 "Coal and Coke.
 "Cleveland, Ohio.

"No. 4.

Toledo, Ohio, Dec. 1st, 1912.

"Shipped in good order and condition by the C. L. Ayers Coal Company, as agents and forwarders, for account and at the risk of whom it may concern, on board the str. Grammer whereof is master, bound from this port for Superior, Wis., the following coal as here marked and described, to be delivered in like good order and condition as addressed on the margin, or to his or their assigns or consignees, upon paying the freight and charges as noted below (dangers of navigation, fire, and collision excepted). It is also agreed that the shipper shall be held blameless for any delay in discharging cargo.

* * * * * * * * * * * * * * *
 "Consignee and Destination Description

 "White Oak Coal Co.,
 "Superior, Wisconsin,
 "% Great Lakes Coal & Dock Co. 6,108 tons 700 lbs.
 "Freight 70 cents per ton,
 free in and free out to
 vessel.
 "\$4,275.85
 "[Signed] The C. L. Ayers Coal Co."

This bill was prepared in the office of the C. L. Ayers Company at Toledo some two or three days after the Grammer cleared that port for Superior. A clerk in that office testified:

"That he had no recollection of handling this bill, and could not say that it or a copy thereof was mailed to the defendant, but that he knew of no reason why a copy should not have been mailed to it, as in other cases."

The Transit Company paid additional insurance upon the boat equal to about 40 cents a ton upon the coal, and this amount by agreement with the Ayers Company was added to the 30-cent rate agreed upon, and the rate of freight at 70 cents per ton was noted upon this bill after the Grammer left Toledo for Superior. No rate was specified

upon the first bill, upon which the defendant received for the coal, and neither that bill nor this bill of lading, so-called, was signed by the master or owner of the vessel.

The Grammer arrived at Superior about December 5th, and the cargo was delivered at the dock of the defendant, and its superintendent made the receipt shown upon the shipping bill first above mentioned. Nothing was then said about the freight by the master to the superintendent. The master testified as follows:

"Q. What did you do in regard to your freight?

"A. Why, I got a telegram from Mr. Becker saying for me to collect freight at 70 cents per ton and send him check for that amount. I tried to do so, but the superintendent said it was all right; we would get our freight; it would come from St. Paul. Nothing was said about the 70-cent rate at the time of the arriving; it might have been after we started to unload two or three hours; but before we were unloaded the matter of the 70-cent rate was up.

"Q. And he [the superintendent] agreed on behalf of his people to pay it, and said that the check would come from St. Paul?"

(Objected to as incompetent and no proper foundation laid. Objection overruled at the hearing.)

"A. Yes; said the check would come, and that it would be all right. I had carried coal in the Grammer before to the Great Lakes Coal & Dock Company under Mr. Becker's management; but I had not on those occasions taken up the matter of freight with the defendant."

Mr. Becker, the manager of the boat, was recalled, and testified that the Great Lakes Coal & Dock Company paid the freight on previous occasions.

"Q. And they paid you the freight on this cargo?

"A. Yes; part of it; whatever has been paid they paid. These previous cargoes were shipped by Mr. Ayers and consigned to the Great Lakes Coal & Dock Company. This cargo was consigned to the White Oak Coal Company, 'care of Great Lakes Coal & Dock Company.'"

The president, who was also manager of the defendant company, testified that about November 20, 1912, he was informed that the White Oak Coal Company was about to ship the defendant a cargo of coal from Toledo upon which the freight was to be 30 cents per ton; that defendant was requested by that company to pay that amount of freight upon receipt of the cargo; that shortly after its receipt the defendant paid the Transit Company 30 cents per ton upon the shipment, amounting to \$1,832.40, which amount the White Oak Coal Company repaid to it; that if the defendant had paid more than that upon the cargo, the White Oak Coal Company would not have reimbursed it for the payment in excess of 30 cents per ton; that the C. L. Ayers Company was not the agent of the defendant for the shipment of this coal; that in receiving the cargo the defendant acted only for the White Oak Coal Company, with whom it had arrangements for the receipt and storage of coal consigned to it in care of the defendant at an agreed compensation. He also testified that cargoes of coal consigned to the defendant during the season of 1912, upon which it paid the freight for itself, belonged to the defendant; that cargoes consigned to the White Oak Coal Company or other companies in care of the defendant were not owned by the defendant, but were the property of the White Oak Coal Company or other

companies to whom they were consigned in care of the defendant; that when it paid the freight upon such consignments it was at the request of the White Oak Coal Company or other company owning the coal, and the amount so paid was reimbursed to the defendant by such other companies.

Mr. Somershield, the dock superintendent of the defendant at Superior, testified as follows:

"When Captain Burns of the steamer Grammer brought the cargo of coal to the dock of the defendant about December 5th, he asked me if the freight was to be paid at Superior. I told him, 'No; I had nothing to do with that; that was to be taken care of at Minneapolis.' He never said anything to me about the rate of freight, whether it was 30 cents or 70 cents per ton."

[1, 2] Upon these facts, may the Transit Company recover from the defendant the unpaid charges upon this shipment of coal?

It is undisputed that the White Oak Coal Company was the owner of this cargo of coal when it was shipped from Toledo and when it arrived at its destination in Superior, and that defendant had no interest in the transaction other than to receive the coal for that company, pay the freight thereon at the rate of 30 cents per ton, and hold it for the White Oak Coal Company. The first bill, upon which the defendant's superintendent received for the cargo, manifestly does not bind the defendant by its acceptance of the coal to pay the freight thereon at any particular rate, for none is specified upon that bill. The second bill was not made until two or three days after the vessel carrying the cargo left Toledo for Superior. When it was mailed to the defendant, if at all, does not appear. It was not signed by the master of the vessel, and if accepted by the manager of the Transit Company it is binding only between that company and the Ayers Coal Company, and not upon the defendant, unless it has in some manner agreed to its terms. If the defendant can be regarded as a consignee at all of this coal under this bill, it is only as agent of the White Oak Coal Company, who upon the face of the bill is the consignee, and the defendant but the caretaker or agent of the consignee. Upon such a consignment the caretaker or agent acquires no interest in the goods, except to receive them and deliver or account for them to the owner. *Grove v. Brien*, 8 How. 429, 12 L. Ed. 1142; *Dart v. Ensign*, 47 N. Y. 619; *Hutchinson on Carriers*, Sec. 450.

In *Grove v. Brien*, 8 How. 429, 12 L. Ed. 1142, the facts were that Brien, being the owner of a quantity of nails and indebted to Grove, Gilmore, and William Fowle & Sons, shipped the nails by boat under a receipt from the master and owner thereof as follows:

"Received of John McP. Brien 500 kegs of nails, to be delivered to William Fowle & Sons, Alexandria, D. C., for the use of Robert Gilmore, Baltimore, in good order."

And on the same day he sent a letter, directed to Fowle & Sons, advising them that the nails were consigned to them for the use of Gilmore, which was received about the time of the arrival of the consignment. Grove attached the goods in the hands of Fowle & Sons to secure the debt owing him by Brien, and Fowle & Sons claimed a

lien upon the nails on account of prior advances to Brien. Of this transaction the court said:

"The effect of a consignment of goods, generally, is to vest the property in the consignee; but if the bill of lading is special, to deliver the goods to A. for the use of B., the property vests in B. * * * If the person to whom the goods are ordered to be delivered is only an agent of the shipper, he has no property in them, and cannot maintain an action against the master for not delivering them."

True, only the question of the ownership of the nails under the facts stated was involved in that case; but it is declared to be the law that if the bill of lading is special—that is, upon its face, that the goods are to be delivered to one for the benefit of another—the one to whom the goods are to be delivered acquires no interest therein except as agent of the other, to whom he must account for them. In Hutchinson on Carriers the rule is concisely stated as follows:

"Sec. 450. The presumption that the consignee is owner of the goods may be rebutted, and a different relation may be shown to exist; and if he be the mere agent of the shipper, or of a third person, and this fact is known to the carrier, or is shown by the bill of lading, no contract will be implied on the part of the consignee to pay the freight, although he does not inform the carrier that he receives the goods as agent. But the consignor, if owner of the goods, will remain solely liable. Accordingly, if goods are consigned to the care of one person, for another for whom they are intended, the former does not become liable for the freight, although he may receive them, because he acts merely as the agent of the latter, and the only promise which can be inferred from their receipt under such direction given in the bill of lading or otherwise is *prima facie* a promise as agent only to pay the freight on account of the principal, and not to be personally responsible for it. The effect of such special consignment is to vest the title to the goods in the person for whom they are sent, and the action for any loss or damage must be brought in his name, and the consignee for care is merely his agent. Nor does a mere intermediate consignee, to whose care the goods are consigned for further transportation to the ultimate consignee for whom they are intended, the facts being known to the carrier or shown by his bill of lading or receipt, become liable by receiving the goods as a mere forwarder. But in such cases the consignor, or consignee at destination, as the one or the other may be the owner, becomes liable to the carrier."

When the principal in a transaction is disclosed, and an agent is shown, or is known to be acting as such for a known principal, the agent is not liable in the transaction unless he has especially agreed to become so. *Whitney v. Wyman*, 101 U. S. 392-396, 25 L. Ed. 1050; *Metcalf v. Williams*, 104 U. S. 93, 97, 26 L. Ed. 665; *Post v. Pearson*, 108 U. S. 418, 422, 2 Sup. Ct. 799, 27 L. Ed. 774; *Dart v. Ensign*, 47 N. Y. 619; *Thilmany v. Iowa Paper Co.*, 108 Iowa, 357, 360, 361, 79 N. W. 261, 75 Am. St. Rep. 259; *Blanchard v. Page*, 8 Gray (Mass.) 281-292; *Boston & Maine R. R. Co. v. Whitcher*, 1 Allen (Mass.) 497.

In the case before us the bill of lading shows upon its face that the defendant was but a caretaker or agent of the White Oak Coal Company to receive the coal; and the evidence shows that it was to pay the freight thereon at the rate of 30 cents per ton and store it for said company. The defendant is not, therefore, liable for the freight in excess of that amount, unless it has agreed with the Transit Company to pay the greater rate. The Transit Company recognized the

correctness of this rule by alleging, and attempting to show, an express agreement of the defendant by its dock superintendent to pay the 70-cent rate on this shipment. It was, therefore, incumbent upon it to prove the authority of the defendant's dock superintendent to bind the defendant by such agreement. There is an entire absence of proof of such authority. But it is said the Transit Company waived its lien upon the coal for the carriage when it surrendered it to the defendant, and for this reason the defendant should be held for the 70-cent rate. The libel, however, is not drafted upon the theory of an estoppel, but upon an alleged civil contract or agreement of the defendant to pay the freight upon the cargo at the rate of 70 cents per ton. If it had been drawn upon the ground of an estoppel, there is no evidence to sustain it upon that ground. The master of the vessel knew "days before the ship was unloaded" that the dock superintendent was not to pay the freight at any rate. If the master desired to retain the ship's lien upon the cargo, he should have stopped the unloading of the vessel until the payment of the freight and the amount thereof was settled, which he failed to do. The defendant is not, therefore, responsible for his waiving the lien by permitting the coal to be unloaded.

We discover nothing in *Empire Transportation Co. et al. v. Philadelphia & Reading Co.*, 77 Fed. 919, 23 C. C. A. 564, 35 L. R. A. 623, cited by appellee, bearing upon the questions involved in this case.

Union Pacific Ry. Co. v. American Smelting & Refining Co., 202 Fed. 720, 121 C. C. A. 182, decided by this court, was an action by the Railway Company to recover the unpaid portion of freight upon a quantity of ore shipped by rail from some place in Nevada to the Smelting Company in Denver and there delivered to it. The rate of freight fixed in the published schedules of the Railway Company for such shipment was \$7,549.70, and only about \$4,600 was paid thereon—for what reason does not appear. The action was to recover from the Smelting Company the difference; and to a complaint alleging these facts a demurrer was sustained, and judgment rendered for the defendant. The judgment was reversed, upon the ground, mainly, that the act to regulate commerce forbade the carrier to charge or receive from any person or corporation, for the carriage of property over its lines in interstate commerce, any greater or less or other rate for carrying such property than that fixed by the schedule of rates filed with the Interstate Commerce Commission. As the amount accepted by the carrier from the Smelting Company upon this shipment of ore was less than the schedule rate, it was a violation of the act to regulate commerce, and the duty of the Railway Company to sue for and recover, from the person or corporation to whom it charged the lesser rate, the difference. See *Texas & Pacific Ry. Co. v. Mugg*, 202 U. S. 242, 26 Sup. Ct. 628, 50 L. Ed. 1011.

The American Smelting Company was apparently the owner of the ore; but, whether so or not, a lesser rate for the carriage of the property was accepted from it for the carriage than the schedule rate. The Smelting Company was not a mere caretaker of the ore,

or agent for the owner thereof, and what is said in the opinion must be limited to the facts and the question involved in the case. Other cases cited by appellee are clearly distinguishable upon their facts from this, and need not be reviewed.

[3] The alleged custom relied upon by the Transit Company does not help it. A custom or usage is only admissible to explain the terms of a contract when they are uncertain, equivocal, or obscure. They are not admissible to make a contract, or to controvert or vary the plain terms of a contract when one exists. *Thompson v. Riggs*, 5 Wall. 663, 679, 18 L. Ed. 704; *First National Bank v. Burkhardt*, 100 U. S. 686, 692, 25 L. Ed. 766; *Savings Bank v. Ward*, 100 U. S. 195, 206, 25 L. Ed. 621.

The decree is reversed, and the cause remanded to the District Court, with directions to dismiss the libel at the costs of the appellee.

Reversed.

BRABHAM v. BALTIMORE & O. R. CO.

(Circuit Court of Appeals, Fourth Circuit. November 5, 1914.)

No. 1253.

1. DEATH ~~91~~—DAMAGES—MITIGATION—LIFE INSURANCE.

In an action for the death of an employé, brought under the Employers' Liability Act (Act April 22, 1908, c. 149, 35 Stat. 65 [Comp. St. 1913, §§ 8657-8665]) for the benefit of his father and mother, evidence that the mother collected \$2,500 insurance on the decedent's life was not admissible in mitigation of damages.

[Ed. Note.—For other cases, see Death, Cent. Dig. §§ 99-101; Dec. Dig. ~~91~~.]

2. APPEAL AND ERROR ~~1050~~—HARMLESS ERROR—ADMISSION OF EVIDENCE.

In an action under the Employers' Liability Act for the death of an employé, the admission of evidence that decedent's mother, one of the persons for whose benefit the action was brought, received insurance on decedent's life, held not harmless under the evidence, but probably to have affected the amount of the verdict.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1068, 1069, 4153-4157, 4166; Dec. Dig. ~~1050~~.]

In Error to the District Court of the United States for the Northern District of West Virginia, at Parkersburg; Alston G. Dayton, Judge.

Action by Leonard W. Brabham, administrator of Raymond H. Brabham, deceased, against the Baltimore & Ohio Railroad Company. Judgment for plaintiff for insufficient damages, and he brings error. Reversed, and new trial granted.

V. B. Archer, of Parkersburg, W. Va. (L. N. Tavenner, of Parkersburg, W. Va., on the brief), for plaintiff in error.

B. M. Ambler, of Parkersburg, W. Va. (J. W. Vandervort, of Parkersburg, W. Va., on the brief), for defendant in error.

Before PRITCHARD, KNAPP, and WOODS, Circuit Judges.

PRITCHARD, Circuit Judge. This is an action in trespass on the case, brought under the federal Employers' Liability Act for wrong.

~~For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes~~

ful death. On December 27, 1910, Raymond H. Brabham, an unmarried adult, a son of Leonard W. and Mary A. Brabham, was employed as a fireman on a locomotive drawing a train of freight cars on the Ohio River division of the defendant, in the state of West Virginia, and on that day was killed in a collision, which collision was the result of the negligence of the employés of the defendant, other than Raymond H. Brabham. After the death of Raymond H. Brabham, the father, Leonard W. Brabham, qualified as administrator of his estate, and instituted this action for damages in the then Circuit Court of the United States for the Northern District of West Virginia, and on February 7, 1912, filed his declaration. On February 16, 1913, the plaintiff, by leave of the court, amended his declaration. The defendant pleaded not guilty, upon which plea issue was joined, and the case was tried by a jury on June 18, 1913, and a verdict was rendered in favor of Leonard W. Brabham for \$500, and in favor of Mary A. Brabham for \$2,000. Stipulations were entered in the cause whereby it was agreed in effect that both plaintiff's decedent and the defendant railroad company were engaged in interstate commerce at the time of the collision resulting in the instant death of Raymond H. Brabham; that plaintiff's decedent was at his post of duty, and in the exercise of ordinary care for his own protection; that the cause of the accident was the negligence of the employés other than plaintiff's decedent; and that the negligence of the defendant's employés was the proximate cause of the death of plaintiff's decedent.

During the progress of the trial the defendant was allowed to prove by plaintiff's witness that Raymond H. Brabham carried life insurance in the sum of \$2,500, which sum was paid to Mary A. Brabham, the mother of the decedent. The plaintiff, at the conclusion of the testimony, asked for certain instructions. Instruction No. 1 was refused by the court. Exception was taken to the ruling of the court in refusing to give said instruction to the jury.

The proof shows that Raymond H. Brabham was a fireman in the employ of the defendant company; that he was born February 18, 1889, and at the time of his death was 21 years, 10 months, and a few days old; that he resided with his parents, and was unmarried; that he was a stout, hearty, strong, young man, and weighed between 190 and 200 pounds; that the father at the time of decedent's death was about 51 years of age; that the son brought his wages home, and contributed in this way to the support of his father and mother; that his father was a laborer, who could not make enough by his own wages to keep the family; that the decedent worked about the house and garden when he had time, and in this way assisted his father and mother; that he brought his check for his wages home, and delivered it to his mother, who would get the check cashed and use the proceeds; that the father and mother were dependent upon the decedent for support.

Mary A. Brabham, the mother, in testifying as to the dependence of herself and husband upon the deceased son, said:

"If it hadn't been for him, I do not know what we would have done; that is just it. He assisted me by means of money, and by helping clothe me, and bringing his check home, and I would have it cashed, and use it, as I seen fit, with the exception of what he necessarily needed for himself. Q. How

often? A. His check was paid to him every month, and there never was a check he ever drew he didn't give me the most of it. Q. How much? A. Well, different amounts; the amount would vary, of course; sometimes he needed things for himself; in the early part of his work for the B. & O. he didn't draw so much; but in the latter part he would give me at least \$50 a month, after he got to be fireman."

Mrs. Brabham, at the time of her son's death, was about 45 years of age. Decedent was earning about \$100 a month at the time of his death—to be exact, an average, covering the whole period of his services as fireman, of \$82.17 per month.

The jury returned a verdict in favor of the plaintiff below for the sum of \$2,500, to which he excepted upon the ground that the sum recovered was inadequate, and the case now comes here on writ of error.

[1] The principal question to be determined in this controversy is as to whether the court below erred in permitting the defendant, over plaintiff's objection, to prove that the mother of the decedent collected \$2,500 life insurance on her son's death. Testimony of this character, when considered by the jury, could have but one effect, to wit, to cause the jury to deduct the amount of insurance paid to the mother from such sum as they might think she would be entitled to recover on account of the death of her son.

We have examined the authorities bearing upon this question, and, as a general rule, it has been determined by the state and federal courts adversely to the contention of the defendant. The case of Harding v. Townshend, 43 Vt. 536, 5 Am. Rep. 304, cites the case of Althorff, Administrator, v. Wolfe, 22 N. Y. 358, in approval. In that case the court in discussing this point said:

"It would seem to be a perversion of justice to subrogate the wrongdoer, who has caused the loss, to the rights of the injured party as to his remedy against the insurer."

The case of Carroll v. Missouri R. Co., 88 Mo. 239, 57 Am. Rep. 382, also cites the case of Althorff v. Wolfe, *supra*, and also the case of Harding v. Townshend, *supra*. There the defendant set up the defense that plaintiff had collected \$2,700 insurance taken out by the husband for the benefit of the plaintiff. The trial court refused to permit the defendant to interpose the same as a defense to the action. In that case the Supreme Court of Missouri said:

"The construction of appellant [defendant railroad company] if allowed, would defeat or modify actions under the statute, where the party killed had, by his own prudence and at his own expense, sought to provide for the maintenance of his family in the event of his death, and would enable the wrongdoer to protect himself to the extent of the insurance against the consequences of his own wrongful and unlawful acts. As against this plaintiff in this action upon the statute for the damages for the death of her husband, we think the matter thus set up in the third special defense was irrelevant and immaterial, and the action of the court in striking it out was, we think, right and proper."

This question was passed upon by the Circuit Court of Appeals for the Eighth Circuit in the case of Clune v. Ristine, 94 Fed. 745, 36 C. C. A. 450. Judge Thayer, who wrote the opinion of the court in this case, among other things, said:

"In the course of the trial the court permitted the defendant to prove, by way of mitigating the damages which the plaintiff might recover, that she had collected from an insurance company, after the death of her son, the sum of about \$2,000, and for that reason was not entitled to recover to the full extent of her loss. An exception was taken to the admission of such evidence. We think that the testimony should have been excluded, and that the objection thereto was well taken. When an action is brought against a wrongdoer, he is not entitled to have the damages consequent upon the commission of his wrongful act reduced by proving that the plaintiff has received compensation for the loss from a collateral source wholly independent of himself. This doctrine is well established by the authorities, and is applicable to the case in hand. Suth. Dam. (2d Ed.) § 158, and cases there cited. On the second trial the evidence complained of should be excluded."

To the same effect are the following cases: Kellogg v. N. Y. C. & H. R. Co., 79 N. Y. 72; Terry v. Jowett, 78 N. Y. 338; Baltimore & O. R. Co. v. Wightman's Admr., 29 Grat. (Va.) 431, 26 Am. Rep. 384; Geary v. Metropolitan S. R. Co., 73 App. Div. 441, 77 N. Y. Supp. 54; Illinois Cent. R. Co. v. Prickett, 210 Ill. 140, 71 N. E. 435; North Pennsylvania R. Co. v. Kirk, 90 Pa. 15; Coulter v. Pine Township, 164 Pa. 543, 30 Atl. 490; Lipscomb v. Houston, etc., R. Co., 95 Tex. 5, 64 S. W. 925, 55 L. R. A. 869, 93 Am. St. Rep. 804; Houston, etc., R. Co. v. Lemair, 55 Tex. Civ. App. 237, 119 S. W. 1162.

[2] It is contended by counsel for defendant that, even if the court erred in permitting testimony to be introduced as to the amount of insurance which the mother received, such error would be harmless, in view of the fact that the mother was permitted to testify that the amount of insurance she received was used to pay burial expenses and certain debts. However, a consideration of the evidence impels us to the conclusion that this testimony tended to influence the jury largely in determining the amount which the plaintiff was entitled to recover, and it is but natural that they should have taken this view of the matter. To say the least of it, the evidence was incompetent, and presented an issue not germane to the real question involved in this case, and therefore calculated to mislead and confuse the jury, and as such was prejudicial to the rights of the plaintiff.

It is also contended by counsel for plaintiff that the court below erred in refusing to give certain instructions. A careful consideration of the instructions tendered, in connection with the charge of the court in its entirety, discloses the fact that the learned judge who heard this case stated the law fully and impartially to the jury as respects the questions raised by the pleadings. Such being the case, we do not deem it necessary to enter into a further discussion of this phase of the case.

For the reasons stated, we are of opinion that the court below erred in permitting the defendant to prove that the mother of the decedent received the sum of \$2,500 insurance on account of the death of her son. Therefore it follows that the judgment of the lower court should be reversed, and a new trial granted, with instructions for further proceedings in accordance with the views herein expressed.

Reversed.

MOFFETT v. BALTIMORE & O. R. CO.

(Circuit Court of Appeals, Fourth Circuit. November 19, 1914.)
No. 1254.**1. DEATH ☞46—ACTIONS—PLEADING AND PROOF.**

In an action for the death of an employé, brought under the Employers' Liability Act (Act April 22, 1908, c. 149, 35 Stat. 65 [Comp. St. 1913, §§ 8657-8665]) for the benefit of the decedent's mother, plaintiff must allege and prove that the decedent left no widow or children surviving him.

[Ed. Note.—For other cases, see Death, Cent. Dig. § 60; Dec. Dig. ☞46.]

2. DEATH ☞75—ACTIONS—QUESTIONS FOR JURY.

In an action for the death of an employé 21 years old, brought under the Employers' Liability Act for the benefit of his mother, evidence *held* to justify the jury in inferring that decedent left no widow or children, though there was no direct evidence to this effect.

[Ed. Note.—For other cases, see Death, Cent. Dig. §§ 93, 95; Dec. Dig. ☞75.]

3. DEATH ☞32—LIABILITY—EMPLOYERS' LIABILITY ACT.

Under Employers' Liability Act, § 2, providing that every common carrier by railroad shall be liable in damages to any person suffering injury while employed by such carrier, or in case of his death to his or her personal representative for the benefit of the surviving widow or husband and children, and if none then of the parents, and if none then of the next of kin dependent on such employé, for such injury or death resulting from negligence, and section 9, providing that any right of action given thereby to a person suffering injury shall survive to his or her personal representative for the benefit of the surviving widow or husband and children, and if none then of the parents, and if none then of the next of kin dependent upon the employé, to support an action for the benefit of the mother it is not necessary that she should be wholly dependent upon the deceased employé; it being sufficient that she should have a reasonable expectation of pecuniary benefit from a continuance of decedent's life, as the provision requiring the next of kin to be dependent does not apply to the first two classes of persons for whose benefit the action may be brought.

[Ed. Note.—For other cases, see Death, Cent. Dig. §§ 47, 48; Dec. Dig. ☞32.]

4. DEATH ☞103—ACTIONS—QUESTIONS FOR JURY.

In an action under the Employers' Liability Act for the benefit of the mother of a deceased employé, evidence *held* sufficient to make a question for the jury as to whether she had a reasonable expectation of pecuniary benefit from a continuance of the decedent's life.

[Ed. Note.—For other cases, see Death, Cent. Dig. § 141; Dec. Dig. ☞103.]

5. DEATH ☞82—LIABILITY—EMPLOYERS' LIABILITY ACT.

Assuming that, under the amendment of 1910 (Act April 5, 1910, c. 143, 36 Stat. 291) to the Employers' Liability Act (Act April 22, 1908, c. 149, 35 Stat. 65 [Comp. St. 1913, §§ 8657-8665]), providing that any right of action given thereby to a person suffering injury shall survive to his or her personal representative for the benefit of the surviving widow, etc., in an action for death, damages for the suffering, which the decedent would have suffered had he survived, may be recovered, in addition to damages suffered by the beneficiaries of the action from the death, such damages are not recoverable where death was instantaneous, and damages for suffering would therefore rest on nothing but conjecture.

[Ed. Note.—For other cases, see Death, Cent. Dig. § 106; Dec. Dig. ☞82.]

In Error to the District Court of the United States for the Northern District of West Virginia, at Parkersburg; Alston G. Dayton, Judge.

Action by James A. Moffett, administrator of Cecil J. Cain, deceased, against the Baltimore & Ohio Railroad Company. Judgment for defendant on a directed verdict, and plaintiff brings error. Reversed and remanded, with instructions.

This act was brought in the Northern District of West Virginia in pursuance of the federal Employers' Liability Act to recover damages for death resulting from negligence of defendant. It appears that on December 27, 1910, Cecil J. Cain (sometimes called Cecil J. Moffett) was a brakeman in the employ of the Baltimore & Ohio Railroad Company on extra train No. 990 west, which consisted in part of a number of empty coal cars being transported by the defendant from the state of Pennsylvania, through West Virginia, to some point in another state southwest of West Virginia. On December 27, 1910, the extra train collided with a certain other train of the defendant, on the Ohio River division of the defendant, in the state of West Virginia, and Cecil J. Cain was then and there by reason of such collision instantly killed. It is alleged that the death of plaintiff's decedent resulted from the negligence of certain employés of the defendant other than Cecil J. Cain, and the proximate cause of his death was the negligence of such other employés, and the decedent was, at the time of his death, in the line of his employment and at his post of duty, and was guilty of no negligence contributing to his death.

On December 23, 1911, James A. Moffett, administrator of the estate of Cecil J. Cain, brought suit in the then Circuit Court against the Baltimore & Ohio Railroad Company, and on April 2, 1912, filed his declaration. On January 25, 1913, the plaintiff amended his declaration, alleging in substance the age, mental capacity, health, and character of the decedent, and the fact that he left surviving him his parents, and that the said Cecil J. Cain contributed to the comfort, support, and care of his parent, his mother, Sophia Moffett, to the amount of \$100 per month, and that the parents of the decedent were dependent upon him for their maintenance and support, and that by his death they lost his support, and that they would be prevented, by his death, from receiving from his wages and earnings the contributions which they had received, and which they would continue to receive for their support and maintenance during their natural lifetime, and during the lifetime of the decedent, had he not been killed.

Demurrers to the original and amended declaration were overruled. The defendant pleaded not guilty to the amended declaration, to which plea plaintiff replied generally, and issue thereon was joined. Several special pleas were filed by the defendant. Plea No. 2 sets up an alleged release claimed to have been executed by James A. Moffett and Sophia Moffett, in consideration of \$1,000. Plaintiff replied generally, and issue thereon is joined. To special pleas Nos. 3, 4, and 5 plaintiff replied generally, and issue thereon was joined.

The stipulations signed by the defendant admit all the material facts in relation to the employment of the plaintiff's decedent; that both he and the defendant at the time of the death of the decedent were engaged in interstate commerce; that the plaintiff's decedent was guilty of no negligence contributing to his death; that he was at his post of duty and in the line of his employment; that the proximate cause of his death was the negligence of the defendant. It appears that plaintiff's decedent was killed on December 27, 1910; that decedent left surviving him no widow or children, but did leave surviving him his father and his mother, Sophia Moffett; that decedent was a young man of good habits, industrious, in perfect health, educated, and that at the time of his death he was earning an average of \$53.27 per month, and that he contributed practically all his earnings to the support of his mother, who, at the time of decedent's death was about 40 years of age; that decedent's mother was divorced from her former husband, and that on November 26, 1893, she married James A. Moffett, with whom she resided during

all the time since her marriage; that she and her husband, James A. Moffett, reared and educated the said Cecil J. Cain.

Sophia Moffett, the mother of Cecil J. Cain, testified that after her son, the decedent, arrived at the age of 21, and up to the time of his death he always contributed to her support and maintenance, and that, while she was only partly dependent upon him for her support, she looked to him, and always expected money from him; that he spent very little of his wages on himself, and gave her his money. The mother also testified that her husband, James A. Moffett, was not at that time engaged in any business; that she had no profession nor any way of supporting herself other than house-keeping; that Cecil J. Cain was 21 years old on August 15, 1910; that he had been employed as a brakeman by the defendant railroad company 3 months and 13 days before the time of his death. The defendant proved by Sophia Moffett that she had a small tract of land in Kentucky, given her by her father when she was married to Mr. Cain. On cross-examination Mrs. Moffett testified that she derived no benefit or income from this property. James A. Moffett, the husband of Sophia Moffett, was 53 years of age in August, 1913.

The plaintiff claimed the right to recover damages against the defendant under sections 2 and 9 of the federal Employers' Liability Act, for the benefit of the mother of the decedent. The defendant claimed that because, upon examination of plaintiff's witnesses, it was shown that the mother of the decedent was not wholly dependent upon him for her support, the defendant was not liable. At the trial of the case, after the plaintiff had offered all his evidence, the defendant moved to exclude the same, and direct a verdict in its favor. This motion was granted, and the court directed the jury to return a verdict for the defendant, and judgment was entered accordingly. The plaintiff excepted, and the case comes here on writ of error.

V. B. Archer, of Parkersburg, W. Va. (Lewis N. Tavenner, of Parkersburg, W. Va., on the brief), for plaintiff in error.

B. M. Ambler, of Parkersburg, W. Va. (J. W. Vandervort, W. W. Van Winkle, and Mason G. Ambler, all of Parkersburg, W. Va., on the brief), for defendant in error.

Before PRITCHARD, KNAPP, and WOODS, Circuit Judges.

PRITCHARD, Circuit Judge (after stating the facts as above). [1] Among other things, it is contended by the defendant in error (who will hereinafter be referred to as defendant) that "there was no evidence that the decedent was a bachelor, or that he left no widow or child." In view of the provisions of the statutes, it was necessary to allege and prove that the deceased left no widow or children surviving him in order to entitle plaintiff in this instance to recover. Garrett v. Louisville & N. R. Co., 197 Fed. 715, 117 C. C. A. 109; Michigan Central Railroad Co. v. Vreeland, 227 U. S. 59, 33 Sup. Ct. 192, 57 L. Ed. 417, Ann. Cas. 1914C, 176; American Railroad Co. v. Didrickson, 227 U. S. 145, 33 Sup. Ct. 224, 57 L. Ed. 456.

[2] While it is true that there was no direct evidence that the decedent was not married and had no children, yet there was proof that he was about 21 years of age and resided with his mother; that his average wage was \$53.27 per month. His stepfather, in testifying as to the contributions that he made to his mother after he became of age, among other things, said:

"* * * He was always giving his mother; he was a mother's boy, and always giving to her. At any and all times he had anything to give he would give it to his mother."

Counsel for defendant made the following admissions:

"* * * That this young man was strong, able-bodied, and healthy, and in good health at the time of this occurrence; that he was an industrious and active man, and that he was of the age stated by his mother; that he was employed by the railroad company, commencing in September and running through September, October, November, and December, as will be shown by the record; and that he was a faithful and industrious man in his employment with the company."

Defendant also made the following admissions:

"The defendant admits, as a matter of fact, as though proven in this case, that the decedent, Cecil Cain, was employed during the months of September, October, November, and December, 1910, at times, as an extra brakeman, and that the table and statement of wages, as shown on this paper now handed to the stenographer, is correct, as follows: September, \$26.30; October, \$77.10; November, \$50.80; December, \$58.90—and an average for the four months of \$53.27, and that the smaller number of dollars for these several months represent the smaller number of days for which he was actually employed in these months, and so as to the larger figures."

As we have stated, the mother of the decedent testified that he always contributed to her support, and that he would give her the last dollar he had; further, that he spent very little for himself, and that he only paid his board, and that she did not know that he bought any clothes while working for the company, but that he gave his money to her. These things probably would not have happened if he had had a wife and children. Indeed, the record shows that the trial was conducted by counsel on both sides on the assumption that the father and the mother were the nearest relatives. In view of this evidence, it would be absurd to say that there were no facts from which the jury could reasonably infer that decedent had no wife or child. To deprive the decedent's mother, in view of the evidence, of the privilege of having her rights passed upon by a jury on account of a technical slip of this kind, would be a manifest miscarriage of justice.

There is no proof that the father suffered any damages or had any reasonable expectation of pecuniary benefit in the event the decedent had not lost his life, and as to it also appears, as shown by pleas Nos. 4 and 5, that the father had compromised with the defendant for a valuable consideration, to wit, the sum of \$1,250, and had therefore released the defendant from all damages.

[3] It is also insisted that, in order to entitle the plaintiff to recover under the statute, it must be shown (1) that the mother was wholly dependent upon the son, and (2) that she would not be entitled to recover for any support which she might reasonably have expected from her son in the future. In the case of *Dooley v. Seaboard Air Line Railroad Company*, 163 N. C. 454, 79 S. E. 970, Judge Allen, of the Supreme Court of that state, in referring to the questions presented in that case said:

"The appeal presents two questions for decision: (1) Can an action be maintained for the benefit of the father under the federal Employers' Liability Act for the wrongful death of an adult son, without alleging and proving that the father was dependent on the son? (2) If the action can be maintained, did his honor instruct the jury correctly as to the measure of damages?"

After an exhaustive review of the Cases of Vreeland, Didricksen, and McGinnis, 228 U. S. 173, 33 Sup. Ct. 426, 57 L. Ed. 785, Judge Allen said:

"It would seem, then, that the construction placed upon the act by the Supreme Court of the United States is that the action may be maintained in behalf of the widow, or husband, or children, or parents upon proof of a reasonable expectation of pecuniary benefit, and that, when it is for the benefit of others as next of kin, there must be proof of dependency. It may be doubted whether the courts should limit and qualify the right of action for the benefit of the widow, etc., when the statute does not do so, and when the effect is to narrow the scope of the act passed for the protection of employés, so that under this construction in most cases the amount of recovery will be greatly reduced, and in many it will be nominal; but, however this may be, the language will not permit the construction that the word 'dependent' relates to any of the beneficiaries except the next of kin. In the first section, after declaring the liability of the employer to the injured employé, it adds: 'Or in the case of the death of such employé, to his or her personal representatives for the benefit of the surviving widow or husband and children of such employé; and if none, then to such employé's parents; and if none, then to the next of kin, dependent upon such employé, for such injury or death,' etc. The beneficiaries are divided into three classes, and it is only when there is no one belonging to the first and second classes that an action may be maintained in behalf of more remote relatives, next of kin, and they must be dependent. If, then, the parent may maintain an action for the wrongful death of his son, although not dependent, if he has a reasonable expectation of pecuniary benefit from the continuance of his life, what is the meaning of this phrase, and how may the fact be proven? We follow the precedent set by Mr. Justice Lurton, who said in the Vreeland Case: 'The statute in giving an action for the benefit of certain members of the family of the decedent is essentially identical with the first act, which ever provided for a cause of action arising out of the death of a human being, that of 9 & 10 Victoria, known as Lord Campbell's Act,' and who had recourse to the decisions upon the English statute and upon like statutes in different states to ascertain the meaning of the federal statute."

After a careful review of the English and American cases, Judge Allen, as to the law applicable to the same, said:

"The evidence meets fully this rule of the English and American courts (requiring proof of a reasonable expectation of pecuniary benefit to the father from a continuance of the life of decedent). The deceased was, according to the evidence, strong, healthy, intelligent, and industrious, and he was a young man of good habits and good character. He had helped the father and was so disposed to him that he would give him his last cent if the father needed it, and the father was growing old, and while not actually dependent on the son for support at the time of death, he did not know how soon he might be. This furnishes sufficient evidence to sustain a finding that the father had a reasonable expectation of pecuniary benefit from the continuance of the life of the son, and the motion for judgment of nonsuit was therefore properly denied."

In view of the rule announced in the cases to which we have referred, we are of opinion that it was only necessary for the plaintiff to prove that she had a reasonable expectation of pecuniary benefit from a continuance of decedent's life in order to entitle her to recover, and the evidence which we have quoted is sufficient to have justified the jury in finding in favor of the plaintiff in this issue if it had been submitted to them by the court below.

[4] The only material difference between the facts in Dooley v. Seaboard Air Line Railroad Co., *supra*, and the case at bar, is that in that case the beneficiary was the father, and in the case at bar the

beneficiary is the mother. The evidence in this case, as we have stated, establishes the fact that the mother was to some extent dependent upon her son for support during his lifetime, and that she had a reasonable expectation of pecuniary benefit if her son had not lost his life. The mother, in response to an inquiry as to what dependency she had upon her son for support, said:

"Well, of course, I was only partly dependent upon him for my support; I looked to him, and expected money from him always."

It is provided by sections 2 and 9 of the federal Employers' Liability Act that, where the death of an employé is caused by the negligence of a common carrier, such common carrier shall be liable in damages to the personal representative of the deceased employé, who may institute suit of one of three distinct classes of beneficiaries, to wit: First, the surviving widow or husband and widow of such decedent; second, the parents of decedent; third, the next of kin dependent upon such decedent.

The court below in directing a verdict for the defendant manifestly acted upon the theory that the mother was not entitled to recover, inasmuch as it was shown that she was married and that her husband was living and able and willing to support her; in other words, that unless she could show that she was wholly dependent upon her son for support and maintenance she would not be entitled to recover. This is tantamount to holding that the language "next of kin dependent upon such employé" applies to the first and second classes. We think that this language is limited to the third class, and therefore does not relate to the first and second classes.

It appears that the party for whose benefit this suit was instituted was in the second class. It further appears that plaintiff not only offered evidence tending to show that the mother was to some extent dependent upon her son for maintenance and support during his lifetime—which he generously furnished her—but that she had a reasonable expectation of pecuniary benefit from a continuance of decedent's life. This evidence raised a question of fact pertinent to the issues presented by the pleading, and the same should have been submitted to the jury for its determination.

[5] It is contended by the plaintiff that the mother is entitled to recover, not only the direct damages suffered by her from the loss of her son, but that under the amendment to the statute of 1910 she is entitled to recover also for all the suffering which her son himself would have suffered had he survived. This doubtful construction of the statute is sustained in Northern Pacific Ry. Co. v. Maerkl, 198 Fed. 1, 117 C. C. A. 237. Even if it be assumed that this construction is correct, we do not think it should be extended in its application to a case like this, where the suffering of the deceased previous to his death could not rest on anything but conjecture, since his death was instantaneous.

For the reasons stated, the judgment of the lower court is reversed, and the case will be remanded, with instructions to proceed in accordance with the views herein expressed.

Reversed.

PROGRESSIVE BUILDING & LOAN CO., Inc., v. HALL.

(Circuit Court of Appeals, Fourth Circuit. September 8, 1914. On Rehearing.
November 27, 1914.)

No. 1259.

1. BANKRUPTCY ~~148~~—“ASSETS”—SUBSEQUENTLY EARNED WAGES.

Wages of a bankrupt earned after adjudication are not properly a part of the “assets” to be administered.

[Ed. Note.—For other cases, see *Bankruptcy*, Cent. Dig. §§ 194, 625; Dec. Dig. ~~148~~.

For other definitions, see *Words and Phrases*, First and Second Series, *Assets*.]

2. BANKRUPTCY ~~391~~—**BANKRUPTCY COURT**—JURISDICTION.

Where a bankrupt assigned wages to be earned in the future to petitioner, a corporation having its principal place of business in the Western District of Virginia, the bankruptcy court sitting in the Eastern District of that state, in bankruptcy proceedings to which petitioner was not a party, had no jurisdiction to enjoin the latter from enforcing the assignment.

[Ed. Note.—For other cases, see *Bankruptcy*, Cent. Dig. §§ 637-655; Dec. Dig. ~~391~~.

Jurisdiction of federal courts in suits relating to bankruptcy, see note to *Bailey v. Mosher*, 11 C. C. A. 313.]

Petition for Revision of Proceedings of the District Court of the United States for the Eastern District of Virginia, at Richmond, in *Bankruptcy*; Edmund Waddill, Jr., Judge.

In the matter of bankruptcy proceedings of J. W. Hall. Petition to superintend and revise in matter of law an order enjoining the Progressive Building & Loan Company, Incorporated, from enforcing an assignment of the bankrupt's wages. Reversed and remanded, with instructions to dismiss.

Harper & Goodman, of Lynchburg, Va., for petitioner.

Robert D. Yancey, of Lynchburg, Va., for respondent.

Before PRITCHARD, KNAPP, and WOODS, Circuit Judges.

PRITCHARD, Circuit Judge. This is a petition to superintend and revise in a matter of law a judgment of the District Court of the United States for the Eastern District of Virginia, wherein an injunction was issued perpetually restraining the petitioner, a citizen and resident of the Western District of Virginia, from taking any steps to enforce an assignment of wages which had been made by respondent, as will hereinafter appear.

It appears that on November 3, 1913, upon a petition of involuntary bankruptcy, J. W. Hall, respondent, was adjudicated a bankrupt. It further appears that no trustee was appointed in said proceedings. The petitioner is a corporation organized under the laws of the state of Virginia, with its principal office in the city of Lynchburg. It further appears that the respondent secured a loan from the petitioner on the 29th of September, 1913, amounting to \$214.50, and duly executed

his note for that sum as of that date, payable to appellant, at which time he also executed and delivered an assignment of his wages to be thereafter earned for the amount of said debt. On that date respondent was employed by the Norfolk & Western Railway Company, and was still employed by said company at the time of the institution of these proceedings. It further appears that the railway company declined to honor the assignment and also failed to pay the accrued wages to respondent, and on the 14th day of February, 1914, respondent secured an order from the District Court of the United States for the Eastern District of Virginia enjoining and restraining petitioner from the collection of this debt save in the bankruptcy proceedings which were then pending. On the 10th day of March, 1914, petitioner filed a motion to dismiss the injunction and petition on the ground that the court had no jurisdiction, and upon the further ground that, even if the court had such jurisdiction, the assignment of wages held by the petitioner was a valid lien under the provisions of section 67d of the Bankruptcy Act (Act July 1, 1898, c. 541, 30 Stat. 564 [Comp. St. 1913, § 9651]) which gave petitioner the legal right to collect its debts "free from restraint on the part of the District Court." The learned judge who heard the cause in the court below, after a hearing, refused to dissolve the injunction and discharge the petition of the bankrupt, and entered an order making the injunction permanent, and restraining petitioner from attempting to collect from the Railway Company any sum that might be due by virtue of said assignment of wages.

[1] The lower court based its ruling upon the ground that the fund in controversy was in the custody of the court together with the other property of the bankrupt's estate, and as such was under the control of the court. But, it should be borne in mind that this fund was created by wages earned after the respondent had been adjudged a bankrupt, and therefore was not properly a part of the bankrupt's assets to be administered by the court. 1 Loveland on Bankruptcy, § 28.

[2] However, we do not deem it necessary to enter into a discussion of this phase of the dispute, inasmuch as we are met at the threshold of this cause with the question: Did the District Court, sitting as a court of bankruptcy in the Eastern District of Virginia, have jurisdiction to issue an injunction against the petitioner, a citizen and resident of the Western District of that state?

In the cause of the *Acme Harvester Co. v. Beekman Lumber Co.*, 222 U. S. 300, 32 Sup. Ct. 96, 56 L. Ed. 208, the Supreme Court passed directly upon this question, and in disposing of the same said:

"As to the injunction, we are of the opinion that there was no power in the District Court to issue an ex parte injunction, without notice or service of process, attempting to restrain the Beekman Lumber Company from suing in a state outside the jurisdiction of the District Court. Such proceeding could only have binding force upon the lumber company if jurisdiction were obtained over it by proceedings in a court having jurisdiction, and upon service of process upon such creditor."

"Whether ancillary proceedings could be had in a District Court in aid of the jurisdiction of an original court of bankruptcy was a subject of much discussion and divers decisions in the federal courts. In *Babbitt, Trustee, v. Dutcher*, 216 U. S. 102 [30 Sup. Ct. 372, 54 L. Ed. 402, 17 Ann. Cas. 969], and on the petition of *Elkus* in the matter of the *Madison Steel Company*, a bank-

rupt, Elkus, Petitioner, 216 U. S. 115 [30 Sup. Ct. 377, 54 L. Ed. 407], the matter came before this court, and it was there determined that there was ancillary jurisdiction in the courts of bankruptcy, in aid of the original jurisdiction in the bankruptcy court, to make orders and issue processes summarily in aid of the original jurisdiction. In the opinion in Babbitt v. Dutcher, it was pointed out by Mr. Chief Justice Fuller, speaking for the court, that the jurisdiction of the bankruptcy courts under the act of 1898 was limited to their respective territorial limits, and was in substance the same as that provided by the act of 1867, giving such courts jurisdiction in their respective districts in matters of proceedings in bankruptcy. The necessary deduction from these cases is to deny to the District Courts jurisdiction such as was sought to be asserted in this case by the issuing of an injunction against one not a party to the proceeding, and which undertook to have effect in the distant jurisdiction outside the territorial jurisdiction of the District Court. Under the act of 1898, as expounded in the two cases in 216 U. S., supra, the injunction might have been sought in the District Court of the United States in the District in Missouri where personal service could have been made upon the Beekman Lumber Company. Since the decision in the cases just referred to, Congress has passed the act of June 25, 1910, 36 Stat. 838, c. 412 [Comp. St. 1913, § 9587], amending the Bankruptcy Law [Act July 1, 1898, c. 541, § 3, 30 Stat. 546], specifically giving ancillary jurisdiction over persons and property within their respective territorial limits to the District Courts of the United States in aid of the receiver or trustee appointed in a bankruptcy proceeding pending in another court of bankruptcy. Statutes of the U. S. of 1909-1911, part 1, page 838."

Thus it will be seen that the Supreme Court has held that in a suit of this character the court has no jurisdiction to proceed against a person residing in another district who is not a party to the suit, but that the proper remedy is by ancillary proceedings instituted in the bankruptcy court in the district wherein such party resides. Therefore, in view of this decision, it is clear that the lower court was without jurisdiction to grant an injunction.

For the reason stated, the judgment of the lower court is reversed, and the cause remanded, with instructions to dismiss the proceedings, at the cost of respondent.

Reversed.

On Rehearing.

The above-entitled cause was heard and decided by this court at the May term, 1914, wherein the judgment of the lower court was reversed on the ground that such court did not have jurisdiction to enjoin the petitioner, who resided in a district other than the one where the bankruptcy proceedings were instituted. The cause was again heard at this term of the court upon a petition for rehearing.

Counsel for respondent insisted, among other things, that the courts of bankruptcy "have a right to make binding orders in all such proceedings as to parties of such proceedings, and others duly adjudicated as bankrupts. Such proceedings include all matters pertaining to the bankrupt and his estate, and such jurisdiction is exclusive, and intended to be exclusive, of all other courts and persons as to the actual parties to the proceedings in bankruptcy," and cites the case of United States Fidelity & Guaranty Co. v. Bray, 225 U. S. 205, 32 Sup. Ct. 620, 56 L. Ed. 1055, in support of such contention.

While the position of counsel in this respect is correct, nevertheless the opinion of the court was based upon the theory that the petitioner

was not such a party to the original suit as to give the court jurisdiction for the purpose sought to be accomplished. It is admitted that the wages of the bankrupt for the months of September, October, and November, 1913, were paid to him. The respondent was adjudicated a bankrupt on November 3, 1913. Therefore the wages now due and involved in this controversy were earned subsequent to the adjudication.

As we stated in our former opinion, wages earned subsequent to the adjudication cannot be treated as a part of the bankrupt's estate. Such being the case, the claim of petitioner is adverse, and could only be litigated by ancillary proceedings in the district wherein respondent resides, or by a plenary suit in the state court.

The trustee—the bankrupt in this instance—could have availed himself of either of these remedies, and, having failed to do so, it necessarily follows that the court below was without jurisdiction.

This view is fully sustained by Judge Haight, Judge of the District Court of New Jersey, in a very able and instructive opinion in the case of *In re Geller*, 216 Fed. 558, in which the various cases bearing upon this point are reviewed.

After a careful consideration of the authorities, we are still of opinion that the holding of this court in the first instance was correct. Therefore we adhere to our former decision reversing the judgment of the lower court.

PUGET SOUND TRACTION, LIGHT & POWER CO. v. SCHLEIF.

(Circuit Court of Appeals, Ninth Circuit. February 1, 1915. Rehearing Denied March 8, 1915.)

No. 2407.

1. STREET RAILROADS \Leftrightarrow 117—INJURIES TO PERSONS ON TRACK—SUFFICIENCY OF EVIDENCE—NEGLIGENCE—CONTRIBUTORY NEGLIGENCE.

In an action against a street railroad company for injuries to a workman engaged in constructing a manhole in the street, who stepped onto the track in front of an approaching car, evidence held sufficient to take to the jury the questions of the negligence of the operators of the car and of plaintiff's freedom from contributory negligence.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 239-257; Dec. Dig. \Leftrightarrow 117.]

2. STREET RAILROADS \Leftrightarrow 93—INJURIES TO PERSONS ON TRACK—NEGLIGENCE—SPEED—WARNINGS.

It is negligence for a street car motorman to approach a street crossing, where workmen are at work close to the track, at a speed exceeding that permitted by ordinance and without sounding any warnings.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 195-200; Dec. Dig. \Leftrightarrow 93.]

Care required of motormen, see note to *Stelk v. McNulta*, 40 C. C. A. 361.]

3. TRIAL \Leftrightarrow 296—INSTRUCTIONS—CURE BY OTHER INSTRUCTIONS.

It is not reversible error to instruct the jury that, if they believed a street car was traveling faster than permitted under an ordinance at the time it struck one working on the street, the burden of proof would be shifted to defendant to show plaintiff's contributory negligence, without

requiring a finding that the excessive speed was the proximate cause of the injury, where in the same instruction the court stated that the mere fact that the car was running at a prohibited speed was no evidence of negligence which was the proximate cause of the injury, and elsewhere charged that the fact that it was going at a prohibited speed was not the cause of the injury, if the jury found that the rate of speed was not the proximate cause of the injury, or that the plaintiff was contributorily negligent.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 705-713, 715, 716, 718; Dec. Dig. ☞296.]

4. TRIAL ☞260—INJURIES TO PERSONS ON TRACK—DUTY TO LOOK AND LISTEN—INSTRUCTIONS ALREADY GIVEN.

In an action for injuries to a workman on the street, struck by a street car, a charge that a person is required to make reasonable use of his eyes and ears, that is, he is required to look and listen for approaching cars when employed near the track, and to do such acts as a reasonably prudent man would do under like circumstances, sufficiently covers that branch of the case, and it was not error to refuse a charge requested by defendant on that issue.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 651-659; Dec. Dig. ☞260.]

5. MASTER AND SERVANT ☞87½, New, vol. 16 Key-No. Series—INJURIES TO SERVANT—INDUSTRIAL INSURANCE—“EXTRAHAZARDOUS WORK.”

A workman for a city contractor, engaged in constructing a manhole in the street near a railroad track, is not employed in an “extrahazardous work,” so as to come within the scope of the state Industrial Insurance Act.

6. MASTER AND SERVANT ☞87½, New, vol. 16 Key-No. Series—INJURIES TO SERVANT—INDUSTRIAL INSURANCE—ESTOPPEL.

The fact that a workman had received two vouchers for monthly indemnity under the Industrial Insurance Act (Laws Wash. 1911, p. 345), which he did not execute, and on which he received no money, does not estop him from denying that he was within the terms of the act.

In Error to the District Court of the United States for the Northern Division of the Western District of Washington; Jeremiah Neterer, Judge.

Action by Charles J. Schleif against the Puget Sound Traction, Light & Power Company. Judgment for plaintiff, and defendant brings error. Affirmed.

The plaintiff in the action in the court below was working for certain contractors constructing a water gate or manhole from the surface of a street in the city of Seattle to the water pipes of the city water system, which were laid underground. The defendant operated a double-track electric street railway upon that street. North-bound cars ran upon the east track, and south-bound cars upon the west track. The portion of the street on which the plaintiff was working, being that portion between the eastern track and the western curb of the street, had been excavated for a concrete base to a depth of about a foot. In constructing the manhole a circular excavation had been made in the unpaved portion of the street about 6 feet in diameter and about 3 feet deep. The most westerly portion of the rim of the excavation was about 18 inches from the easterly rail of the street car track, and the ends of the ties of the track extended over the hole. The north edge of the excavation was about on the south marginal line projected of the walk of a cross-street running east and west. For the convenience of pedestrians on that cross-street a temporary sidewalk had been constructed across the street on which the plaintiff was working by laying rough boards or planks directly upon the ground. There was evidence that the ends of some of these boards projected a few inches over the manhole. The dirt from the excavation had

☞For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

been thrown upon the southerly side of the hole. The manhole was being constructed with brick and mortar. It was the plaintiff's duty to wheel the bricks in a wheelbarrow from the place where they were piled, and dump them near the hole, then hand them down to the mason constructing the manhole as he needed them. In doing this work the plaintiff generally stood at the north of the center of the hole on the temporary plank crosswalk. He testified that the line of his duty was "around the hole." There was no occasion for him to cross the track in going for or bringing bricks. At 10:20 in the forenoon on the day of the accident he had wheeled a load of brick to the excavation, and was standing north of the center of the hole, and at a point where a car approaching from the south on the easterly track could easily pass him, when he suddenly jumped or stepped upon the track at a time when a car approaching from the south on the easterly track was not more than 10 or 12 feet distant. He could have seen the car, had he been looking, at a distance of at least 600 feet. He testified that he was engaged about his work, and was not looking or thinking about the car, and did not hear the car approaching. He was struck by the car and sustained serious injuries. He testified that he was rendered unconscious, and had no recollection that he was upon the track at the time when he was struck; but the testimony of other witnesses indicates that, either because one of the planks of the crosswalk tipped as he stepped upon the end thereof, or for some other reason, he suddenly stepped or sprang upon the track.

James B. Howe and A. J. Falknor, both of Seattle, Wash., for plaintiff in error.

Geo. D. Emery, of Seattle, Wash., for defendant in error.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

GILBERT, Circuit Judge (after stating the facts as above). [1] The defendant contends that it was entitled to a directed verdict in its favor, both on account of lack of evidence of its negligence and the proof of the plaintiff's contributory negligence. The negligence of the defendant alleged in the complaint was its failure to give the plaintiff proper warning of the approach of the street car, and the operation of the car at 15 miles per hour, when its speed was limited by ordinance to 12 miles per hour. There was evidence that the car was going at from 15 to 20 miles an hour, and that no bell was rung until the plaintiff was seen on the track, and at a time when the car was within 12 feet of where he stood. In view of the testimony, we do not think it should be said, as a matter of law, that the defendant was not guilty of negligence, or that the plaintiff was guilty of such contributory negligence as to bar his right of recovery.

[2] If it were true that the street car was approaching at a rate of speed prohibited by the ordinance, and the men who were working at the manhole were plainly visible to the conductor, the circumstances were such that a jury might properly say that ordinary care required the conductor to give a timely signal of the approach of his car, and that he should take into account the fact that one of the group of workmen engaged in work around the manhole and in proximity to the track, without such warning, might inadvertently step upon the track, or so near thereto as to be injured by the passing car. Although courts have held that there is no obligation resting upon a motorman to sound a gong, unless some extraordinary exigency requires it, it has been held, and very properly, we think, that the approach to a street crossing gives rise to such an exigency. And it has been held that proof of the

running of a street car at an excessive speed across a public street, or of failure to give proper warning of its approach, is evidence tending to show negligence. *Pierce v. Lincoln Traction Co.*, 92 Neb. 797, 139 N. W. 656; *Indianapolis St. R. Co. v. Bordenchecker*, 33 Ind. App. 138, 70 N. E. 995. In *Peterson v. Seattle Electric Ry. Co.*, 71 Wash. 349, 351, 128 Pac. 650, 651, it was said:

"If a motorman assumes to drive his car at an excessive speed, he cannot be excused from his duty to ring his bell and give such warning as is commensurate with the increased hazard, for it is the measure of due care."

In harmony with this view of the law the trial court instructed the jury that the defendant company could not recklessly run its car at a speed to exceed the limits of the law without ringing a bell or sounding a gong, irrespective of the plaintiff's employment near its track; that the defendant had the right to rely on the fact that the street along the line of its railway would not be used by persons in any other than a reasonable and usual manner, taking into consideration the improvement that was being made at the time near to its track, and that the company was required to exercise reasonable care and caution, such as an ordinarily prudent man would under similar circumstances, taking into consideration the improvements that were being made there and the dangers that were apparent by reason of the employment of the plaintiff and others in close proximity to its track; and that the plaintiff had the right to rely on the fact that the defendant would not run its car faster than the limit of speed required by the ordinance, and that the motorman operating the car would give the usual warning by ringing a bell or sounding a gong to advise plaintiff of the approach of the car.

In *Hanley v. Boston Elevated Railway*, 201 Mass. 55, 87 N. E. 197, the plaintiff was one of a gang of four engaged in repairing a gas main alongside the defendant's street railway. The court said:

"When viewed in the light of common experience, the jury could say that the plaintiff's knowledge of the attendant circumstances would not lead him conclusively to anticipate that, if he slipped and in falling on the spur of the moment grasped the rail to prevent dropping into the trench, an on-coming car, whose approach he had no reason to apprehend, because no warning had been given, might cut off his fingers. * * * Nor can it be said, as matter of law, that there was no evidence of the defendant's negligence. If neither the defendant's flagman, nor its motorman, nor its conductor, could be charged with knowledge that the pipe had become slippery, the flagman knew, and the others either knew, or could have been found to have known, of the excavation, and that the men were at work in the trench in the ordinary way making the necessary repairs. The usual warning from the flagman might have given the plaintiff time to choose between jumping into the trench, and reaching over and grasping the rail at the peril of losing his hand. In such a situation the mind reasons instinctively, and it is not outside the pale of common knowledge that even a few seconds might have saved the plaintiff from injury. Or if, instead of running at a speed which could have been found upon conflicting evidence to have been from 18 to 20 miles an hour, the motorman or conductor had slackened the speed of the car, the plaintiff might have recovered his footing and have released his grasp before the car passed over."

The defendant relies upon *Kiely v. Seattle Electric Co.*, 78 Wash. 396, 139 Pac. 197. The court had under consideration in that case the question of the contributory negligence of the plaintiff, and said:

"Although respondent was rightfully in the street, it was his duty to exercise reasonable care to learn of the approach of cars; a turn of the head and a glance of the eye would have been sufficient, especially when a signal was given by the ringing of a repeating gong."

In the sentence last quoted is found the feature which distinguishes that case from the case at bar. If in the present case it had been established by the evidence that a gong had been sounded on the approaching car in time to give warning, a very different case would have been presented.

[3] It is assigned as error that the court instructed the jury as follows:

"You are instructed, however, that if, by a fair preponderance of the evidence, you believe that the car was running more than 12 miles an hour at the place of the accident, the burden of proof, would by such act be shifted to the defendant to show by a fair preponderance of the evidence that the injury, if one was sustained, was the result of contributory negligence on the part of the plaintiff, and that such negligence was the proximate cause of the injury, and without which it would not have happened."

It is said that this instruction was erroneous, for the reason that in law the burden could not be cast upon the defendant until the jury had not only found that the car was traveling at an excessive speed, but that such excessive speed was the proximate cause of plaintiff's injury. But in the same instruction the court charged the jury that:

"The mere fact that the plaintiff was injured is no evidence of liability on the part of the defendant, nor is the fact that the car was running more than 12 miles an hour evidence of negligence which was the proximate cause of the injury."

And again the court charged the jury that:

"The fact that the car was going at a greater rate of speed than 12 miles an hour was not the cause of the injury, if you find from the evidence that such rate of speed above 12 miles an hour was not the proximate cause of the injury, or if you find from the evidence that the plaintiff was guilty of contributory negligence."

And elsewhere in the charge the jury was plainly instructed that the running of the car at an excessive speed, together with the failure to give an appropriate signal of its approach, might be regarded as negligence. We are not convinced, therefore, that there was reversible error in the portion of the charge which was singled out by the defendant in its exception.

[4] Error is assigned to the refusal of a requested instruction on the subject of the duty of the plaintiff to use his senses, his eyes and his ears, especially when working in or about a place where a collision with a car was likely to occur. But, on examining the instructions, it is seen that the court charged the jury sufficiently on that branch of the case as follows:

"And a person is required to make reasonable use of his eyes and ears; that is, he is required to look and listen for approaching cars when employed near the track, and to do such acts as a reasonably prudent man would under like circumstances."

[5] One of the defenses pleaded was that the plaintiff was employed in extrahazardous work, an employment which comes within the scope

of the state Industrial Insurance Act, and that because of the provisions of that act he could not recover in the action, and that prior to bringing the present action he had made his election to take under that act, and had presented his claim to the state and had received on account thereof two state warrants for \$30 each. Error is assigned to the instruction wherein the court charged the jury that under the evidence the act did not apply and that the defense so pleaded should be disregarded. There was no error in that instruction. *Meese v. Northern Pac. Ry. Co.*, 211 Fed. 254, 127 C. C. A. 622.

[6] Nor was it shown that the plaintiff had received warrants from the state. What he did receive were two vouchers for a monthly indemnity, which he did not execute and upon which he received no payment. Nothing that he did in that matter should be held to estop him from prosecuting the present action.

We find no error for which the judgment should be reversed. It is accordingly affirmed.

ATCHISON, T. & S. F. RY. CO. v. NELSON.

(Circuit Court of Appeals, Ninth Circuit. February 1, 1915)

No. 2406.

JUDGMENT ~~725~~—CONCLUSIVENESS—EFFECT AS EVIDENCE.

Code Civ. Proc. Cal. § 1908, provides that a judgment in respect to matters directly adjudged is conclusive between the parties and their successors in interest, litigating for the same thing under the same title and in the same capacity, provided they have notice of the pendency of the action. Section 1909 declares that other judicial orders of a court or judge of the state or of the United States create a disputable presumption according to the matter directly determined between the same parties and their representatives or successors in interest by title subsequent to the commencement of the action or special proceeding, litigating for the same thing under the same title and in the same capacity. Section 1910 declares that the parties are deemed to be the same when those between whom the evidence is offered were on opposite sides in the former case, and a judgment or other determination in that case could have been made between them alone, though other parties were joined with both or either. *Held*, that the clause of section 1910, "and a judgment or other determination could in that case have been made between them alone," relates to and qualifies section 1909, but not section 1908, and hence a judgment in favor of a husband and wife in an action against a carrier for injuries to the wife was conclusive of the carrier's negligence, and that it was the proximate cause of the injury, in a subsequent action by the husband alone for loss of the wife's services, medical expenditures, etc., because of the same accident.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1255-1257; Dec. Dig. ~~725~~.]

In Error to the District Court of the United States for the Southern Division of the Southern District of California; Frank H. Rudkin, Judge.

Action by A. H. Nelson against the Atchison, Topeka & Santa Fé Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed.

The defendant in error recovered in the court below a judgment against the plaintiff in error for damages on account of moneys expended for services of doctors and nurses, and the cost of drugs and medicine and hired help, and for the loss of services of his wife, all growing out of an injury suffered by his wife while she was a passenger on one of the cars of the defendant in error. The complaint alleged that prior to the commencement of the action the defendant in error and his wife had sued the same defendant for the injuries to her person suffered by the wife in the accident which is referred to in the case at bar. The plaintiff set out the pleadings and judgment in the former case, and pleaded the judgment roll in that action as res adjudicata, and as conclusive upon and an estoppel in respect to all issues in the case at bar concerning the negligence of the defendant and the effect of the negligence of either of said parties as the proximate cause of the injury complained of, and averred that upon the strength of that judgment it should be adjudged and determined that the defendant was guilty of negligence which was the proximate cause of the injury complained of, and that the plaintiff was not guilty of any want of ordinary care or negligence which contributed to the injuries to his wife. The answer alleged that the plaintiff's wife had been guilty of negligence which was the proximate cause of her injuries, and denied that the judgment roll in the former case was res adjudicata, or conclusive, or estoppel, in respect to any issues in the present case. On the trial the judgment roll was introduced in evidence over the objection of the plaintiff in error, and the defendant in error offered evidence of the amount of damages and rested. The defendant introduced no evidence. The court instructed the jury that the judgment roll was conclusive on the question of the use of due care on the part of the plaintiff's wife, and conclusive that the negligence of the defendant was the proximate cause of the injury both to the plaintiff's wife and to the plaintiff in the present case, and that the jury must find for the plaintiff in some sum.

U. T. Clotfelter, A. H. Van Cott, M. W. Reed, and E. W. Camp, all of Los Angeles, Cal., for plaintiff in error.

Gray, Barker & Bowen, of Los Angeles, Cal., for defendant in error.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

GILBERT, Circuit Judge (after stating the facts as above). It is conceded by both parties to the action that the judgment in the former case should be given in the present case the same effect as evidence which it would have had, had it been rendered by a court of the state of California and offered in evidence in a court of that state. We turn, therefore, to the Code of California and the decisions of the Supreme Court of that state to ascertain what is the effect of such a judgment as evidence in a case such as that which is here under review. The provisions of the Code are as follows:

"Sec. 1908. The effect of a judgment or final order in an action or special proceeding before a court or judge of this state, or of the United States, having jurisdiction to pronounce the judgment or order, is as follows: * * *

"2. In other cases, the judgment or order is, in respect to the matter directly adjudged, conclusive between the parties and their successors in interest by title subsequent to the commencement of the action or special proceeding, litigating for the same thing under the same title and in the same capacity, provided they have notice, actual or constructive, of the pendency of the action or proceeding.

"Sec. 1909. Other judicial orders of a court or judge of this state, or of the United States, create a disputable presumption, according to the matter

directly determined, between the same parties and their representatives or successors in interest by title subsequent to the commencement of the action or special proceeding, litigating for the same thing under the same title and in the same capacity.

"Sec. 1910. The parties are deemed to be the same when those between whom the evidence is offered were on opposite sides in the former case, and a judgment or other determination could in that case have been made between them alone, though other parties were joined with both or either."

In Ferrea v. Chabot, 63 Cal. 564, 567, the court said:

"These sections of the Code are merely declaratory of the common-law rule, that the judgment of a court of competent jurisdiction, directly upon the point, is as a plea a bar, or as evidence conclusive, between the same parties, upon the same matter directly in question in another court."

In Cook v. Rice, 91 Cal. 664, 27 Pac. 1081, in an action against a husband and wife to recover damages for an alleged trespass upon public land in the possession of the plaintiff, who claimed as a pre-emptioneer, and to enjoin further trespasses, to which the answer of the defendant alleged that the wife claimed no interest in the land and that her acts were those of a member of the family of the husband and in privity with his title, it was held that it was proper to admit in evidence on behalf of the defendants the judgment roll in a former action of ejectment of the plaintiff against the husband, wherein it was adjudged that the plaintiff was entitled to the possession only of a small inclosure of the land not trespassed upon by the defendants, and that the plaintiff was not possessed or entitled to the possession of any part of the lands entered upon by the defendants. The court said:

"It was objected that it was not between the same parties. Substantially it was between the same parties. Mrs. Rice made no claim to the land, and all she did was under the claim of her husband. Had she, by her acts, taken possession, the right, if any, thus acquired would have been common property, and the right to control and manage in her husband."

In Woolverton v. Baker, 98 Cal. 628, 33 Pac. 731, the court said:

"The plea of res judicata applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties," by employing "reasonable diligence, might have brought forward at the time."

And in Reed v. Cross, 116 Cal. 473, 48 Pac. 491, the ruling was the same, and the court held that a judgment or decree necessarily affirming the existence of any fact is conclusive upon the parties or their privies, whenever the existence of that fact is again an issue between them, not only when the subject-matter is the same, but when the point comes incidentally in question in relation to a different matter, in the same or any other court, except on appeal or other proceeding provided for its revision.

Again in Lamb v. Wahlenmaier, 144 Cal. 91, 77 Pac. 765, 103 Am. St. Rep. 66, which was an action brought upon a contractor's bond against the contractor, Wahlenmaier, and his surety, to recover amounts paid by the plaintiff in discharge of liens in excess of the contract price for constructing a building, to which the defendants in the case pleaded in bar a judgment in a previous action brought alone by the contractor

against the owner to recover under the contract, in which the same questions were litigated as in the case of the owner against the contractor and his surety, the court said:

"The defendants herein have pleaded the judgment in that action in bar of plaintiff's right of recovery. The superior court held that it was a bar in favor of Wahlenmaier, but not in favor of the surety company, and rendered judgment against the latter and in favor of the plaintiff for \$691. The surety company has appealed. The rule formulated by Lord Chief Justice De Grey in the Duchess of Kingston's Case, and frequently repeated in other cases, that 'the judgment of a court of concurrent jurisdiction directly upon a point is as a plea a bar, or as evidence conclusive, between the same parties upon the same matter directly in question in another court,' has been substantially reproduced in section 1908, subd. 2, of the Code of Civil Procedure of this state. The estoppel thus created is not limited to an action which is identical in form with the former action, or where the same parties are plaintiff and defendant in each of the actions, but may be invoked whenever, in the second action, the parties are in privity with the parties to the first action and the same issue is presented for determination which was determined in the former action. As between the parties to the action the judgment therein is an estoppel as to all matters which are actually and necessarily included in the judgment."

The common-law rule thus adopted by the Code and construed by the statutes of the state is found expressed in the decisions of the courts of other states, notably in *Lindsey v. Town of Danville*, 46 Vt. 144, a case very similar in facts to the case at bar; also in *Southern Pacific Railroad v. United States*, 168 U. S. 1, 48, 18 Sup. Ct. 18, 42 L. Ed. 355.

The plaintiff in error refers to the following words in section 1910:

"And a judgment or other determination could in that case have been made between them alone"

—and argues that because a judgment in the first action could not have been rendered for the husband alone, but must have been a joint judgment in favor of both husband and wife, the statute precludes the introduction of such a judgment as evidence in the case at bar. But, upon examining the sections which precede section 1910, it will be seen that the language so quoted from that section relates to and qualifies section 1909, and not 1908. The decisions of the Supreme Court above quoted must necessarily have so construed the statutes.

The plaintiff in error cites *Walker v. Philadelphia*, 195 Pa. St. 168, 45 Atl. 657, 78 Am. St. Rep. 801, and *Womach v. St. Joseph*, 201 Mo. 467, 100 S. W. 443, 10 L. R. A. (N. S.) 177, 119 Am. St. Rep. 781, 9 Ann. Cas. 1161. In the first of those cases it was held that where a wife, with her husband as a nominal party, but in her own right, has recovered a judgment for personal injuries, the husband cannot, in a second suit to recover for loss of his wife's services by reason of the same injuries, introduce in evidence as conclusive of the defendant's negligence the record of the former suit, for the reason that that record is res inter alios acta, and not admissible as evidence. But that decision was based upon the statute of the state, which declared the right of action for wrong done to a wife to be her separate property. The court held that by virtue of that act her husband could not control or interfere with the conduct of the suit. The court said:

"It was the wife's claim that was litigated: the judgment was obtained in her right, and it was exclusively hers. Identity of subject-matter, in whole or in part, and identity of parties in interest, must unite, to render a deposition in one case admissible in another."

In Womach v. St. Joseph a similar decision was made, based on similar reasons. The court pointed to the statute, which it said had made a radical change, in providing that the damages sued for by the wife shall be and remain her separate property and under her separate control, and further providing that she shall be deemed a feme sole, and may sue or be sued at law or in equity, with or without her husband being joined. The essential difference between those cases and the case at bar is that although the Code of California, as it was prior to the change made in 1913, was held to require that an action for personal injuries to the wife must be brought in the name of the husband and wife, and that an action for consequential injury to the husband, such as expenses incurred by reason of her injury and the loss of her services to the husband, must be brought in the name of the husband alone (Tell v. Gibson, 66 Cal. 247, 5 Pac. 223), the judgment recovered in either case was community property, and by reason of that fact the wife was in privity with the husband and an actual party to each suit. McFadden v. Santa Ana, etc., Ry. Co., 87 Cal. 464, 25 Pac. 681, 11 L. R. A. 252; Lamb v. Harbaugh, 105 Cal. 680, 39 Pac. 56; Martin v. Southern Pacific Co., 130 Cal. 285, 62 Pac. 515.

It follows that there was no error in the ruling of the court below. The judgment is affirmed.

GOLDMAN v. UNITED STATES.

(Circuit Court of Appeals, Sixth Circuit. February 2, 1915.)

No. 2498.

1. POST OFFICE & 35—OFFENSES AGAINST POSTAL LAWS—USE OF MAILS TO DEFRAUD.

Under Criminal Code (Act March 4, 1909, c. 321) § 215, 35 Stat. 1130 (Comp. St. 1913, § 10385), providing that whoever, having devised or intending to devise any scheme or artifice to defraud, shall, for the purpose of executing such scheme, or attempting so to do, place any letter, etc., in any post office, etc., or take or receive any such therefrom, shall be punished as therein provided, where accused devised a scheme whereby he was to advertise for a woman to assist him on a financial proposition, and, having found a satisfactory assistant, men of standing and position were to be induced to visit her for social or business purposes, and, if possible, take a compromising position with her, whereupon photographs were to be taken and used in extorting money, it was not essential to the completeness of the scheme that an agreement should first be made as to the names of the men and the ways and means to be adopted to influence them as desired; and hence an indictment alleging that accused planned that, when he found such a person as he desired, he would agree and arrange with her that she should devise ways and means to meet and become acquainted with men of high financial and social standing, was not insufficient, as showing that there was no scheme to defraud, but only a preparation to devise such a scheme.

[Ed. Note.—For other cases, see Post Office, Cent. Dig. § 55; Dec. Dig. & 35.]

For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

2. POST OFFICE 48—OFFENSES AGAINST POSTAL LAWS—INDICTMENT—SUFFICIENCY.

Where the indictment distinctly alleged that, for the purpose of executing such scheme, accused unlawfully received and took letters in answer to such advertisement from a post office box, it was not insufficient as showing that the act of receiving the letters was a step in devising the scheme, and not for the purpose of executing it.

[Ed. Note.—For other cases, see Post Office, Cent. Dig. §§ 67-80; Dec. Dig. 48.]

Nonmailable matter, see notes to Timmons v. United States, 30 C. C. A. 79; McCarthy v. United States, 110 C. C. A. 548.]

3. CRIMINAL LAW 901—MOTION FOR DIRECTED VERDICT—WAIVER.

Accused waived any error in denying a motion to direct a verdict in his favor at the close of the evidence for the prosecution by introducing evidence.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2124; Dec. Dig. 901.]

4. POST OFFICE 49—OFFENSES AGAINST POSTAL LAWS—SUFFICIENCY OF EVIDENCE.

Where the evidence showed that accused, in advertising for a person to assist him in a scheme to defraud, requested persons answering the advertisement to write to him for a personal interview, and gave no address except a post office box, and that he took from such box letters so addressed, and it did not appear that this method of correspondence ever happened in any other transaction, or that he ever received a letter so addressed, except in connection with the particular scheme, it showed, notwithstanding his lack of knowledge of the contents of the letters, that he received and took them from the post office for the purpose of executing or attempting to execute such scheme.

[Ed. Note.—For other cases, see Post Office, Cent. Dig. §§ 84-86; Dec. Dig. 49.]

5. POST OFFICE 35—OFFENSES AGAINST POSTAL LAWS—DECOY LETTERS.

That letters taken by accused from a post office box for the purpose of executing or attempting to execute a scheme to defraud were written at the instance of a post office inspector, at whose request the superintendent of the post office station notified accused that the letters were there, did not render the act of taking and receiving them any less an offense, if the postal officials adopted and pursued this course upon reasonable grounds to suspect accused of misusing the mails, in an effort to detect, and not to induce the commission of, a crime.

[Ed. Note.—For other cases, see Post Office, Cent. Dig. § 55; Dec. Dig. 35.]

6. POST OFFICE 49—OFFENSES AGAINST POSTAL LAWS—SUFFICIENCY OF EVIDENCE.

On a trial for receiving and taking letters from a post office for the purpose of executing or attempting to execute a scheme to defraud, evidence held to show that the letters written at the instance of a post office inspector were so written in an effort to detect, and not in an effort to induce the commission of, a crime.

[Ed. Note.—For other cases, see Post Office, Cent. Dig. §§ 84-86; Dec. Dig. 49.]

In Error to the District Court of the United States for the Eastern Division of the Northern District of Ohio; William L. Day, Judge.

Jacob L. Goldman was convicted of a misuse of the mails, and he brings error. Affirmed.

For opinion below on demurrer to the indictment and motion to quash, see United States v. Goldman, 207 Fed. 1002.

This writ is prosecuted to reverse sentence entered upon conviction for misuse of the mails. The indictment contains two counts, and they in effect are the same, except that one of the two letters involved appears in the first count and the other in the second. The indictment enters greatly into details and is very long. We think the following fairly states the substance of its allegations:

Goldman unlawfully devised a scheme to defraud divers men of "reputed high financial standing and position in and about said city of Cleveland," but whose names were unknown to the grand jury. He planned to effect the scheme by inducing women to enter into correspondence with him through letters to be mailed by them in the post office establishment in that city, and to this end to advertise in the Cleveland Tribune as follows:

"Desire—The assistance and co-operation of a well-educated and well-groomed lady on a big financial proposition. Must be good looking, chic, and have the ability to interest men of means. If you can measure up to this standard, write me for personal interview. Box 14, Station D."

That upon receiving such letters he would arrange for personal interviews with the writers and select one of them to carry out his purposes; that he intended to have this woman "devise ways and means" to induce men of standing and position, upon pretense of friendly and social relations or of legitimate business, to visit her in some hotel or apartment house to be selected in Cleveland; that a suite of rooms would there be engaged and so equipped with two cameras as to secure photographs of the woman and her visitor in one of these rooms, without the knowledge of the visitor; that the woman should induce her visitor if she could to take a "compromising position with her," when Goldman would take or cause to be taken two photographs showing the woman and the visitor in such compromising position, but "from different views"; that Goldman would then enter the room, advise the man of the taking of only one of the photographs, and threaten to expose him unless he would pay \$50,000 to \$75,000 either for the photograph or for destroying it, but would retain the other for the purpose of silencing the man in case he paid the money and caused trouble later; that the scheme involved men who were not indebted to Goldman, and that the fraud would consist in so extorting money from them. Whatever moneys should be obtained were, as part of the scheme, to be divided between Goldman and the woman.

It is charged that in execution of the scheme Goldman caused the advertisement before quoted to be inserted in the issue of the Cleveland Tribune for January 4, 1913; that on the 9th of that month he knowingly took and received from the post office box before described a certain letter contained in a sealed envelope which bore an uncanceled two-cent stamp and this address, "P. O. Box 14, Station D, Cleveland," and which had theretofore been deposited in answer to such advertisement in the post office establishment for mailing and delivery. The letter as set out in the first count bears the signature and address of the writer, and reads:

"Dear Sir: In answer to your ad. in the 'Tribune' of January 4th, I should like to have an interview with you. You ask for a well-educated and well-groomed lady to help you on a big financial proposition. The ad. interests me and I should like to talk to you about it."

The letter described in the second count was also inclosed in an envelope bearing a two-cent uncanceled stamp and an address the same as the other letter. The letter bears the signature and address of the writer, a woman other than the first writer, and reads:

"Box 14, Station D, Cleveland, O. I have read your advertisement in 'The Tribune' of the 4th, in which you desire assistance and co-operation of a lady, on a big financial proposition. I think I can fill the position satisfactorily. Please write me when and where I can see you."

Goldman also took this letter from the box at the same time he received the other. Goldman was thereupon arrested, the letters were found upon his person, and nothing further was done toward executing the scheme.

A demurrer and a motion to quash were filed and overruled, and thereupon the accused entered a plea of not guilty. At the close of the evidence

for the prosecution the accused moved the court to direct a verdict in his favor, which was overruled; but no such motion was made at the close of all the evidence.

F. J. Wing and F. W. Walther, both of Cleveland, Ohio, for plaintiff in error.

C. R. Alburn, Asst. U. S. Atty., of Cleveland, Ohio, for defendant in error.

Before WARRINGTON, KNAPPEN, and DENISON, Circuit Judges.

WARRINGTON, Circuit Judge (after stating the facts as above). [1] 1. The ground alleged in the demurrer is insufficiency in law of either count of the indictment; and this is explained in argument to mean that the scheme to defraud as it is alleged was "but a preparation to devise a scheme," and so did not fall within the language of section 215 of the Federal Criminal Code. Reliance is placed, for example, on this portion of the indictment:

"Goldman had planned, devised, and intended that, when he should find a person * * * of the description indicated" in his advertisement, "he would agree and arrange with her in this: That she should devise ways and means through pretended business engagements, and through ways to the grand jurors unknown, to meet and become acquainted with certain and divers persons, men, of reputed high financial and social standing and position, but whose names are to the grand jurors unknown. * * *"

Counsel fail to discriminate between language employed to set forth Goldman's scheme and that used to describe the means he selected for its execution. Goldman's scheme, as it is alleged, consisted of a methodical course of procedure down to the very point of extorting money from his intended victims; and the woman was but an instrumentality designed to be used in ways pointed out in material part in the scheme itself, as well as through ways and means the woman herself should devise, to entice men to her room and into "compromising" positions for the purposes appearing in the statement. The scheme in part required the woman to become acquainted with men of "reputed high financial and social standing and position"; and to say it was essential to the completeness of the scheme that an agreement should first be made as to the names of men and the ways and means to be adopted to influence them as desired is to overlook the main features and ultimate purpose of the scheme, and to subordinate it to incidental conditions which plainly could arise only in the course of its execution.

[2] The motion to quash presents a kindred question. It is addressed to both counts of the indictment and in the main for the same reasons. The complaint is that neither count states that the use made of the postal establishment in taking the letters from the post office was for the purpose of executing the scheme, but that the letters themselves show that the acts of receiving them were steps taken in devising the scheme. This is but another effort to show that there was not a completed scheme, though for a reason different from that urged under the demurrer. The complete answer to this is to be found in the indictment. It is there distinctly alleged that for the purpose of

executing the scheme, Goldman, on January 9, 1913, did unlawfully take and receive the two letters from Box 14 of Station D of the post office establishment at Cleveland.

We may here allude to a criticism of the indictment which counsel made in support of both the demurrer and the motion to quash. They contend:

"The vice of an indictment of this character arises from the attempt of the pleader to broaden the scope of the statute by broadening his description of the scheme, so as to include therein uses of the mails which in their nature could not be acts done for the purpose of executing the scheme to defraud, contemplated by the statute, although within the scheme as described by the pleading."

This is either an assumption that the scheme alleged could not in the nature of things have been devised in advance of advertising for and receiving the letters, or it is a challenge of the right, as also of the duty, of a pleader to employ allegations according to his understanding of the facts. It certainly is conceivable that Goldman might have thought out and finished his scheme of extortion in advance of securing and setting in motion the instrumentalities, like the use of the mails, designed for its execution; and so counsel's criticism should be addressed to the proofs and not the allegations. The demurrer and motion were rightly overruled.

[3, 4] 2. Counsel next contend that it was error to deny the motion to direct a verdict in favor of defendant, for the reason that the evidence of the government was "insufficient to support the necessary allegations of the indictment." While it would be enough to say of the error so claimed that it was waived by the introduction of evidence for the defendant (*Sandals v. United States*, 213 Fed. 571, 573 [C. C. A. 6th Cir.], and citations), we are disposed to consider the contention made against the sufficiency of certain features of the evidence. Counsel recognize the change made in elements of the offense defined by section 215 (construed in *United States v. Young*, 232 U. S. 155, 161, 34 Sup. Ct. 303, 58 L. Ed. 548), as compared with the offense denounced by old section 5480 (interpreted by this court in *Horman v. United States*, 116 Fed. 350, 53 C. C. A. 570) and the resulting modification in the form of indictment as now required; but they insist that the evidence is lacking even in tendency to show one of the elements of the offense as now defined (section 215), since it fails to show a *purpose* in Goldman, when receiving the two letters, to execute or to attempt to execute his scheme. It is said the acts of receiving letters are to be differentiated from those of preparing and mailing letters; the theory being that lack of knowledge of the character and contents of letters received forbids imputing the element of purpose in the one instance, while this cannot be said in the other.

The difficulty with this contention and theory is that they do not fit this case. The evidence shows that Goldman himself placed the original of the advertisement (set out in the statement) in the office of the Cleveland Tribune with direction to publish it; and it is to be observed that the advertisement contained an express request to the class of persons addressed to write to him for a personal inter-

view, and also this significant address, "Box 14, Station D." His name did not appear in the advertisement, and the envelopes containing the letters bore only the address, "Box 14, Station D, Cleveland." It is not claimed that this method of correspondence ever happened in any other transaction of Goldman, or that he ever received a letter so addressed, except in connection with this particular scheme. In these circumstances it was but natural for him to expect to receive letters so addressed and relating to the subject of his advertisement. He could not rationally have mistaken their character. Whether he would take them from his post office box or not was optional with him; he might have refused either to take or receive them; the address on each was to him an unmistakable warning. The act of Congress forbade him to "take or receive any such" letter from "the post office establishment" (section 215); and to hold that the record does not tend to prove the element of forbidden purpose in his receipt of the letters, would be to frustrate the evidence and also the statute itself.

[5, 6] 3. There is another objection to these letters which is deserving of attention. The letters were decoys and were written at the instance of a post office inspector. The writer of the first letter was not in the employ of the government, though the writer of the other was. The letters bore the address called for in the advertisement, were duly stamped, and the inspector placed them in Box 14, Station D. The superintendent of the station, pursuant to request of the inspector, notified Goldman by telephone that two letters were there. Goldman then went to the post office and took the letters from the box, opened and read them, and as one of the witnesses said "was in the act of tearing up the envelopes" when the officer arrested him. If these officials adopted and pursued this course upon reasonable grounds to suspect Goldman of misusing the mails, their conduct was, under well-settled principles, justifiable, and the offense was committed; if no such grounds existed, neither their course nor the conviction can be sanctioned. *United States v. Wight* (D. C.) 38 Fed. 106, 109, per Brown and Jackson, JJ.; *Grimm v. United States*, 156 U. S. 604, 609, 610, 15 Sup. Ct. 470, 39 L. Ed. 550; *Goode v. United States*, 159 U. S. 663, 669, 16 Sup. Ct. 136, 40 L. Ed. 297; *Rosen v. United States*, 161 U. S. 29, 42, 16 Sup. Ct. 434, 480, 40 L. Ed. 606; *Montgomery v. United States*, 162 U. S. 410, 411, 16 Sup. Ct. 797, 40 L. Ed. 1020; *Andrews v. United States*, 162 U. S. 420, 423, 16 Sup. Ct. 798, 40 L. Ed. 1023; *Price v. United States*, 165 U. S. 311, 315, 17 Sup. Ct. 366, 41 L. Ed. 727; *Hall v. United States*, 168 U. S. 632, 637, 18 Sup. Ct. 237, 42 L. Ed. 607; *Scott v. United States*, 172 U. S. 343, 349, 350, 19 Sup. Ct. 209, 43 L. Ed. 471; *Bates v. United States* (C. C.) 10 Fed. 92, 94, 95, per Drummond, C. J.

The evidence tends to justify the course taken by the post office officials; in other words, it seems to have been an effort to detect, and not to induce commission of, a crime. In the interval between the publication of Goldman's advertisement and the preparation of the letters, the inspector had been told of Goldman's purposes. During

that interval the woman who wrote the first letter set out in the statement had conversed with Goldman on the subject of his scheme, and he had told her just what it was. This occurred for the most part in the presence of a third person, a man, and the man and woman testified at the trial, without objection, that Goldman told them that he had received 10 or 12 letters in answer to his advertisement, though Goldman testified that he had said they were applications, not letters. It was from the man, who was present at the interview, that the inspector received his information. In view, then, of the verdict, we cannot say that Goldman's acts of taking and receiving the two letters in issue were any the less an offense because of the fictitious character of the letters. It was not necessary, in order to establish the offense, to show that the nature of the letters so received was such as effectively to aid in working out Goldman's scheme. It was enough if, having devised his scheme, he received the letters with the purpose of thereby executing or attempting to execute the scheme. *Durland v. United States*, 161 U. S. 307, 315, 16 Sup. Ct. 508, 40 L. Ed. 709; *Weeber v. United States* (C. C.) 62 Fed. 740, 741, per Brewer, Circuit Justice; *O'Hara v. United States*, 129 Fed. 551, 555, 64 C. C. A. 81 (C. C. A. 6th Cir.); *Lemon v. United States*, 164 Fed. 953, 957, 958, 90 C. C. A. 617 (C. C. A. 8th Cir.); *Walker v. United States*, 152 Fed. 111, 115, 81 C. C. A. 329 (C. C. A. 9th Cir.).

Further discussion is not necessary. We have considered all the assignments and found no reversible error.

The judgment is accordingly affirmed.

STEIGMAN et al. v. UNITED STATES.

(Circuit Court of Appeals, Third Circuit. January 30, 1915. Rehearing Denied March 3, 1915.)

No. 1876.

1. CRIMINAL LAW ~~1149~~—APPELLATE PROCEEDINGS—REVIEW—MOTION TO QUASH INDICTMENT.

It is a rule of the federal courts that a motion to quash an indictment is ordinarily addressed to the discretion of the court, and its action will not be reviewed by an appellate court, except in cases where the failure to properly exercise judicial discretion amounts to a denial of justice.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3039–3043, 3058; Dec. Dig. ~~1149~~.]

2. CONSPIRACY ~~43~~—SUFFICIENCY OF INDICTMENT.

In an indictment under Cr. Code (Act March 4, 1909, c. 321) § 37, 35 Stat. 1096 (Comp. St. 1913, § 10201), for conspiracy to commit an offense against the United States by concealing property from a trustee in bankruptcy, in violation of Bankr. Act July 1, 1898, c. 541, § 29b(1), 30 Stat. 554 (Comp. St. 1913, § 9613), an averment of the appointment of a trustee is not an essential allegation, since the crime charged might be committed, although no trustee was ever appointed.

[Ed. Note.—For other cases, see Conspiracy, Cent. Dig. §§ 79, 80, 84–99; Dec. Dig. ~~43~~.]

~~1149~~ For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

3. INDICTMENT AND INFORMATION \Leftrightarrow 125—INDICTMENT—DUPPLICITY.

An indictment charging a bankrupt and another with conspiracy to conceal property from the bankrupt's trustee, and also alleging such concealment by the bankrupt, is not bad for duplicity.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 334-400; Dec. Dig. \Leftrightarrow 125.]

4. CONSPIRACY \Leftrightarrow 37—MERGER OF OFFENSES.

The doctrine of merger of offenses does not apply as between misdemeanors, and hence a misdemeanor which is the object of a conspiracy is not merged in the latter offense, nor is the offense of conspiracy merged in the consummated misdemeanor.

[Ed. Note.—For other cases, see Conspiracy, Cent. Dig. §§ 68-70; Dec. Dig. \Leftrightarrow 37.]

In Error to the District Court of the United States for the District of New Jersey; Thos. G. Haight, Judge.

Criminal prosecution by the United States against Louis Steigman and David Steigman. From a judgment of conviction, defendants bring error. Affirmed.

The evidence for the government tended to prove the following facts: Louis Steigman was engaged in the retail clothing business in Plainfield, N. J., and his brother, David Steigman, was engaged in the same business in New Brunswick, N. J. In March, 1913, the store of David Steigman was burned, and in September, 1913, he opened a new store and conducted fire sales and other special sales until December 24, 1913. In the fall of 1913, Louis Steigman purchased goods in unusual quantities, for which he failed to make payments. The goods so purchased, or a substantial part of them, were from time to time shipped or carted from his store in Plainfield to the store of David in New Brunswick. By this method, the stock of Louis was depleted and the stock of David correspondingly augmented. On December 23, 1913, Louis admitted bankruptcy, and on December 24, 1913, an involuntary petition in bankruptcy was filed against him. On the day upon which Louis admitted bankruptcy, arrangements were made by David and Louis for the removal of the entire stock from the store of David. Early on the morning of December 24th, being the day upon which the involuntary petition in bankruptcy was filed against Louis, two men, with whom the alleged arrangement for the removal of the goods had upon the previous day been made, opened the store of David, loaded all the goods in a van, and took them away. The defendants introduced testimony to show that the transfer of goods from one store to the other constituted transactions in the ordinary course of business.

Benjamin M. Weinberg, of Newark, N. J., for plaintiffs in error.

Walter H. Bacon, of Bridgeton, N. J., for defendant in error.

Before BUFFINGTON, McPHERSON, and WOOLLEY, Circuit Judges.

WOOLLEY, Circuit Judge (after stating the facts as above). The defendants were indicted for conspiracy under section 37 of the United States Criminal Code (section 5440, Revised Statutes), to violate section 29b of the Bankruptcy Act of July 1, 1898, and upon trial were convicted. Section 5440, R. S., under which the charge of conspiracy was made, provides that "if two or more persons conspire * * * to commit any offense against the United States, * * * and one or more of such parties do any act to effect the object of the conspir-

acy," they shall be punished in the manner prescribed; and the law of the United States which it is alleged the defendants conspired to offend, being section 29b of the Bankruptcy Act, provides punishment for a person upon conviction for "having knowingly and fraudulently concealed while a bankrupt * * * from his trustee any of the property belonging to his estate in bankruptcy."

The assignments of error are numerous, and extend to the sufficiency of the indictment, the relevancy of the testimony, and the charge of the court. The error most insistently urged to have been committed by the court below was its refusal to grant a motion to quash the indictment.

[1] It has been ruled by this and other Circuit Courts of Appeal that a motion to quash an indictment is ordinarily addressed to the discretion of the court, and will not be reviewed by an appellate court save in cases where the failure to properly exercise judicial discretion amounts to a denial of justice. *Carlisle v. United States*, 194 Fed. 827, 114 C. C. A. 531; *Hillegass v. United States*, 183 Fed. 199, 105 C. C. A. 631. The case presented is not within the exception of the rule, but the defects charged to exist in the indictment are so related to the subject-matter of other applications made at the trial, that we feel justified in giving this specification of error consideration in this opinion which otherwise would be withheld.

The indictment charged that Louis and David Steigman unlawfully conspired and fraudulently agreed together that Louis Steigman should commit an act of bankruptcy, and thereafter be adjudged bankrupt, and that, while a bankrupt, he (Louis Steigman) should knowingly and fraudulently conceal from the trustee of his estate in bankruptcy certain described property thereto belonging, and alleged acts in furtherance of the design, substantially as recited in the statement of the case.

The first and principal matter urged as a defect in the indictment is that "the indictment failed to show that a trustee in bankruptcy for the said Louis Steigman was ever appointed." In support of this contention, the defendants cited no case directly in point, but relied upon deductions from cases decisive of altogether different matters. *Alkon v. United States*, 163 Fed. 810, 90 C. C. A. 116; *Kerrch v. United States*, 171 Fed. 366, 96 C. C. A. 258; *Gilbertson v. United States*, 168 Fed. 672, 94 C. C. A. 158; *Pettibone v. United States*, 148 U. S. 197, 13 Sup. Ct. 542, 37 L. Ed. 419.

[2] The precise question raised by this specification is whether, in an indictment charging conspiracy to conceal property from a trustee, an allegation of the appointment of a trustee is an essential allegation, or whether the failure to make such an allegation violates the cardinal rule of criminal pleading that everything made essential to constitute the crime must be alleged. The crime charged by the indictment is conspiracy, and it has been held that:

"The crime of 'conspiracy' is sufficiently charged if it be stated that two or more persons, naming them, conspired (that is, agreed together) to commit some offense against the United States (that is, commit some act declared to be a crime by some statute of the United States); and it is also charged that one or more of such parties did an act to effect (that is, carry out) the object of such conspiracy. * * * In charging a conspiracy to

commit a crime against the United States and overt acts done to effect the object of such conspiracy, it is not necessary to allege that the crime which the parties conspired to commit was actually committed, or that any act in and of itself evil was done in aid of effecting the object of such conspiracy." *United States v. Wupperman* (D. C.) 215 Fed. 135; *Ryan v. United States*, 216 Fed. 13, 31, 132 C. C. A. 257.

The crime of conspiracy as contemplated by section 5440, R. S., has its origin in an agreement between two or more persons to do an act prohibited by law, and it is completed when an overt act is done toward that end, without regard to a violation of the law by the consummation of the act prohibited. In *United States v. Cohn et al.* (C. C.) 142 Fed. 983, a charge of conspiracy against the defendants was made under the same statute and alleged substantially the same acts as in the case under consideration. It was demurred to upon the ground that the acts of concealment were committed before the proceedings in bankruptcy were begun, and the contention was made that a conspiracy to commit such acts before bankruptcy is not a crime. In overruling the demurrer, the court said:

"A conspiracy to commit a crime always, in the nature of the case, precedes the commission of the crime; and in my opinion it does not follow, because at the time that a conspiracy is entered into to conceal property from a trustee no trustee has been appointed and no proceedings in bankruptcy begun, that therefore the crime of conspiracy under section 5440 cannot have occurred. The indictment alleges, as a part of the conspiracy, a plan to bring about the filing of petitions in involuntary bankruptcy and adjudications thereon, and that, pursuant to the conspiracy, property was removed and concealed before the proceedings were taken, was intentionally omitted from the schedules, and was kept concealed from the trustee after his appointment and qualification. In my opinion, such a conspiracy constitutes a criminal offense. The true test is: Could a conviction be had if no bankruptcy proceedings were ever taken? I think it could, if, in addition to the organization of the conspiracy, any of the parties to it did any act to effect the object of the conspiracy. Undoubtedly a criminal prosecution in such a case would be harsh and unusual; but, in my opinion, a crime would have been committed in such a case, even if no proceedings in bankruptcy were in fact ever taken. A conspiracy to murder, joined with a single act done by the conspirators to effect the object of the conspiracy, would be a crime under section 5440, and would not cease to be a crime because no murder was committed."

In *Williamson v. United States*, 207 U. S. 425, 28 Sup. Ct. 163, 52 L. Ed. 278, the Supreme Court held that under section 5440, R. S., the conspiracy to commit a crime against the United States is itself the offense, without reference to whether the crime which the conspirators have conspired to commit is consummated.

In view of the fact that in this case the defendants were charged by indictment with the crime of conspiring to violate a statute of the United States, and were not charged by the indictment with the actual violation of that statute, we are of opinion that the appointment of a trustee was not essential to complete the offense of conspiracy, and therefore the allegation of the appointment of a trustee was not essential in charging that offense. In determining what is essential in charging a crime, the test is not whether the charge might possibly have been made with greater particularity and certainty, but whether it contains every element of the offense intended to be charged, sufficient

to apprise the defendant of what he must be prepared to meet, and to sustain a plea of former conviction or acquittal in case of a second indictment for the same offense. *Cochran v. United States*, 157 U. S. 286, 290, 15 Sup. Ct. 628, 630, 39 L. Ed. 704; *Houston v. United States*, 217 Fed. 852, 856, 133 C. C. A. 562; *United States v. Shevlin* (D. C.) 212 Fed. 343, 344. We are of opinion that the indictment meets this test, and that the court below, either on the motion to quash, or as the same matter subsequently appeared, committed no error in holding the indictment sufficient.

[3] The contention that the "indictment was bad for duplicity, in that it charged in the same count two different crimes, without distinguishing which crime either of the defendants was indicted for," is wholly without merit. Two crimes are alleged, but one crime is charged. The crime of conspiracy is the one charged, and it is charged against both defendants. The crime of conspiracy, from its very nature, precedes or contemplates the perpetration of another offense, and a charge of conspiracy under the statute, without an allegation of the offense to which the conspiracy relates, as being intended or consummated, would be wholly impossible of statement.

There is no duplicity in an indictment which alleges that Louis Steigman unlawfully concealed property from his trustee in bankruptcy, and charges a conspiracy between Louis Steigman and David Steigman to procure the doing of that very thing. *Heike v. United States*, 227 U. S. 131, 33 Sup. Ct. 226, 57 L. Ed. 450, Ann. Cas. 1914C, 128.

[4] It is contended by the defendants that the crime of conspiracy charged against Louis and David Steigman has been merged in the completed crime alleged against Louis Steigman alone. To the abstruse argument presented in support of this contention we are not inclined to yield. The logical consequence of this argument, if upheld, is to make impossible conviction of either one or both of two persons for conspiring to violate the provision of the Bankruptcy Act against the concealment of property in every instance where the substantive crime has been consummated by one of them. The doctrine of merger is invoked, where the same act constitutes a misdemeanor and a felony; but where conspiracy and the executed act are crimes of equal grades, one cannot be merged in the other. 5 R. C. L. 1077, 1078. This general doctrine was recognized and applied by this court in the case of *Berkowitz v. United States*, 93 Fed. 452, 35 C. C. A. 379. In that case the court held the doctrine of merger of offenses does not apply as between misdemeanors, and hence a misdemeanor, which is the object of a conspiracy, is not merged in the latter offense, nor is the offense of conspiracy merged in the consummated misdemeanor.

In *Berkowitz v. United States*, *supra*, this court held that conspiracy under section 5440, R. S., whether to commit a misdemeanor or a felony, is, as it was at common law, not a felony, but merely a misdemeanor. It is recognized that offenses against section 29 of the Bankruptcy Act are not felonies, but are merely misdemeanors. 2 Loveland on Bankruptcy, 1226. The conspiracy charged in this case

being a misdemeanor, and the offense contemplated or committed in pursuance thereof being likewise a misdemeanor, the doctrine of merger cannot be invoked.

The remaining specifications to the sufficiency of the indictment, which go to the certainty and particularity of the property concealed, are entirely without merit.

The offense of conspiracy to commit the offense of concealing goods from a trustee in bankruptcy is, from the very nature of the acts done or contemplated, difficult to prove. Conspiracies are not hatched or engaged in openly, and the concealment of goods, as indicated by the word itself, is done with secrecy. When these or either of these offenses are susceptible of proof by direct testimony, it is more accidental than usual, and, as a result, evidence in proof of either must be largely, and usually is wholly, circumstantial. Such was the character of the testimony admitted in this case, which we find quite sufficient to sustain the verdict rendered. In admitting this testimony, and submitting it to the jury with its instructions upon the law, we find no error committed by the trial court.

The judgment below is affirmed.

SHADOAN v. CINCINNATI, N. O. & T. P. RY. CO.

(Circuit Court of Appeals, Sixth Circuit. February 2, 1915.)

No. 2518.

1. TRIAL ~~178~~—MOTION FOR DIRECTED VERDICT—VIEW OF EVIDENCE.

On a motion to direct a verdict for the defendant, it must be assumed that plaintiff's testimony is true, and he must have the benefit of every fair inference therefrom; and the rule of fair and reasonable inference deducible from the entire evidence so challenged is not varied, even where there are contradictions in the testimony of one or more of the witnesses, since the credibility of the witnesses is purely a question for the jury.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 401-403; Dec. Dig. ~~178~~.]

2. MASTER AND SERVANT ~~332~~—ACTION FOR DEATH OF TRESPASSER—QUESTIONS FOR JURY.

A number of boys, who had stolen a ride on a freight train on defendant's railroad, were discovered and driven off at a station where the train stood on a side track. As the train was slowly moving out along the side track, and while the boys were standing ahead and to one side of it, one of them was shot and killed by a brakeman on the caboose. In an action to recover for his death, it was shown that a rule of defendant required freight brakemen to prevent unauthorized persons from riding on the trains, and the brakeman testified that he knew such rule and believed he was performing his duty thereunder when he fired the shot, intending to scare the boys and prevent them from again getting on the train. Held, that defendant was responsible for his act, if it was done in the course of his employment, whether it was within or without his actual authority, and whether or not the boys were in fact threatening to board the train, and that under the evidence that question was one for the jury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1274-1277; Dec. Dig. ~~332~~.]

3. COURTS ~~352~~—PROCEDURE—MOTION FOR DIRECTED VERDICT—POWER OF COURT.

It is a rule of decision in the federal courts that in disposing of a motion to direct a verdict the trial judge cannot weigh the evidence.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 926–932; Dec. Dig. ~~352~~.]

In Error to the District Court of the United States for the Eastern District of Kentucky; Andrew M. J. Cochran, Judge.

Action at law by T. R. Shadoan, administrator of McKinley Shadoan, deceased, against the Cincinnati, New Orleans & Texas Pacific Railway Company. Judgment for defendant, and plaintiff brings error. Reversed.

T. L. Edelen, of Frankfort, Ky., and James Denton, of Somerset, Ky. (Robt. Harding, of Danville, Ky., of counsel), for plaintiff in error.

George Hoadly, of Cincinnati, Ohio, for defendant in error.

Before WARRINGTON, KNAPPEN, and DENISON, Circuit Judges.

WARRINGTON, Circuit Judge. The administrator brought an action in the Pulaski circuit court, charging the railroad company and one of its brakemen, Starling Litton, with negligently and wrongfully causing the death of McKinley Shadoan, a boy 15 years of age. The case was removed to the court below on the ground of diversity of citizenship. In the course of the trial, on motion of plaintiff, Litton was dismissed without prejudice; and at the close of plaintiff's evidence, on motion of the company, a directed verdict was rendered in its favor. The only assignment argued or relied on here charges error in directing the verdict.

The intestate and two other boys boarded a south-bound freight train of the defendant at Burnside, Pulaski county, to ride to and beyond Greenwood, a station about 11 miles south of Burnside, with the intention of returning home on some north-bound train. The boys resided in Burnside, and, having a school holiday, undertook, according to the evidence, "to steal a ride without the knowledge of the train employés." The train in question was the first of two sections, and both entered a side track at Greenwood to permit a north-bound passenger train to pass. There the boys left the train, but after the north-bound train had passed, and the freight train had started to return to the main track, they got on the bumpers of two adjoining box cars forward of the caboose (but how far forward is not shown) and were discovered by the conductor of the freight train. The conductor threw stones at them, and also beneath the cars, to drive them off. They again left the train and started away from the track. The track there runs north and south in a cut, and the railroad right of way is bounded on the east by a county road; the right of way and the road being separated by a wire fence. When the boys started away from the track, the conductor climbed to the top of a box car, and with his right hand made a motion indicating an intent again to throw at the boys, and with his left hand motioned toward the rear end of the train, and the boys took this to be a signal to trainmen riding on the caboose. These

motions were made while the boys were close to the wire fence (but on which side is in doubt), and seem to have frightened them.

Shortly after this, Starling Litton, the brakeman, fired a pistol three times from the east side door of the caboose and mortally wounded the intestate. Just where the boys then were is not definitely shown; estimates as to where they were seen immediately after the shooting occurred range from 50 to 75 yards east of the track. When Starling Litton was a defendant, he was called by the plaintiff to testify by deposition. He did not testify whether he saw the conductor give the signal mentioned or not, but did testify that while on the caboose he saw the boys throwing rocks at the conductor, from a place near the wire fence and some distance south of the caboose, though he could not say on which side of the fence they were, and that while the train was moving slowly on the side track he went below and to a locker of the caboose for his pistol, and in the presence of another brakeman fired from the east door with the result already stated. A rule of the company then in force and applicable to freight brakemen provided:

"They will allow no unauthorized person to enter the cars, ride on the train, or handle freight."

Litton had knowledge of this rule, and was satisfied that the boys had been riding on the train; and, further, his purpose in shooting was to scare them away from the train and prevent them from riding on it. He testified at considerable length. In reference to the rule, for example, this appears:

"Q. Is that the rule you referred to when you say it was your duty to keep an unauthorized person, or persons who didn't have transportation, from riding on the train? A. Yes, sir. Q. And that kind of a rule was in force at the time you did that? A. Yes, sir. Q. Had your train gotten out of the switch when you fired? A. No, sir."

And referring to the shooting:

"Q. Did you believe at that time that would frighten the boys and prevent them from getting on the train? A. I thought it would make a noise and scare them away. Q. And your sole purpose was not to injure them, but to prevent them from coming back on the train? A. Keep them away. Q. And you knew at that time the company required you to keep them from coming back on the train? A. Yes, sir. * * * Q. And you knew they were out there in the direction in which you fired? A. They were south of where I was; the caboose was moving; we were pulling out. Q. And they were still south of you when you fired the shots? A. Yes, sir. * * * Q. From the time you left the top of the caboose and got down and got your pistol, how many feet had it gone? A. Fifty or sixty feet."

Further, on re-examination:

"Q. You thought you were performing your duty in firing your pistol? A. Yes, sir; to scare them away. Q. You thought your duty required you to scare them away from the train and keep them from getting on the train at the time you fired the shots, didn't you? A. Yes, sir. Q. And it was for that reason alone you fired the shots? A. Just to scare them away. Q. And to prevent them from getting back on the train? A. Yes, sir."

[1] Does such testimony as this, in connection with the recited facts preceding it, present a question of law for the court, or a question of fact for the jury? It is hardly necessary to restate the rule, prevailing

in this court, that upon a motion to direct a verdict it is the duty of the trial judge to take that view of the evidence most favorable to the party against whom the direction is requested. *Williams v. Choctaw O. & G. R. Co.*, 149 Fed. 104, 105, 79 C. C. A. 146; *Crucible Steel Forge Co. v. Catharine Moir, Adm'x*, 219 Fed. 151, decided January 5, 1915; *Worthington v. Elmer*, 207 Fed. 306, 308, 125 C. C. A. 50. Stated otherwise, "it must be assumed that plaintiff's testimony is true, and he must have the benefit of every fair inference therefrom." *Louisville & N. R. Co. v. Bell*, 206 Fed. 395, 398, 124 C. C. A. 277, 280 (C. C. A. 6th Cir.). And the rule of fair and reasonable inference deducible from the entire evidence so challenged is not varied, even where there are contradictions in the testimony of one or more of the witnesses, for the credibility of witnesses is purely a question for the jury under proper instructions of the court. *Rochford v. Pennsylvania Co.*, 174 Fed. 81, 83, 98 C. C. A. 105 (C. C. A. 6th Cir.). The issue made in the arguments of counsel presents a striking illustration of the necessity to test the soundness of a directed verdict by such inferences as may be justifiably drawn in accordance with the rules thus pointed out.

[2] Counsel in effect, if not in terms, agree to the proposition that the defendant's liability for the act of Litton is to be determined by the inquiry, whether at the time he fired the shots he was engaged in the course of his employment; the one side contending that he was, and the other that he was not. Many cases are cited and commented upon by counsel, but they are reducible to the issue stated; and owing to their varying facts, peculiar to each, such cases afford but slight assistance in the ultimate solution of a distinct though somewhat similar case, except through the rule they in substance declare that evidence which justifies opposing inferences as to whether the servant was or was not acting within the scope of his employment presents a question of fact for the jury, under appropriate instructions; and some of the cases will presently be cited and considered. It must meanwhile be remembered that Litton believed he was engaged within the scope of his employment and in the performance of a duty to his master at the time he fired the shots; and the evidence tends to justify this belief. He was so situated on the caboose, at the time the conductor gave the signal to train hands riding there, as either to have seen or heard of the signal; and another brakeman stood by his side at the time of the shooting and seemingly acquiesced in it. Further, the slow movement of the train on the side track was calculated to impress Litton with the belief that the boys might board it again; because while on top of the caboose he saw the boys at a place near the wire fence (on which side is not clear) some distance south of him, and in spite of the time he took to go below to the locker, and then to the east door of the caboose to fire the pistol, the boys were still south of him.

It may be true that at the time of the shooting the boys were off the railroad property; still it cannot be safely said that if, after the conductor had motioned to the men on the caboose, nothing further had been done by any of the crew to keep the boys away, they would not have returned to the train while it was on the side track or before

it got under way on the main track. Their purpose was in truth to ride beyond Greenwood. To assume that they would not have re-boarded the train would be to treat the evidence as reasonably open to but one inference—that Litton's act was not done in the course of his employment; and upon no other theory could the directed verdict be sustained. *Otis Steel Co. v. Wingle*, 152 Fed. 914, 917, 82 C. C. A. 62 (C. C. A. 6th Cir.).

Such a theory would not accord to plaintiff the most favorable view of the circumstances disclosed by the record or by Litton's testimony alone. The rule of the company requiring Litton to prevent unauthorized persons from riding on the train plainly invested him with authority and discretion commensurate with a rightful discharge of the duty. The liability of an employer, however, is not limited simply to the results of acts done by his agent in the proper performance of duty. It is a familiar doctrine that the direct consequences of an agent's acts, done in the wrongful exercise of his authority and in the course of his employment, are chargeable to his master. Hence, under the rule applicable to a motion to direct, we think the evidence gives rise to a substantial inference that Litton's act was done in the course of his employment; it would be sufficient, however, if the evidence should justify opposed inferences in this respect. It is therefore not enough to say that Litton's act was an abuse of his authority; nor that the boys either were in fact or threatening to become trespassers, for that could not rightfully subject any of them to the consequence that happened through the method adopted by Litton to prevent them from riding on the train. *Rounds v. Del., Lack. & West. R. R. Co.*, 64 N. Y. 129, 138, 21 Am. Rep. 597; *Nelson Business College Co. v. Lloyd*, 60 Ohio St. 448, 459, 54 N. E. 471, 46 L. R. A. 314, 71 Am. St. Rep. 729; *Brennan v. Merchant & Co., Inc.*, 205 Pa. 258, 261, 262, 54 Atl. 891; *Ritchie v. Waller*, 63 Conn. 155, 161, 28 Atl. 29, 27 L. R. A. 161, 38 Am. St. Rep. 361; *St. Louis, I. M. & S. Ry. v. Hendricks, Adm'r*, 48 Ark. 177, 181, 2 S. W. 783, 3 Am. St. Rep. 220; *Brunner v. Telegraph, etc., Co.*, 160 Pa. 300, 303, 28 Atl. 690; *Schulte v. Holliday*, 54 Mich. 74, 76, 19 N. W. 752; *Peck v. Mich. Cent. R. R. Co.*, 57 Mich. 3, 7, 23 N. W. 466; *Planz v. Boston & Albany Railroad*, 157 Mass. 377, 380, 32 N. E. 356, 17 L. R. A. 835; *Pierce v. Railroad Co.*, 124 N. C. 83, 87, 32 S. E. 399, 44 L. R. A. 316; *Pollatty v. Char. & West. Car. Co.*, 67 S. C. 391, 398, 45 S. E. 932, 100 Am. St. Rep. 750; *McKeon v. New York, etc., Railroad*, 183 Mass. 271, 274, 67 N. E. 329, 97 Am. St. Rep. 437. And see *Sharp v. Erie R. R. Co.*, 184 N. Y. 100, 104, 105, 76 N. E. 923, 6 Ann. Cas. 250; *Conchin v. El Paso, etc., R. R. Co.*, 13 Ariz. 259, 262, 263, 108 Pac. 260, 28 L. R. A. (N. S.) 88; 2 *Cooley on Torts* (3d Ed.) p. 1017; 2 *Wood on R. R.* (2d Ed.) § 316, p. 1404.

[3] The case of *C., N. O. & T. P. Ry. Co. v. Rue*, 142 Ky. 694, 699, 134 S. W. 1144, 1146 (34 L. R. A. [N. S.] 200), relied on by defendants, was disposed of after recovery below and in full recognition of the settled rule in that court that a master is responsible for the wrongful act of his servant if "done in execution of the authority, express or implied, given by the master"; but the court upon weighing

the evidence found that the servant's act did not fall within the rule (142 Ky. 703, 134 S. W. 1144, 34 L. R. A. [N. S.] 200). In this court, however, the prevailing rule of decision is that in disposing of a motion to direct a verdict the trial judge cannot weigh the evidence. See, in addition to the decisions of this court first above cited, Mt. Adams & E. P. Inclined Ry. Co. v. Lowrey, 74 Fed. 463, 477, 20 C. C. A. 596; Big Brushy Coal & Coke Co. v. Williams, 176 Fed. 529, 532, 99 C. C. A. 102. Cases like Little Miami Railroad Co. v. Wetmore, 19 Ohio St. 110, 2 Am. Rep. 373, have no more relevancy here than that case had in Nelson Business College Co. v. Lloyd, *supra*, 60 Ohio St. at pages 454, 460, 54 N. E. 471, 46 L. R. A. 314, 71 Am. St. Rep. 729.

The judgment must be reversed, with costs, and a new trial awarded.

CRAWFORD et al. v. STERNBERG.

(Circuit Court of Appeals, Eighth Circuit. January 4, 1915.)

No. 144, Original.

1. BANKRUPTCY ☞136—ORDER FOR DELIVERY OF PROPERTY TO TRUSTEE—INABILITY AS DEFENSE.

That members of a bankrupt partnership had paid out money withdrawn by them from the firm assets the day preceding the adjudication in bankruptcy, and had no other means, and therefore were unable to pay such money to the trustee, was a sufficient defense to an application to require them to repay such money.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 233, 235; Dec. Dig. ☞136.]

2. BANKRUPTCY ☞183—PARTNERSHIP AND INDIVIDUAL CREDITORS—RIGHTS.

Where, by mutual consent, the members of a bankrupt partnership withdrew money from the firm assets the day preceding the adjudication, and applied it to the payment of individual debts, they could not be required to return it, as Bankr. Act July 1, 1898, c. 541, § 5f, 30 Stat. 547, 548 (Comp. St. 1913, § 9589), providing that the net proceeds of partnership property shall be appropriated to the payment of partnership debts, and the net proceeds of the individual estate of each partner to the payment of individual debts, applies to the property constituting partnership and individual property at the commencement of the bankruptcy proceedings and to property fraudulently transferred, and the power of the partners to transform individual property into partnership property, or partnership property into individual property, continues until the property is placed in custody of the law for administration.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 282; Dec. Dig. ☞183.]

3. BANKRUPTCY ☞397—EXEMPTIONS—PARTNERSHIP AND INDIVIDUAL PROPERTY.

Though, under Kirby's Dig. Ark. § 3903, exempting personal property of the value of \$200 to unmarried persons, not the head of the family, a member of a firm may not claim such exemption out of the partnership assets, where partners by mutual consent took \$200 each from the assets of the partnership on the day preceding the adjudication in bankruptcy against the partnership, such money became their separate property and subject to their claims of exemption, as the firm's control of the partnership property and the right to transfer it in whole or in part to strangers or to members thereof, even if the firm is insolvent, continues until the property goes into the custody of the law, and it is not a fraudulent

☞For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

transfer for an insolvent person to convert property which is not exempt into property which is exempt for the purpose of claiming his exemptions therein.

[Ed. Note.—For other cases, see **Bankruptcy**, Cent. Dig. § 678; Dec. Dig. ☞397.]

Petition to Revise Order of the District Court of the United States for the Western District of Arkansas; Frank A. Youmans, Judge.

Bankruptcy proceeding against Claud F. Crawford and another. On petition to revise an order requiring the bankrupts to pay over money to M. Sternberg, trustee. Petition granted, and order reversed.

Ben D. Kimpel and Harry P. Daily, both of Ft. Smith, Ark., for petitioners.

W. S. Chastain, of Ft. Smith, Ark., for respondent.

Before CARLAND, Circuit Judge, and T. C. MUNGER, District Judge.

T. C. MUNGER, District Judge. On March 4, 1914, a petition in bankruptcy was filed by a partnership, which was engaged in mercantile business in Arkansas, and an adjudication in bankruptcy was entered on the same day. The next day the individuals constituting the partnership filed petitions in bankruptcy and were adjudicated bankrupts. The District Court made an order that the partners each pay over to the trustee of the partnership, the sum of \$200 and a petition to revise that order is the subject of this case.

[1, 2] The partners, each acting with the consent of the other, withdrew this money from the assets of the partnership on the day preceding its adjudication in bankruptcy, at a time when the partners and the partnership were insolvent, but when no action was pending against any of them. The money was so taken on the theory that each partner had the right to segregate that sum as his individual property, and to claim it as exempt under the laws of Arkansas, and it was scheduled and claimed to be exempt in the individual schedules in bankruptcy filed by them. A portion of this money was applied by each partner, before the trustee made application for its return, to the payment of individual debts owing by him, and neither has other assets, except the remainder of the \$200 not so expended. The fact that the defendants had paid out this money and had no other means, and therefore were unable to repay it to the trustee, was a sufficient defense to this application for its return. *Louisville Trust Co. v. Comingor*, 184 U. S. 18, 22 Sup. Ct. 293, 46 L. Ed. 413; *Boyd v. Glucklich*, 116 Fed. 131, 53 C. C. A. 451; *In re Mize* (D. C.) 172 Fed. 945. The money so expended was not subject to an order for its return as a part of the partnership estate, for the further reason that it had been, by the consent of the partners, applied to the payment of individual debts of the partners. This was the effect of the decision in the case of *Sargent v. Blake*, 160 Fed. 57, 87 C. C. A. 213, 17 L. R. A. (N. S.) 1040, 15 Ann. Cas. 58, in which this court held:

"The clause of section 5f upon which counsel rely is nothing but the familiar rule of administration of partnership and individual estates, which has been

imported into the bankruptcy law from the courts of equity. 'The net proceeds of the partnership property shall be appropriated to the payment of the partnership debts, and the net proceeds of the individual estate of each partner to the payment of the individual debts.' The partnership property and the individual estate at what time—four months, or at some indefinite time within four months, before the petition is filed, or at the time it is filed? This section treats of administration in the bankruptcy court, and hence of the partnership and individual property, the title to which is in the bankrupt at the time the petition against him is presented to the court and that which he had transferred in fraud of his creditors. Section 70. Any other interpretation would produce intolerable vexation and confusion, for in the daily conduct of business partners are necessarily and constantly applying partnership property to the payment, not only of large individual obligations, but to the payment of their petty individual debts for living expenses, and are often devoting their individual property to the promotion of the partnership business and the discharge of the partnership debts. It never could have been, it never was, the intention of Congress that these transactions—these transformations of partnership into individual and of individual into partnership property within four months, or within any other time preceding the commencement of bankruptcy proceedings—should either be rescinded or avoided by subsequent adjudications in bankruptcy, unless they were actually fraudulent or voidably preferential. It did not make them fraudulent in themselves. The terms of section 5f, and the natural and rational interpretation of them in the light of the general rules of law and of the entire act in which they appear, limit their application to partnership and individual property at the commencement of bankruptcy proceedings, and to property the transfer of which is fraudulent for other reasons than that partnership property was applied to the payment of individual debts, or individual property to the payment of partnership debts. This conclusion is in accord with the general principles applicable to the management and disposition of partnership property.

"There are two rules of law which at different times apply to the management and disposition of the property of a partnership: First, partners own, and, with the consent of each, have the right and power to sell and dispose of, the partnership property, to transform it into the individual property of one or more of the partners, to apply it or its proceeds to the payment of their individual debts in preference to those of the partnership, and to make such other honest disposition of it as they deem fit; second, in the administration of the property of a partnership in the courts the creditors of the partnership have the right to the application of the partnership property to the payment of the partnership debts in preference to the individual debts of the respective partners. The first is a rule of operation; the second a rule of administration. The first governs during the operation of the partnership business and the disposition of the partnership property by the partners; the second operates during the administration of the partnership property after it is brought into the custody of a court. The first rule prevails until by some suit or act the interposition of some court is invoked to administer the partnership property; and until that time the second rule is ineffective. Before the partnership property is placed in custodia legis for administration, it is not held in trust for the payment of the partnership creditors in preference to the creditors of the individual partners. The partnership creditors have no lien upon it, and no independent right to its application to the payment of their claims in preference to the claims of the creditors of the individual partners. Each partner, however, has the right to require the partnership property to be applied to the payment of the partnership debts in preference to the debts of the individual partners, to the end that he may not be required to pay the former out of his individual estate. The right of the creditors of the partnership to payment out of the partnership property in preference to the individual creditors is the mere right by subrogation or derivation to enforce this right of one of the partners after the partnership property has been placed in the custody of the law. Until it has been so placed, each partner has plenary power at any time to release or waive this right; and if each partner has done so, and at the time the property comes within the jurisdic-

tion of a court no partner has this right, then no creditor of the partnership has it, for a stream cannot rise higher than its source."

[3] The unexpended portions of the sums of money taken by the partners are claimed by them to be exempt under the law of Arkansas. Under the statutes of that state, it has been determined that the individuals constituting a firm may not select exemptions out of the partnership assets (*Richardson v. Adler, Goldman & Co.*, 46 Ark. 43; *Porch v. Arkansas Milling Co.*, 65 Ark. 40, 45 S. W. 51, 67 Am. St. Rep. 895; *In re Handlin*, 3 Dill. 290, 11 Fed. Cas. 6,018; *In re Meriwether* [D. C.] 107 Fed. 102); but such selection may be made when the interests of the partners have been ascertained and segregated (*Farmers' Union Gin & Milling Company v. Seitz*, 93 Ark. 329, 124 S. W. 780).

In the present case, the partners by mutual consent transferred to each other portions of the firm's money; and unless this transfer was fraudulent, the money became the separate property of the individuals and subject to their claims of exemption (section 3903, Kirby's Digest Laws Ark.), as the firm's control of the partnership property, and the right to transfer it in whole or in part, to strangers or to each other, even if the firm is insolvent, continues until it comes into custody of the law (*Sargent v. Blake*, *supra*; *Case v. Beauregard*, 99 U. S. 119, 25 L. Ed. 370; *Fitzpatrick v. Flannagan*, 106 U. S. 648, 1 Sup. Ct. 369, 27 L. Ed. 211; *Huiskamp v. Moline Wagon Co.*, 121 U. S. 310, 7 Sup. Ct. 899, 30 L. Ed. 971).

There is no claim of fraud in the severance of these sums of money into individual ownership, except that it took from partnership creditors a fund to which they could have resorted if it had remained partnership assets until placed in the custody of the law, and placed it among the individual assets, where it was subject to a claim of exemption, and that this was done for that purpose, and when it was known to the partners that they and the firm were insolvent and in anticipation of early proceedings in bankruptcy. It is well settled that it is not a fraudulent act by an individual who knows he is insolvent to convert a part of his property which is not exempt into property which is exempt for the purpose of claiming his exemptions therein, and of thereby placing it out of the reach of his creditors. *Flask v. Tindall*, 39 Ark. 571; *In re Irvin*, 120 Fed. 733, 57 C. C. A. 147; *Huenergardt v. John S. Brittain Dry Goods Co.*, 116 Fed. 31, 53 C. C. A. 505; *First National Bank v. Glass*, 79 Fed. 706, 25 C. C. A. 151; *In re Wilson*, 123 Fed. 20, 59 C. C. A. 100; *In re Thompson* (D. C.) 140 Fed. 257; *O'Donnell v. Segar*, 25 Mich. 367; *Randall v. Buffington*, 10 Cal. 491; *Cipperly v. Rhodes*, 53 Ill. 346; *Meigs v. Dibble*, 73 Mich. 101, 40 N. W. 935; *Jacoby v. Parkland Distilling Co.*, 41 Minn. 227, 43 N. W. 52; *Palmer v. Hawes*, 80 Wis. 474, 50 N. W. 341; *Thomp. on Homesteads & Ex.* §§ 305-309.

This has become an established principle, because the statutes granting exemptions have made no such exceptions, and because the policy of such statutes is to favor the debtors, at the expense of the creditors, in the limited amounts allowed to them, by preventing the forced loss of the home and of the necessities of subsistence, and because such

statutes are construed liberally in favor of the exemption. As it is not fraudulent for an individual debtor to convert property which is not exempt into that which is, it is not fraudulent for individuals constituting a partnership to sever the joint interest in partnership property, which is not yet in the custody of the law, and thereafter to hold their exemptions out of such property. Goudy v. Werbe, 117 Ind. 154, 19 N. E. 764, 3 L. R. A. 114; Mortley v. Flanagan, 38 Ohio St. 401; Worman v. Giddey, 30 Mich. 151; Bates v. Callender, 3 Dak. 256, 16 N. W. 506; Lee v. Bradley Fertilizer Co., 44 Fla. 787, 33 South. 456; Fairfield Shoe Co. v. Olds, 176 Ind. 526, 96 N. E. 592; In re Phillips (D. C.) 209 Fed. 490; 2 Freeman on Execution (3d Ed.) § 221.

Petition to revise granted, and order reversed.

FRANKFORT MARINE, ACCIDENT & PLATE GLASS INS. CO. v. JOHN B. STEVENS & CO.

(Circuit Court of Appeals, Ninth Circuit. February 1, 1915. Rehearing Denied March 8, 1915.)

No. 2397.

1. CORPORATIONS ~~428~~—NOTICE TO CORPORATION—KNOWLEDGE OF OR NOTICE TO AGENT OR EMPLOYÉ.

Knowledge of an injury to a workman in the employ of a corporation, acquired by a foreman, also an employé, while not acting for the corporation, but for himself, does not charge the corporation with notice of the injury.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1748-1761; Dec. Dig. ~~428~~.]

2. TRIAL ~~235~~—INSTRUCTIONS—CAUTION AS TO ACCEPTANCE OF TESTIMONY.

An instruction that the jury should accept testimony of conversations and oral admissions with great caution, especially where there had been a considerable lapse of time since the conversations, held not erroneous, where the jury were also properly instructed that they were sole judges of the credibility of the witnesses.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 539-541, 543-548, 551; Dec. Dig. ~~235~~.]

In Error to the District Court of the United States for the Southern Division of the Western District of Washington; Edward E. Cushman, Judge.

Action at law by John B. Stevens & Co., a corporation, against the Frankfort Marine, Accident & Plate Glass Insurance Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Hudson, Holt & Harmon, all of Tacoma, Wash., for plaintiff in error.

L. B. Da Ponte and J. W. Quick, both of Tacoma, Wash., for defendant in error.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

~~428~~ For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

GILBERT, Circuit Judge. The plaintiff in error issued its policy of insurance to the defendant in error, insuring it against loss on account of damages for bodily injuries or death suffered by any of its employés through accidental causes. While the policy was in force, and on or about July 19, 1909, one Merrill, an employé of the insured, was injured. On October 28, 1909, Merrill commenced an action against the defendant in error to recover damages. The insurance company refused to defend the action, and denied its liability on the policy, for the reason that notice of the accident had not been given it, in compliance with the provisions of the policy, which required that, upon the occurrence of an accident, the assured should immediately, "and at the latest within ten days," give notice in writing of such accident to the insurance company. Merrill recovered a judgment against the defendant in error, and thereupon the latter brought its action against the insurer to recover on the policy. The insurance company in its answer alleged the failure of the insured to give the notice required by the policy. Under the instructions of the court that there could be no recovery against the defendant in the action on account of the loss sustained in paying the judgment which Merrill recovered, because of its failure to give the ten days' notice, the jury returned a verdict in its favor. On writ of error to this court, the judgment was reversed; this court holding that the provision of the policy requiring immediate notice of an accident to any of the employés of the insured is to be given a reasonable and not a literal construction, and that it means notice within a reasonable time under all the circumstances, and that where it appeared that the insured did not know of the accident at the time when it happened, and gave notice to the insurance company immediately or within a reasonable time after learning thereof, the requirement of immediate notice was complied with. The cause was remanded to the court below for a new trial. Upon that trial the jury returned a verdict for the defendant in error. To review alleged errors on that trial, the cause is again brought to this court.

[1] Error is assigned to the ruling and instructions of the court in regard to certain testimony of Merrill and others as to conversations with Comstock, the foreman of the defendant in error. At the time of the accident Stevens was the president of the defendant in error, Moore the vice president, Comstock the day foreman, and Bass the night foreman. Stevens testified that he expected Moore, Comstock, or Bass to report cases of accident to the employés, and that in fact his corporation never received notice of the accident to Merrill until October 19, 1909. Merrill testified that about August 2, 1909, he had conversations with Comstock as to his accident; that Comstock was telephoned to and came to Merrill's house, and discussed with him the question of his wages and the liability of the company and other matters. The court instructed the jury to disregard the testimony as to declarations of and conversations with Comstock, unless they found that the plaintiff (the defendant in error here) sent Comstock to the hospital at the time of the conversation, and that, as there was no testimony to that effect, they should consider the conversations only

so far as they might tend to show what Comstock learned at the time when the accident happened, and that the conversations should be considered only in the event that they constituted an admission on Comstock's part that he knew from the beginning that Merrill was hurt, and the court directed the jury to disregard any admissions made by Comstock, because there was nothing to show that he was on the business of the company.

We are of the opinion that there was no error in the ruling or the instructions of the court. Comstock was not an officer of the corporation, but was a servant, with certain defined duties. There is no evidence that he was specially charged with the duty of reporting to the corporation accidents to the employés. The corporation looked to him, together with two others, to report accidents which might occur while the men were at work. The evidence was that Merrill did not consider his accident serious at the time when it occurred, that he continued at work as before for 12 days thereafter, and that until about the time when he went to the hospital he did not know that the ailment from which he was suffering was caused by the accident. The call which Comstock made at Merrill's house was in the evening and after working hours. He went upon his own accord, and not in compliance with any instruction from the defendant in error. He did not go in the discharge of any of the duties of his employment, and we think the court did not err in ruling that his employer was not chargeable with notice of anything said on that occasion, either by Comstock or Merrill, or other persons in their presence. As to the question of the competency of the testimony concerning what was said in the conversations at Merrill's house, as tending to show that Comstock had prior knowledge of the accident, or knowledge of it at the time when it occurred, it is sufficient to point to the fact that nothing appears in those conversations to show such prior knowledge on the part of Comstock.

Notice to and knowledge of the agent, acquired and present in his mind while he is exercising the powers and discharging the duties of his agency, are notice to and knowledge of his principal. Chicago, St. P., M. & O. Ry. Co. v. Belliwith, 83 Fed. 437, 28 C. C. A. 358. The knowledge acquired by the officer or agent of a corporation, while not acting for the corporation, but while acting for himself, is not imputable to the corporation. 10 Cyc. 1063. The general rule is that notice communicated to, or knowledge acquired by, officers or agents of corporations when acting in their official capacity, or within the scope of their agency, becomes notice to or knowledge of the corporation. 10 Cyc. 1054. And the same authority announces the rule that information communicated to an officer of a corporation on the street, touching a matter affecting the rights of the corporation, is not, as a matter of law, notice to the corporation.

[2] Error is assigned to the instruction of the court that certain evidence was to be accepted with great caution by the jury. The court said :

"In this case there has been testimony concerning conversations and admissions, oral admissions. The court instructs you that evidence of that kind should be accepted with great caution by the jury. Especially is that true

where a considerable lapse of time has intervened between the time of these alleged admissions or conversations and the time the witness testified. Counsel has pointed out some reasons for that, too. In addition to those pointed out by counsel would be the fallibility of the memory of the witness who undertakes to relate a conversation, as the meaning of persons often depends upon the arrangement of the words. The same words arranged differently often give a different impression, or a word omitted here or substituted there may change the whole meaning of a conversation; therefore that is why I instruct you that testimony of that kind should be accepted with caution."

The objection made to this instruction is that therein the court went beyond the right of the judge to comment on the credibility of witnesses and the weight of the evidence, and expressed a rule which is not a rule of law, a rule whose correctness, when applied to any particular case, depends on facts of which the jury should be the judges. We think the instruction was not improper. It expressed a permissible estimate of testimony such as that to which the jury's attention was directed, and if, indeed, it is to be taken as an expression of the opinion of the judge as to the credibility of witnesses, it did not transcend the power of the court, for it was coupled with an express instruction to the jury that they were the sole and exclusive judges of every question of fact in the case, and of the weight of the evidence and the credibility of the witnesses. Nome Beach Lighterage & Transp. Co. v. Munich Assur. Co. (C. C.) 123 Fed. 820; Lesser Cotton Co. v. St. Louis, I. M. & S. Ry. Co., 114 Fed. 133, 52 C. C. A. 95; Fuller v. New York Life Ins. Co., 199 Fed. 897, 118 C. C. A. 227; Fidelity Mutual Life Ass'n v. Jeffords, 107 Fed. 402, 46 C. C. A. 377, 53 L. R. A. 193.

There are other assignments of error, which present questions which were disposed of on the former writ of error, and need not be discussed here.

The judgment is affirmed.

HIMROD v. FT. PITT MIN. & MILL. CO.†

(Circuit Court of Appeals, Eighth Circuit. January 6, 1915.)

No. 4094.

1. EASEMENTS ☞15—RIGHTS PASSING BY IMPLICATION—NECESSITY.

In every private grant there passes by implication that which is reasonably necessary to the enjoyment of the thing granted; nor is it essential to an implied grant that there be an absolute physical necessity for the right demanded.

[Ed. Note.—For other cases, see Easements, Cent. Dig. §§ 42-58; Dec. Dig. ☞15.]

2. MINES AND MINERALS ☞55—EASEMENTS—TUNNELS—DEPOSIT OF WASTE—IMPLIED GRANT.

Where defendant by deed acquired the right to bore a tunnel through plaintiff's property and use the tunnel for the operation of defendant's mines, the right to use the surface of plaintiff's property for the deposit of waste and débris brought from the tunnel might be implied from reasonable necessity, to be determined as a question of fact from all the circumstances in the case.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. §§ 153-165; Dec. Dig. ☞55.]

☞For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

† Rehearing denied March 19, 1915.

3. MINES AND MINERALS ☞55—**IMPLIED GRANT—REASONABLE NECESSITY—QUESTION FOR JURY.**

Where defendant was granted the right to bore a tunnel through plaintiff's property and use the same for the operation of an adjoining mine, whether there was a reasonable necessity for the use of plaintiff's property for the deposit of waste and débris from the tunnel, so as to raise an implied grant, and the extent and mode of use of the surface to which defendant was entitled, if any, *held* for the jury.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. §§ 153-165; Dec. Dig. ☞55.]

4. ESTOPPEL ☞54—**EQUITABLE ESTOPPEL—KNOWLEDGE OF FACTS.**

On an issue as to whether defendant had an implied grant of an easement to use plaintiff's property for dumpage of waste from a mine tunnel, the right to maintain and use which had been deeded to him, evidence, to raise an estoppel, that plaintiff had made no objection to defendant's use of the surface as a dumping ground for many years prior to suit, was properly excluded, in the absence of proof that plaintiff had knowledge of defendant's use of the surface.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. §§ 128-135; Dec. Dig. ☞54.]

Youmans, District Judge, dissenting.

In Error to the District Court of the United States for the District of Colorado; Robert E. Lewis, Judge.

Action by the Ft. Pitt Mining & Milling Company against Fred E. Himrod. Judgment for plaintiff, and defendant brings error. Reversed, and new trial granted.

C. C. Parsons, Jr., of Salt Lake City, Utah, and F. L. Collom, of Idaho Springs, Colo. (Charles C. Parsons, Sr., of Salt Lake City, Utah, on the brief), for plaintiff in error.

Caldwell Martin, of Denver, Colo. (Charles W. Waterman, of Denver, Colo., on the brief), for defendant in error.

Before CARLAND, Circuit Judge, and T. C. MUNGER and YOUNMANS, District Judges.

T. C. MUNGER, District Judge. This action for the recovery of damages occasioned by the deposit of rock and débris by plaintiff in error upon the property of the defendant in error, was formerly before this court, and the opinion of the court is published in *Himrod v. Ft. Pitt Mining & Milling Co.*, 202 Fed. 724, 121 C. C. A. 186, to which reference may be had for a statement of the essential facts.

Upon the second trial, the deed and mining lease referred to in the former opinion were received in evidence. The lease provided for certain mining and tunnel work to be done by plaintiff in error and another, in a portion of the Oneida lode claim, for two years after August 15, 1894. The deed, which was executed to the plaintiff in error and his associate and their assigns at the same time as the lease, recited the ownership of distinct lode claims by the parties, the desire of the grantees to extend the No. 2 tunnel or level of the Oneida mine into their own claims "for the purpose of working and draining said Lamartine and other mines through said level, tunnel, or adit so run or to be run," and then granted to them a perpetual right of way

☞ For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

through the Oneida level No. 2 for the purpose of driving the tunnel or level into the Lamartine or other mines owned by them. It also granted a perpetual right of way through the tunnel, when constructed, with the right to maintain and operate it for the purpose of working and mining all lodes and mines beyond the boundaries of the Oneida claim, that the grantees might own or acquire, and to place and maintain in the tunnel, tram tracks, air, water, and steam pipes, electric light and power wires, telephone wires, electric lamps, and telephones. The right was also given to conduct the water through the tunnel from the mines of the grantees and to operate cars and trains in the tunnel "together with all and singular such other and further rights in and to said tunnel, adit, or level, or the right of way hereby granted, as will enable the [grantees] to work the mines they now own or may hereafter acquire by lease, deed, or location, through the said tunnel, adit, or level in such manner as they shall deem expedient or proper." The grantors reserved in the deed the right to work the Oneida and other mines through the tunnel, to move over the railway tracks therein its timbers, waste, and ore, and to cut openings in the bottom of the tunnel to furnish air to other workings. The plaintiff in error succeeded to the rights of his associate grantee and cut the tunnel through the Oneida claim to the mines owned by him, depositing at the mouth of the tunnel, which opened on the surface of the Oneida claim, rock and waste from the Oneida and from his own claims.

At the close of the evidence the court instructed the jury that the plaintiff in error had no right to deposit, upon the surface of the Oneida claim, rock and waste brought from the tunnel or mines beyond the Oneida claim, and the jury returned a verdict against the plaintiff in error. The instructions of the court, denying the plaintiff in error the right of dumpage on the surface of the Oneida claim, are claimed to be erroneous, because the grant of that right was implied in the deed, as it was reasonably essential to carrying on his mining operations through the tunnel, and because the grantor had deposited the waste from the Oneida mine at the mouth of the tunnel before the making of the deed, and because the plaintiff in error for many years after the execution of the deed had used that place for the deposit of waste from his mines without objection on the part of the grantor.

[1] In every private grant there passes by implication that which is reasonably necessary to the enjoyment of the thing granted. Washburn on Easements (4th Ed.) pp. 49-54. Hence a grant of the minerals under the surface of the land implies the right to mine them by the sinking of shafts or boring of tunnels and the removal of them through such openings. Shep. Touch. 89-100; Cardigan v. Armitage, 2 Barn. & Cress. 197; Rowboltam v. Wilson, 8 H. L. Cases, 38; Ingle v. Bottoms, 160 Ind. 73, 66 N. E. 160; Ewing v. Sandoval C. & M. Co., 110 Ill. 290; Marvin v. Brewster Iron Mining Co., 55 N. Y. 538, 14 Am. Rep. 322; Baker v. Pittsburg C. & W. R. Co., 219 Pa. 398, 68 Atl. 1014; Hooper v. Dora Coal Min. Co., 95 Ala. 235, 10 South. 652; 2 Lindley on Mines, § 813.

Because a mine may not be worked practically without other facilities, the grant of the minerals implies the right to construct and operate roads, tram and railway tracks upon the surface for the use of the mine (Dand v. Kingscote, 6 M. & W. 174; Marvin v. Brewster Iron Min. Co., *supra*; Porter v. Mack Mfg. Co., 65 W. Va. 636, 64 S. E. 853; Consolidated Coal Co. v. Savitz, 57 Ill. App. 659), to build air shafts, erect machinery, store water for the use of the engines, and in general to do that which is reasonably necessary for the use of the thing granted (Dand v. Kingscote, *supra*; Fowler v. Delaplain, 79 Ohio St. 279, 87 N. E. 260, 21 L. R. A. (N. S.) 100; Williams v. Gibson, 84 Ala. 228, 4 South. 350, 5 Am. St. Rep. 368; Wardell v. Watson, 93 Mo. 107, 5 S. W. 605; Turner v. Reynolds, 23 Pa. 199; Gordon v. Million, 248 Mo. 155, 154 S. W. 99; Gordon v. Park, 219 Mo. 600, 117 S. W. 1163; Armstrong v. Maryland Coal Co., 67 W. Va. 589, 69 S. E. 195; 2 Barr. & Ad. Mines and Mining, 576). That which is convenient does not pass by such grant, unless it is also reasonably necessary. Cardigan v. Armitage, *supra*; Midgely v. Richardson, 14 M. & W. 595; Marvin v. Brewster Iron Min. Co., *supra*; Ingle v. Bottoms, *supra*; Williams v. Gibson, *supra*; Anderson v. Cowan, 125 Iowa, 259, 101 N. W. 92, 68 L. R. A. 641, 106 Am. St. Rep. 303; Humphreys v. McKissick, 140 U. S. 304-313, 11 Sup. Ct. 779, 35 L. Ed. 473; Webster v. Vogel, 159 Pa. 235, 28 Atl. 226; Hooper v. Dora Coal Min. Co., *supra*.

It is not requisite to an implied grant that there is an absolute physical necessity for the right demanded. It is said in Pettingill v. Porter, 8 Allen (Mass.) 1, 85 Am. Dec. 671, there may be a way by necessity when another cannot be got or made without unreasonable labor and expense, and that in determining the question the jury may consider the comparative value of the land and the probable cost of such ways, and that—

"the word 'necessary' cannot * * * be limited to absolute physical necessity. If it were so, the way in question would not pass with the land, if another way could be made by any amount of labor and expense, or by any possibility. If, for example, the property conveyed were worth but \$1,000, it would follow from this construction that the plaintiff's intestate would not have the right of way over the triangular piece as appurtenant to the land, provided he could have made another way at the expense of \$100,000. If the word 'necessary' is to have a more liberal and reasonable interpretation than this, the one adopted by the judge must be regarded as correct. Its effect was to require proof that the way over this triangular piece was reasonably necessary to the enjoyment of the dwelling house granted."

[2] There are obvious degrees of necessity for the use of the surface in the conduct of subterranean mining operations, from the absolute necessity of sinking shafts or making other entrances to the minerals, to the practical necessities of business operations, such as the placing of steam engines and machinery at the mouth of the entrances, of constructing ponds of water to supply the engines, of laying and operating rail or tram ways to bring in supplies and to carry out the ore, of storage of minerals on the surface pending sales, of assembling houses, stores, and shops for the use of the miners; but such uses have been declared in the cases cited to be implied in the grants, if

found to be necessary by the triers of fact. It is equally obvious that a grant of the right to bore a tunnel or to sink a shaft may imply the right, as a reasonable necessity, to use the surface for the deposit of waste and débris brought from the tunnel or shaft, such necessity to be determined as a question of fact from the circumstances of the case. *Scheel v. Alhambra Min. Co.* (C. C.) 79 Fed. 821; *Schwab v. Smuggler-Union Min. Co.*, 174 Fed. 305, 98 C. C. A. 160; *Webber v. Vogel*, *supra*; *Wardell v. Watson*, *supra*; *Marvin v. Brewster Iron Min. Co.*, *supra*.

In the case of *Schwab v. Smuggler-Union Min. Co.*, *supra*, this court held that the grant of the right to deposit tailings and débris in a river, whence they would be carried through the flumes, sluices, and reservoirs of the grantor, gave the implied right to deposit the tailings and débris on grantor's lands and claims, as they were precipitated at the ends of the flumes and sluices. In the present case the grant allowed plaintiff in error (1) to conduct drainage water from his mines through the Oneida tunnel, and (2) to use the tunnel as a carriage-way in working his mines in such manner as he deemed proper. It is apparent that if the plaintiff in error had deposited débris at the mouth of the mine as a result of the discharge of drainage water, the principle announced in the *Schwab Case* would apply. No reason is perceived why it may not be as necessary to deposit the débris there, if carried by cars through the tunnel, as if carried as a deposit in water and through drainage ditches. The nature of the surface where the right of deposit is claimed, its adaptability and value for other uses, the accessibility of other places where dumping could be made, and the reasonable cost of acquiring and using such a place of deposit, are among the considerations that may enter into the question of an implied grant to make such a deposit in mining or tunnel operations as a reasonable necessity.

[3] In this case, the tunnel's mouth was located at an elevation of about 10,000 feet above the sea level, and upon a steep mountain slope, not adapted to many uses, and the owner of the surface had long used the surface as a place of deposit for similar refuse brought from his own mines and from his portion of the tunnel. The evidence was such that the question of the reasonable necessity of the right, the extent and the mode of use of the surface by the plaintiff in error in order to enjoy the grant made to him by the deed, should have been left to the jury.

[4] Complaint is made of the exclusion of evidence whereby the plaintiff in error sought to show that the defendant in error had made no objection to his use of the surface as a dumping ground for many years before this suit was brought, and also of the court's action in refusing to give tendered instructions on the issues of estoppel, and on the construction to be placed upon the deed because of this conduct of the parties. It is not claimed that the defendant in error had knowledge of this use of the surface of the Oneida claims, nor were facts shown that imposed upon it the duty to know of such use, and there was no error in the court's ruling thus challenged. *Bank v. Kennedy*, 17 Wall. 19, 21 L. Ed. 554; *Farmers' & Merchants' Bank v. Farwell*,

58 Fed. 633, 7 C. C. A. 391; Anthony v. Campbell, 112 Fed. 212, 50 C. A. 195.

A number of other errors are alleged, but a careful examination of them discloses no error of which plaintiff in error can complain; but, for the reasons already indicated, the judgment must be reversed, and a new trial granted.

YOUNMANS, District Judge. I dissent from the opinion of the majority of the court, for the reason that in my judgment the reversal is based upon a ground differing from the theory on which the case was tried in the court below. In the lower court the defendant in error based its defense on the theory that its right to dump waste on the Oneida claim appears on the face of the deed. It asked an instruction to that effect. It made no request for an instruction submitting to the jury the question whether the privilege to so dump waste was reasonably necessary to the enjoyment of the right granted by the deed. Its contention below, and in this court also, is that its right appears on the face of the deed, and that it is to be determined by the court as a matter of law.

AUSTIN v. CHICAGO, R. I. & P. RY. CO.

(Circuit Court of Appeals, Eighth Circuit. January 12, 1915.)

No. 4161.

MASTER AND SERVANT ~~180~~—**ACTION FOR INJURY TO RAILROAD EMPLOYÉ—CONSTRUCTION OF STATUTE—“ENGAGED IN WORK OF OPERATING A RAILROAD.”**

Rev. St. Mo. 1909, § 5434, which provides that every railroad corporation owning or operating a railroad in the state shall be liable for all damages sustained by any agent or servant thereof “while engaged in the work of operating such railroad” by reason of the negligence of any other agent or servant thereof, as construed by the Supreme Court of the state, is not restricted in its application to employés engaged in the operation of trains, and an employé in a roundhouse, who was injured through the negligence of a fellow employé while engaged in gathering up and removing scrap which had accumulated in the yard, in obedience to orders of the foreman, was engaged in work necessary to the operation of the railroad, and may maintain an action under such statute.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 359-361, 363-368; Dec. Dig. ~~180~~.

For other definitions, see Words and Phrases, First and Second Series, Operate.]

In Error to the District Court of the United States for the Western District of Missouri; Arba S. Van Valkenburgh, Judge.

Action at law by Herbert H. Austin against the Chicago, Rock Island & Pacific Railway Company. Judgment for defendant, and plaintiff brings error. Reversed.

The plaintiff in error, hereinafter called the plaintiff, sued the defendant railway company to recover damages for a personal injury which he alleged was caused by the negligence of a coemployé in the

service of the railway company. At the close of the plaintiff's evidence the court, upon motion of the defendant, directed a verdict and judgment in its favor, to reverse which the plaintiff prosecutes this writ of error.

E. H. Gamble, of Kansas City, Mo. (Guthrie, Gamble & Street, of Kansas City, Mo., on the brief), for the plaintiff in error.

Paul E. Walker, of Topeka, Kan., for the defendant in error.

Before HOOK and CARLAND, Circuit Judges, and REED, District Judge.

REED, District Judge. At the time of his injury (May 17, 1912) the plaintiff was employed by the defendant railway company as hostler helper in its roundhouse at Eldon, a division point on its railroad in Missouri. On the day of his injury he had completed his work upon an engine, and there being nothing further to do immediately in the line of his regular employment, he and a coemployé named Beeler were directed by their foreman to help two other employés remove some scrap that had accumulated in the yard upon the railway premises, and two radiators that had been used in or near the roundhouse to a different location near the scrap bin. Following this direction he and his coemployé, Beeler, assisted two other employés in loading the scrap onto a push car in use in the yards, and on top of this they placed the two radiators and pushed the car to a place near the scrap bin. The larger of the two radiators was about 16 feet long and weighed some 650 pounds. When the car reached a position near the scrap bin, the plaintiff and other employés who helped handle the car lifted the larger radiator to the ground and carried it to some blocks upon which it was to be placed. There was a man at each corner of the radiator; the plaintiff and Beeler being at one end, and the other two employés at the other end. In attempting to place the radiator on the blocks, Beeler negligently and without warning, it is alleged, let go of the corner of the radiator that he was carrying, and it fell to the ground with a sudden jerk or jolt, causing a serious injury to the plaintiff's back, of which he complains, and for which he seeks recovery from the railway company. The plaintiff relies for recovery upon a statute of Missouri which reads in this way:

"Every railroad corporation owning or operating a railroad in this state shall be liable for all damages sustained by any agent or servant thereof while engaged in the work of operating such railroad by reason of the negligence of any other agent or servant thereof: Provided, that it may be shown in defense that the person injured was guilty of negligence contributing as a proximate cause to produce the injury." Revised Statutes of Missouri (1909) § 5434.

It is admitted by the defendant that plaintiff was in its employ in and about its roundhouse and yards at Eldon at the time of his injury, and was injured while assisting Beeler and other employés in carrying a radiator as alleged; but it contends that when plaintiff was injured he was not engaged in "operating a railroad," within the meaning of the Missouri statute above quoted, and was not there-

fore within its provisions, that such statute is in effect the same as the statutes of Iowa, Minnesota, and of some other states which abolish the fellow-servant rule in those states, and that the words "operating a railroad," as used in such statutes, have been construed by the courts of those states to mean only "the movement of trains, cars, or engines upon a railroad track," and that as so construed plaintiff was not when injured engaged in the work of "operating a railroad," or, if the statute be so construed as to include the plaintiff while doing the work in which he was injured, it violates the equal protection clause of the federal Constitution.

The statute of Iowa reads in this way:

"Every corporation operating a railway shall be liable for all damages sustained by any person, including employés of such corporation, in consequence of the neglect of the agents, or by any mismanagement of the engineers or other employés thereof, and in consequence of the wilful wrongs, whether of commission or omission, of such agents, engineers or other employés, when such wrongs are in any manner connected with the use and operation of any railway on or about which they shall be employed, and no contract which restricts such liability shall be legal or binding." Code of Iowa (1897) § 2071.

This statute differs somewhat from the Missouri statute, but it is true that the Supreme Court of Iowa has construed it to mean only the movement of trains, cars, or engines upon the tracks of a railroad, and that an employé to be within its provisions must be one who is engaged in the operation of trains or cars and thus exposed to the hazards of moving trains, and in most of the cases to have been injured by such movement, and that such construction was deemed to be necessary to save the statute from violating the equality clause of the federal Constitution. But we are not now concerned immediately with the statute of Iowa or the construction placed upon it by its courts, for the Supreme Court of Missouri has construed the Missouri statute in question to be different from the Iowa statute, or the statutes of other states patterned thereafter, and such construction is controlling, unless as so construed it is repugnant to the federal Constitution. Chicago, etc., Ry. Co. v. Stahley, 62 Fed. 363, 11 C. C. A. 88.

In *Callahan v. St. Louis, etc., Ry. Co.*, 170 Mo. 473, 71 S. W. 208, 60 L. R. A. 249, 94 Am. St. Rep. 746, one of a section crew in the employ of the railroad company was stationed upon a street below an overhead track of the railroad to remove from the street ties that might fall thereto in the course of replacement by other members of the crew above him, and to warn persons upon the street of dangers from the falling ties, was injured by a tie negligently thrown to the ground by some of the crew above him, and for which injuries he recovered judgment against the railroad company. It was contended in that case, as it is here, that the injured employé and his fellow servant were not engaged in the work of "operating a railroad" within the meaning of the Missouri statute, and that the injured employé was not, therefore, within its provisions. The court, after citing the statutes of Iowa and of some other states patterned thereafter, and the decisions of the courts construing them, said:

"It thus appears that everywhere, except in Iowa and Minnesota, the adjudications agree that it is not essential that the injury should have been inflicted by reason of the negligence of a fellow servant while actually engaged in running a car, but that the injured employé may recover if injured by the negligence of a fellow servant while they are engaged in doing any work for the railroad which was directly necessary for the operation of the railroad, and that even so sweeping a statute as that of Indiana was held by the Supreme Court of the United States not to be repugnant to or violative of the federal Constitution. * * * Under our statute to entitle the injured servant to recover it must be shown that he sustained his injuries 'while engaged in the work of operating such railroad, by reason of the negligence of any other agent or servant.' This is very different from the Iowa statute. Here the injured person must be injured 'while engaged in the work of operating such railroad'—injured not necessarily by the negligence of another employé or engineer while actually moving a train, but injured by the negligence of any other employé of the railroad. In Iowa the injury must have been inflicted by the moving of a train. In Missouri the person injured must have been actually engaged in the work of operating such railroad, not necessarily in operating the train. The two statutes, therefore, are almost the antitheses of each other, and our law cannot properly be said to have been taken from or modeled after the Iowa law." Under the Kansas statute, though that is adopted from the Iowa statute, "to entitle an injured employé to recover, it is necessary for him to show that he was injured when performing a service for the railroad that was necessary to the use and operation of the road, and it is not essential that he show that the injury was caused by a fellow servant while moving a train. Railroad Co. v. Vincent, 56 Kan. 344, 43 Pac. 251."

See, also, Union Pacific Ry. Co. v. Harris, 33 Kan. 416, 6 Pac. 571; Atchinson, etc., Ry. Co. v. Koehler, 37 Kan. 463, 15 Pac. 567, 570.

The Callahan Case was affirmed by the Supreme Court of the United States upon the authority of Tullis v. Railway Co., 175 U. S. 348, 20 Sup. Ct. 136, 44 L. Ed. 192, and cases cited in St. Louis Merchants' Bridge Terminal Ry. Co. v. Callahan, 194 U. S. 628, 24 Sup. Ct. 857, 48 L. Ed. 1157, and approved in Louisville & Nashville Ry. Co. v. Melton, 218 U. S. 36, 30 Sup. Ct. 676, 54 L. Ed. 921. In the last-named case Melton recovered judgment against the railroad company in Kentucky for an injury received while employed by the railroad company in Indiana. He was one of a crew engaged in constructing a foundation for a coal tipple alongside the track, at which engines might coal, and was injured by the falling of a frame which was being raised for the purpose of placing it in its foundation. The falling of the frame was caused by the negligence of the foreman of the crew, to whose orders Melton was bound to conform, without fault on the part of Melton. The right of recovery was based upon the provisions of the statute of Indiana known as the "Employers' Liability Statute" of that state, which provides:

"That every railroad * * * operating in this state, shall be liable in damages for personal injury suffered by any employé while in its service, the employé so injured being in the exercise of due care and diligence, in the following cases:

"First. When such injury is suffered by reason of any defect in the condition of ways, works, plant, * * * and machinery connected with or in use in the business of such corporation, when such defect was the result of negligence on the part of the corporation, or some person entrusted by it with the duty of keeping such ways, works, * * * and machinery in proper condition."

"Second. Where such injury results from the negligence of any person in

the service of such corporation, to whose order or direction the injured employé at the time of the injury was bound to conform, and did conform." Laws Ind. 1893, c. 130, § 1.

The railroad company assailed the validity of this statute upon the ground, among others, that it was in violation of the equal protection clause of the fourteenth amendment to the federal Constitution. The state court held that Melton was within its protection as construed by the Supreme Court of Indiana, and that, as so construed, it did not deny to the railroad company the equal protection of the law. In speaking of this contention, Mr. Justice White, after reviewing the authorities bearing upon this question, including the prior decisions of the Supreme Court, said:

"And coming to consider the concrete application made of these general principles in the decisions of this court which have construed the statute here in question, and statutes of the same general character enacted in states other than Indiana, we think, when rightly analyzed, it will appear that they are decisive against the contention now made. It is true that in the Tullis Case, which came here on certificate, the nature and character of the work of the railroad employé who was injured was not stated, and that reference in the course of the opinion was made to some state cases, limiting the right to classify to employés engaged in the movement of trains. But that it was not the intention of the court to thereby intimate that a classification, if not so restricted, would be repugnant to the equal protection clause of the fourteenth amendment, will be made clear by observing that the previous case of Chicago, etc., R. Co. v. Pontius, 157 U. S. 209, 15 Sup. Ct. 585, 39 L. Ed. 675, was cited approvingly, in which, under a statute of Kansas classifying railroad employés, recovery was allowed to a bridge carpenter employed by the railroad company, who was injured while attempting to load timber on a car. And in the opinion in the Pontius Case there was approvingly cited a decision of the Court of Appeals of the Eighth Circuit (Chicago, R. I. & P. R. Co. v. Stahley, 62 Fed. 363, 11 C. C. A. 88), wherein it was held that under the same statute an employé injured in a roundhouse while engaged in lifting a driving rod for attachment to a new engine could recover by virtue of the statute. All this is made plainer by the ruling in St. Louis Merchants' Bridge Terminal Ry. Co. v. Callahan, 194 U. S. 628, 24 Sup. Ct. 857, 48 L. Ed. 1157, where, upon the authority of the Tullis Case, the court affirmed a judgment of the Supreme Court of Missouri, which held that recovery might be had by a section hand upon a railroad who, while engaged in warning passers-by in a street beneath an overhead bridge, was struck by a tie thrown from the structure. While, as we have previously said, it is true there are state decisions dealing with statutes classifying railroad employés sustaining the restricted power to classify which is here insisted upon, we do not think it is necessary to review them or to notice those tending to the contrary. They are referred to in the opinions rendered in the court below. Nor do we think our duty in this respect is enlarged because since the judgment below was rendered the court of last resort in Indiana (Indianapolis, etc., Co. v. Kinney, 171 Ind. 612, 85 N. E. 954, 23 L. R. A. [N. S.] 711, and Cleveland, C. & St. L. Ry. Co. v. Poland, 174 Ind. 411, 91 N. E. 594, 92 N. E. 165, decided April 20, 1910), has, upon the theory that it was necessary to save the statute in question from being declared repugnant to the equality clause of the state Constitution and the fourteenth amendment, unequivocally held that the statute must be construed as restricted to employés engaged in train service."

This ruling was followed in Mobile, etc., Ry. Co. v. Turnipseed, 219 U. S. 35, 39, 31 Sup. Ct. 136, 55 L. Ed. 78, 32 L. R. A. (N. S.) 226, Ann. Cas. 1912A, 463.

In the light of these decisions it seems entirely clear that the Missouri statute is not restricted to employés engaged in the operation

of trains, and that it does not deny to the defendant the equal protection of the law because it is not so restricted.

In sustaining defendant's motion for a directed verdict and judgment, it is said in argument that the court said:

"There is nothing in this work that plaintiff was doing that had anything to do with the operation of the railroad; it did not in any sense pertain to the loading or unloading of freight, or the operation of the railroad."

But the "operation of a railroad" consists in doing many things other than the loading or unloading of freight or the movement of trains. Sectionmen engaged in keeping the track in order and free from obstructions are engaged in the operation of a railroad as much as are enginemen and trainmen, or others directly engaged in the movement of trains. In railroad yards and tracks, and about roundhouses or machine shops, it is a matter of common knowledge that there is always an accumulation of scraps, heavy objects, and other débris that, if not removed, would seriously interfere with or obstruct the operation and movement of engines and cars, or other railroad work, in such places; and employes engaged in removing such accumulations are just as much engaged in the "operation of the railroad," though in a different capacity, as are trainmen, and are alike subject to the hazards of railroad operation. The plaintiff at the time of his injury was therefore engaged in a branch of railway service necessary to the successful operation of defendant's road, and was directly within the provisions of the Missouri statute.

It is also contended by the defendant that the plaintiff's testimony fails to show any negligence upon the part of Beeler in dropping his corner of the radiator, and that the verdict was rightly directed upon this ground alone. But the testimony in regard to this was such, we think, as to require its submission to the jury; besides, it seems to be conceded that the court did not consider this question, but directed the verdict and judgment for defendant upon the ground alone that the plaintiff was not within the provisions of the Missouri statute. The judgment is reversed, and the cause remanded for a new trial.

Reversed.

COY v. TITLE GUARANTEE & TRUST CO. et al. (MULTNOMAH COUNTY, OR., et al., Intervenors).

(Circuit Court of Appeals, Ninth Circuit. February 1, 1915. Rehearing Denied March 8, 1915.)

No. 2455.

1. TAXATION ~~87~~—PROPERTY SUBJECT—PROPERTY IN CUSTODIA LEGIS.

The taking of property of a corporation into the hands of the court through a receiver does not withdraw it from taxation.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 177; Dec. Dig. ~~87~~.]

2. TAXATION ~~87~~—PROPERTY TAXABLE—PROPERTY IN HANDS OF RECEIVER.

Property in the hands of a receiver is subject to state and municipal taxation, whether under the laws of the government assessing the tax it

is a lien or a debt; it being nevertheless enforceable in receivership proceedings as a preferred and paramount claim.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. § 177; Dec. Dig. 87.]

Appeal from the District Court of the United States for the District of Oregon; Chas. E. Wolverton, Judge.

Suit by N. Coy against the Title Guarantee & Trust Company, a corporation, and others, in which Multnomah County, Or., and others, intervened. From an order (212 Fed. 520) allowing a claim for taxes assessed against the corporation's property while in the hands of R. S. Howard, Jr., receiver, said receiver appeals. Affirmed.

William C. Bristol, of Portland, Or., for appellant.

Walter H. Evans, Dist. Atty. for Fourth Judicial District of Oregon, Robert F. Maguire, Deputy Dist. Atty., and Emmons & Webster, all of Portland, Or., for appellees.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

ROSS, Circuit Judge. This suit was originally brought in the Circuit Court for the District of Oregon, in which that court on the 6th day of November, 1907, appointed a receiver of all of the property of the Title Guarantee & Trust Company, who duly qualified and took possession of its property as the officer of the court, and which receivership, it appears, has continued ever since—having passed to the District Court under the new Judicial Code.

The present appeal grows out of certain intervention proceedings which took place in the court below for the recovery of certain state, county, city, and school taxes alleged to have been levied upon certain personal property of the insolvent corporation in the possession of the receiver, for the years 1908, 1909, 1910, and 1911, with certain penalties and interest added thereto for delinquency—one of the petitions in intervention being filed by the county of Multnomah, of the state of Oregon, in which the taxes alleged to have been levied and due are alleged to be "a first and prior lien and claim" upon all of the property in the hands of the receiver; and in the other petition, which was filed on behalf of the state of Oregon, the county of Multnomah, and the city of Portland thereof, it was alleged that the corporation mentioned "is indebted" to those interveners on account of taxes upon personal property of the insolvent corporation, with penalties and interest, in certain specified amounts for the years 1908, 1909, 1910, and 1911. Both petitions prayed an order of the court directing the receiver to pay the amounts so claimed. The receiver contested the petitions in the court below, in which the decision was against him, and from the final order of the court directing the payments he brings the present appeal.

The answers of the receiver to the petitions in intervention denied that either intervener ever had any lien or preferred claim of any nature upon any of the property of the Title Guarantee & Trust Company in the hands of the receiver, or that any "indebtedness" existed by reason of the alleged assessments, and set up in defense, among other things:

That "as matter of law, on and after the 6th day of November, 1907, no property or funds or assets of the Title Guarantee & Trust Company were assessed as such to the Title Guarantee & Trust Company; that the same were on that date, and ever since have been, and are now, in custodia legis; and that the Title Guarantee & Trust Company, under a bill of complaint in this court, was then in liquidation and being wound up."

The appellant's counsel thus states "the single important and pertinent question" presented by the appeal:

"Whether under the laws of the state of Oregon, prior to the amendment of 1913, a personal property tax assessment in the name of a defunct corporation, through merely placing its name upon the tax roll, after it had ceased business, and after all of its property of every kind had been surrendered to its creditors, and while said property was being administered and distributed through and by a court and receiver, can be made and enforced, with penalties and interest, after several years' delay, by an intervention in the receivership cause, prosecuted by the authorities as a preferred lien or claim, or by indebitatus assumpsit, when the laws of the state at the time of intervention do not provide for such cases, and the Supreme Court of the state has expressly denied such a tax to be either a lien or a debt, and declared equity courts without power to render judgment therefor."

We regard it as wholly unimportant that under the laws of Oregon taxes levied upon personal property do not constitute a lien thereon, nor a "debt." The statutes of that state do declare the personal property of every individual liable to taxation, and that like property of every private corporation is likewise liable, and shall be assessed in the name of such corporation in the county where its principal place of business is, unless otherwise specially provided by law, and require, among other things, the assessor to put down on his roll the names of all persons assessable in his county, and among other property the personal property owned by or taxable to such person. Lord's Oregon Laws, §§ 3560, 3563, 3593.

[1, 2] It is too clear for argument that the appointment of a receiver and the taking of property into the hands of the court through its officer does not withdraw it from taxation. It remains subject to assessment and to the payment of all legal taxes thereon while in custodia legis, to the same extent as it was while in the possession of the owner. And whether or not such taxes be a lien or a debt by the laws of the government within whose jurisdiction the property is situated, such taxes are and should be regarded by the courts as a preferred and paramount claim over all other claims, for they are essential to the existence and maintenance of the very government under which the property is acquired and protected.

"A court," says Cooley on Taxation (3d Ed.) vol. 2, p. 834, "having in its charge or under its control a fund or other property upon which taxes are due, will, as the representative of the sovereignty, direct them to be paid without raising any question of the means of enforcement by process, and before all other claims except judicial costs. Thus upon proper application and suitable proof a receiver will be ordered to satisfy a tax assessed against the property in his hands, and a like direction will be made in other cases where funds are held subject to the authority of the court."

In High on Receivers (4th Ed.) § 881a, it is said:

"Taxes levied upon personal property in the hands of a receiver become a charge upon the estate, and are properly payable by the receiver as a part of the costs and expenses of the administration of the trust. And the fact that

the taxes are assessed in the name of the insolvent, over whom the receiver is appointed, rather than in the name of the receiver, constitutes no objection against the validity of the tax, nor will it avail against the tax that there is no averment or proof that there are sufficient funds in the hands of the receiver to pay the tax in question."

See, also, High on Receivers (4th Ed.) § 140a; 34 Cyc. 346; In re Tyler, 149 U. S. 164, 13 Sup. Ct. 785, 37 L. Ed. 689; First National Bank v. Ewing, 103 Fed. 195, 43 C. C. A. 150; George et al. v. St. Louis Cable & W. Ry. Co. (C. C.) 44 Fed. 117; Greeley v. Provident Savings Bank, 98 Mo. 458, 11 S. W. 980; Wiswall v. Kunz, 173 Ill. 110, 50 N. E. 184.

The case of United States v. Whitridge, 231 U. S. 144, at pages 148, 149, 34 Sup. Ct. 24, 25, 26 (58 L. Ed. 159), so much relied upon by the appellant, is not at all in point. That case did not involve any tax upon any property of any character, but was a proceeding to recover from the receiver of an insolvent corporation the corporation tax provided for by the Corporation Tax Law of 1909, which law, as stated by the Supreme Court, imposed an excise or privilege tax, and was not in any sense a tax upon property or upon income merely as income—the court saying:

"A reference to the language of the act is sufficient to show that it does not in terms impose a tax upon corporate property or franchises as such, nor upon the income arising from the conduct of business, unless it be carried on by the corporation. Nor does it in terms impose any duty upon the receivers of corporations, or of corporate property, with respect to paying taxes upon the income arising from their management of the corporate assets, or with respect to making any return of such income. And we are unable to perceive that such receivers are within the spirit and purpose of the act, any more than they are within its letter. True, they may hold, for the time, all the franchises and property of the corporation, excepting its primary franchise of corporate existence. In the present cases, the receivers were authorized and required to manage and operate the railroads and to discharge the public obligations of the corporations in this behalf. But they did this as officers of the court, and subject to the orders of the court, not as officers of the respective corporations, nor with the advantages that inhere in corporate organization as such. The possession and control of the receivers constituted, on the contrary, an ouster of corporate management and control, with the accompanying advantages and privileges."

We also agree with the court below in its ruling in respect to the penalties and interest, for the reasons stated in its opinion at page 524, 212 Fed.

The judgment is affirmed.

NORTH ALASKA SALMON CO. V. LARSEN.

(Circuit Court of Appeals, Ninth Circuit. February 1, 1915.)

No. 2445.

L ADMIRALTY ~~13~~—JURISDICTION—"MARITIME CONTRACT."

A contract to render service as a seaman on a vessel owned by a salmon company on a voyage from San Francisco to its cannery in Alaska and return, and also as fisherman, beachman, trapman, and such other service as might be required by the company's superintendent, is a "maritime

For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

"contract," and a suit thereon is within the jurisdiction of a court of admiralty.

[Ed. Note.—For other cases, see Admiralty, Cent. Dig. §§ 164-176; Dec. Dig. ☞13.]

For other definitions, see Words and Phrases, First and Second Series, Maritime Contract.

Jurisdiction as to matters of contract, see notes to The Richard Winslow, 18 C. C. A. 347; Boutin v. Rudd, 27 C. C. A. 530.]

2. SEAMEN ☞29—INJURY IN SERVICE—MEDICAL TREATMENT AND CARE.

A finding of the trial court that a shipowner did not furnish a seaman injured in its service with proper medical attention and care *held* sustained by the evidence.

[Ed. Note.—For other cases, see Seamen, Cent. Dig. §§ 186, 188-194; Dec. Dig. ☞29.]

3. SEAMEN ☞29—INJURY IN SERVICE—SUIT FOR FAILURE TO FURNISH PROPER CARE.

Where the personal negligence of a shipowner in failing to furnish proper medical attention and care to an injured seaman is alleged and proved, the court may make an allowance to the seaman for expenses of his care and for loss of time after the expiration of his term of service.

[Ed. Note.—For other cases, see Seamen, Cent. Dig. §§ 186, 188-194; Dec. Dig. ☞29.]

Rights and liabilities of seamen as to medical treatment, see note to The Cuzco, 83 C. C. A. 186.]

Appeal from the District Court of the United States for the First Division of the Northern District of California; M. T. Dooling, Judge.

Suit in admiralty by Peder Larsen against the North Alaska Salmon Company. Decree for libelant, and respondent appeals. Affirmed.

D. Freidenrich, of San Francisco, Cal., for appellant.

F. R. Wall and I. F. Chapman, both of San Francisco, Cal., for appellee.

Before GILBERT and ROSS, Circuit Judges, and WOLVERTON, District Judge.

GILBERT, Circuit Judge. The appellee shipped as a seaman on the Olympic for a voyage from San Francisco to the appellant's salmon cannery at Locanock, Alaska, and return. On July 12, 1912, while in that employment and working on a lighter which was alongside the appellant's dock, engaged in throwing fish into a bucket to be hoisted up to the wharf, he sustained an injury to his knee. In his libel he alleged that the appellant failed and neglected to furnish him with proper medical and surgical care and attention, and compelled him to work on board the Olympic after he was injured, that he did not and could not receive proper medical care at Locanock, and that he could and should have been sent by the appellant to Naknek, or to Koggiung, or to Dutch Harbor, where he could have received proper medical and surgical care and attention. Upon the evidence, the court below found that the appellant was negligent as alleged, and decreed that it pay the appellee \$506, together with interest on said sum from December 21, 1912, the date of the filing of the libel, and the appellee's costs.

[1] We find no merit in the contention that the cause of suit is not

within the admiralty jurisdiction of the court, in that the appellee's contract for service as a seaman, fisherman, beachman, trapman, "and such other services as might be required" by the appellant's superintendent, was not a maritime contract. In *The Minna* (D. C.) 11 Fed. 759, the libelant was employed solely as a fisherman, and took no part in the navigation of the vessel, which went out every morning to the fishing grounds; the libelant sleeping ashore. It was held that he was entitled to proceed against the vessel for the recovery of his wages. Judge Brown said:

"All hands employed upon a vessel, except the master, are entitled to a lien if their services are in furtherance of the main object of the enterprise in which she is engaged. * * * I do not regard the fact that libelant slept upon shore at night, and there reeled out and mended the nets, as qualifying in any way the nature of his contract. These services were merely incidental and subsidiary to his main contract."

In *Alaska Packers' Ass'n v. Domenico*, 117 Fed. 99, 54 C. C. A. 485, this court affirmed the jurisdiction in admiralty of a contract made by men who acted as seamen on a voyage to and from salmon fishing grounds in Alaska to work as fishermen during the season, and assist in canning fish on shore, and in loading them on board for transportation, notwithstanding that the men while engaged in fishing slept on shore, and mended their nets and cared for the fish on shore. See, also, *The Virginia Belle* (D. C.) 204 Fed. 692; *McRae v. Bowers Dredging Co.* (C. C.) 86 Fed. 344; *Disbrow v. The Walsh Brothers* (D. C.) 36 Fed. 607.

[2] It is contended that the finding of the court below that the appellant did not furnish the appellee with proper care and attention is not sustained by the evidence, and the appellant relies upon the fact that it had in its employment a regularly licensed physician at Locanock, who attended the appellee, and it contends that thereby it discharged its full duty to him. The testimony was all taken in open court, with the exception of one deposition taken on behalf of the appellee. We must therefore accord to the finding of the court conclusive effect, unless there is absence of evidence to sustain it. There was evidence that after the appellee was injured he was sent to the bunk house, where his knee was painted with iodine by the doctor who was in the appellant's employment. The doctor was of the opinion that the injury was not serious, and that the appellee would be all right the next day. Three days later the doctor saw the appellee again, and told him there was nothing the matter with his knee, and he had better get out and go to work, and also told the beach boss in the appellee's presence that the appellee was lazy and had better be put to work, saying he would see the superintendent and tell him to give the appellee "lots of work." The doctor gave the appellee no further attention. On August 1st the beach boss sent the appellee on board the Olympic to work at mending sails, which he continued to do until August 23d, when his leg had got so bad he could walk on it only with great difficulty. He again came ashore to see the doctor. The doctor laughed at him, told him there was nothing the matter with his knee, and that all the matter with him was that he was lazy. The appellee resented this,

and personally assaulted the doctor. Thereafter the doctor gave him no further attention. There was evidence that at that time the appellee asked the superintendent to send him to Koggiumg or Nushigak or Naknek, where there were good doctors, and said to him:

"It is up to you, Mr. Hale, to take care of me. It is up to you to get me to some other doctor where I can get treatment, because that doctor won't do nothing for me. He claims there is nothing the matter with me"

—and that, in answer to such requests, he was told, "We have no launches to spare."

The court below in the opinion said:

"I am satisfied from the evidence herein that the libelee did not furnish libelant with proper medical attention and care after his injuries, as the doctor at all times seemed to regard libelant's injuries as trifling, and libelant himself as a malingerer. It is evident, however, that the injury to libelant's knee was a grave one, which, if properly treated, would not have resulted so seriously."

We think the evidence in the case sustains the conclusion of the trial court.

[3] The court below awarded the appellee \$86 for doctor's fees, \$15 for medicines, and \$405 as the amount which he could have earned during the period of his disablement of 4½ months after his discharge from the vessel. It is said that the court erred in awarding the appellee damages for loss of earnings after his discharge from the vessel, and for his expenses after such discharge, and the appellee cites authorities for the rule that the injured seaman is to be cured at the expense of the ship, but that he is not to receive any compensation or allowance for the effects of the injury, further than the expenses incurred in the cure, and that the permanent disability is not a ground for indemnity from the owners of the ship. But that is a rule which has been applied only in cases in which the vessel was without fault. It does not apply to cases in which personal negligence and default in furnishing care and attendance are alleged and proven. In *The Troop*, 128 Fed. 858, 63 C. C. A. 584, this court held that damages may be awarded a seaman on the ground of the negligence of the master in failing to furnish him proper care and medical treatment after his injury. There are cases, however, which hold that, even where there is no negligence, the end of the voyage does not end the obligation, if there were not sufficient time and facilities for the vessel to have done its duty. *The Mars*, 149 Fed. 731, 79 C. C. A. 435. In *Dougherty v. Thompson-Lockhart Co.* (D. C.) 211 Fed. 224, Judge McPherson awarded \$500, with interest, to a seaman who was in a hospital for three months, where he was maintained and cured free of charge, but was unable to work for about nine months thereafter.

The decree is affirmed.

BREIT v. MOORE.

(Circuit Court of Appeals, Ninth Circuit. February 1, 1915.)

No. 2435.

BANKRUPTCY ~~293~~—VOIDABLE PREFERENCE—SUIT TO RECOVER—JURISDICTION OF BANKRUPTCY COURT.

Where a creditor filed a claim against the estate of a bankrupt, to which objection was made by the trustee on the ground that the creditor had received voidable preferences, an order of the referee, made after a contested hearing and not sought to be reviewed, finding that the creditor had received payments on his claim within four months prior to the bankruptcy, when the bankrupt was insolvent, and with reasonable ground to believe that such was the fact and that a preference would result, constitutes an adjudication binding on the creditor, and under Bankr. Act July 1, 1898, c. 541, § 60b, 30 Stat. 562, as amended by Act Feb. 5, 1903, c. 487, § 13, 32 Stat. 799 (Comp. St. 1913, § 9644), the court of bankruptcy has jurisdiction of a suit by the trustee to recover the amount of the preference.

[Ed. Note.—For other cases, see *Bankruptcy*, Cent. Dig. §§ 411, 417; Dec. Dig. ~~293~~.]

In Error to the District Court of the United States for the First Division of the Northern District of California.

Action by William H. Moore, Jr., trustee in bankruptcy of Philip T. Davidson, against H. Breit, to recover a preference. Judgment for plaintiff, and defendant brings error. Affirmed.

For opinion below, see 211 Fed. 687.

Samuel M. Samter, of San Francisco, Cal., for plaintiff in error.

Clarence A. Shuey, of San Francisco, Cal., and W. T. Craig, of Los Angeles, Cal., for defendant in error.

Before GILBERT and ROSS, Circuit Judges, and WOLVERTON, District Judge.

ROSS, Circuit Judge. The judgment here in contest is a judgment of a bankruptcy court for the recovery of money from an unsecured creditor of a bankrupt, found to have been unlawfully paid to him within four months immediately preceding the adjudication in bankruptcy, as a preference over the other unsecured creditors. The contention is that the court below was without jurisdiction of the suit, and that the defendant to it was entitled to a jury trial upon the question as to whether or not the payments received by him from the bankrupt constituted an unlawful preference over the other unsecured creditors.

In view of the record, we do not think there is any merit in the contention. It appears that on the 3d day of October, 1912, Davidson filed in the court below a voluntary petition in bankruptcy; that he was thereafter duly adjudged a bankrupt; that the matter was duly referred by the court to one of the referees in bankruptcy, before whom, on the 19th day of October, 1912, the first meeting of the creditors of the bankrupt was duly and regularly held, at which the complainant in the suit was duly elected trustee of the estate of the bankrupt, duly qualifying as such on the 21st of the same month. It ap-

~~293~~ For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes
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pears that prior to the 8th of July, 1912, Breit sold and delivered to the bankrupt goods, wares, and merchandise of the value of \$481.35, all of which was due from the bankrupt to Breit on the day last mentioned. It further appears that on various days thereafter during the months of July, August, and September, 1912, the bankrupt paid to Breit various sums of money, aggregating \$250, leaving still due him \$231.35. For this latter amount Breit duly filed with the referee a claim, to the allowance of which objections were filed by the trustee on the ground that the above-mentioned payments made to Breit constituted unlawful preferences. The claim and objections subsequently came on regularly for hearing before the referee, evidence on behalf of both parties being taken, and resulted in these findings, conclusions, and judgment:

"A proof of debt having been filed by H. Breit, a creditor herein, in the sum of \$231.35, and the trustee herein, Wm. H. Moore, Jr., having filed verified objections thereto, and the said claim and objections coming on for hearing this 14th day of January, 1913, Wm. H. Moore, Jr., trustee, appearing in person, and said claimant not appearing at said hearing, except by deposition, and evidence both oral and written having been introduced, and the court, being advised in the premises, finds the facts to be as follows:

"That prior to the 8th day of July, 1912, the said claimant, H. Breit, sold and delivered to said bankrupt goods, wares, and merchandise of the value of \$481.35, and that there was due and owing from said bankrupt to said claimant on said 8th day of July, 1912, as the purchase price of said goods, wares, and merchandise, the sum of \$481.35. That within four months next immediately preceding the date of the filing of the petition herein, to wit, the 3d day of October, 1912, the said bankrupt transferred and paid to, and there was received by, said H. Breit from said bankrupt, sums of money on the dates and in the installments as follows:

July 8, 1912.....	\$ 50 00
July 24, 1912.....	50 00
August 1, 1912.....	25 00
August 5, 1912.....	25 00
August 13, 1912.....	25 00
August 20, 1912.....	25 00
August 26, 1912.....	25 00
September 2, 1912	25 00
 Total	 \$250 00

"That at all times during the four months next immediately preceding the date of the filing of said petition on October 3, 1912, as aforesaid, and at each and all of the dates of the payments by said bankrupt to said claimant hereinabove set forth, the said Philip T. Davidson was insolvent, and that said creditor, said H. Breit, the person receiving said payments and to be benefited thereby, and his agent, Samuel M. Samter, acting therein, had, on the dates of receiving said payments, and each of them, reasonable cause to believe that the enforcement of such transfer would effect a preference, and that at the dates and time of said payments, and each of them, the said payments constituted a transfer of property of said bankrupt to said claimant, and that the transfer thereof then operated as a preference. That the effect of said H. Breit, a creditor as aforesaid, receiving said payments on said dates, was to enable the said H. Breit to receive a greater percentage of his claim against said bankrupt than other creditors of the same class, to wit, unsecured creditors. That the transfer by said bankrupt and the receiving of said payments by said H. Breit constituted a voidable preference, recoverable by the trustee of said estate under section 60 of the Bankruptcy Act of 1898, with amendments.

"Wherefore, by reason of the premises and the law in such cases made and

provided, it is ordered, adjudged, and decreed that the claim of H. Breit, on file herein, stand as proven as an unsecured claim against the estate of Philip T. Davidson, bankrupt, in the sum of \$481.35, to be disallowed until the surrender to the trustee of said estate the sum of two hundred and fifty dollars (\$250.00), constituting the amount of the voidable preference obtained by said claimant over the other creditors of said bankrupt.

"Dated January 14, 1913. Lynn Helm, Referee in Bankruptcy."

No review of the foregoing findings, conclusions, or judgment was sought. Becoming final, and Breit refusing to return the money so received by him as a preference, the trustee brought this suit thereon in the court below to recover the amount. The answer of Breit containing no denial of the judgment or of any of the proceedings on which it was based, the court below rightly gave the complainant judgment on the pleadings. Breit was no stranger to the proceedings before the referee. On the contrary, he presented his claim, contested the preference alleged to have been received by him—introducing proof in behalf of his contention—and then abided by the findings and decision against him. He thus had a trial before a competent officer of his own selection of the issue he now claims the right to have tried by a jury. The conclusive answer is that he is concluded by the adverse decision of the referee in which he acquiesced. In such circumstances, that the court below had jurisdiction of the suit of the trustee to recover the property of the bankrupt unlawfully turned over to Breit is sufficiently shown by the decisions of the Supreme Court in the cases of Bardes v. Hawarden Bank, 178 U. S. 524, 20 Sup. Ct. 1000, 44 L. Ed. 1175, and Hicks v. Knost, 178 U. S. 541, 20 Sup. Ct. 1006, 44 L. Ed. 1183.

The judgment is affirmed.

STONEBRAKER-ZEA CATTLE CO. v. UNITED STATES.

(Circuit Court of Appeals, Eighth Circuit. January 4, 1915.)

Nos. 4129, 4130, 4131.

1. PUBLIC LANDS \Leftrightarrow 120—CANCELLATION OF PATENTS—EVIDENCE—BONA FIDE PURCHASER.

In suits by the government to cancel patents to homesteads and conveyances by the patentees to the defendant corporation, evidence held to show that the corporation had knowledge of facts sufficient to put it upon inquiry as to its grantors' compliance with the homestead laws, so that it was not a bona fide purchaser.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 332-335; Dec. Dig. \Leftrightarrow 120.]

2. PUBLIC LANDS \Leftrightarrow 120—CANCELLATION OF PATENTS—BURDEN OF PROOF—BONA FIDE PURCHASER.

One defending a suit to cancel government patents on the ground that it was a bona fide purchaser has the burden of proving absence of notice of the defects.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 332-335; Dec. Dig. \Leftrightarrow 120.]

Appeals from the District Court of the United States for the Western District of Oklahoma; John H. Cotteral, Judge.

\Leftrightarrow For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

Three separate suits by the United States against the Stonebraker-Zea Cattle Company. Decrees for the United States in each case, and the defendant appeals. Affirmed.

H. B. Martin, of Tulsa, Okl. (A. F. Moss, of Tulsa, Okl., on the brief), for appellant.

T. G. Chambers, Jr., Asst. U. S. Atty., of Oklahoma City, Okl. (Isaac D. Taylor, U. S. Atty., of Guthrie, Okl., on the brief), for the United States.

Before CARLAND, Circuit Judge, and T. C. MUNGER and YOUNG MANS, District Judges.

T. C. MUNGER, District Judge. The United States brought three actions against a corporation known as the Stonebraker-Zea Cattle Company, seeking to cancel patents issued to homestead claimants and deeds made by such claimants to the company. The decrees granted the relief prayed for in each case, and the company has appealed. As the issues and the proofs are substantially the same, the cases may be considered together. The bills filed by the government alleged fraud in the making of the applications to enter, and in the making and procuring of final proof statements, by the young women who sought to obtain the land. There is no claim by the appellant that the proofs were not sufficient to show clearly that there was no such settlement, residence, and cultivation by the entrywomen as was required by the land laws of the United States relating to homesteads, but the appellant's defense rests upon the claim of a bona fide purchase of the land. The conveyances were made to appellant soon after the receiver's receipts had been issued to the homestead claimants, and before patent, and a fair price was paid for the land, and the only real issue in the case is whether the corporation had notice at the time of purchase of the infirmities of the entrywomen's title.

[1] The president of the company conducted the negotiations for the purchase of the lands, received the deeds, and paid the consideration. The appellant corporation was formed by three men, who have, at all times, held all the capital stock, and have been the officers and directors who managed its affairs; but one of the stockholders, who acted as secretary, held but a nominal interest, and had little active participation in the conduct of the business. The corporation owned a stock ranch of about 15,000 acres of land, extending for 25 miles along a river in Oklahoma, where it pastured about 6,000 head of cattle and 400 head of horses. A ranch foreman resided upon the ranch and was in charge of the actual operations there. The president and secretary resided at Kansas City, Mo., and the vice president appears to have resided at some distance from the ranch. The president's duties included the purchase of real estate, payment of taxes, and caring for the finances, and it was the vice president's duty to supervise the conduct of the ranch operations relating to the stock. Both the president and vice president were frequently at the ranch. The three young women who made the homestead entries came to the ranch together in the fall of 1904, and lived at the ranch house for a week or 10 days, and then removed to a house which was so placed as to bestride the boundary

line between two of their homesteads. This house was removed after the arrival of the young women, and early in November, 1914, by employés of the company, from the company's ranch land, to this place, by directions of the ranch foreman, and he paid the men who moved it with the company's checks. Later a house was built upon the homestead claimed by the other of the young women, an employé of the company devoting 36 days of time to the performance of this work, for which he was also paid by the company's check, given him by the foreman. Less than a month's residence on these claims was maintained in the autumn of 1904, but the entrywomen returned in the following April or May and remained in the vicinity until the making of final proof in August, 1905. Provisions were furnished them from the company's supply at the ranch house, and water was hauled to them from the company wells and by its employés. The homesteads were in a part of the public domain which the company had been using for the purpose of grazing its cattle, and where it had placed wells and windmills to furnish a supply of water for them, and prior to this time it had purchased 25 to 50 other homesteads in this vicinity. Two of the homesteads were about a mile from the ranch house, and the other was about 2 miles distant.

The president of the company testifies that when he purchased the land he knew of no failure by the entrywomen to comply with the homestead laws. Referring to the furnishing of the house and supplies from the ranch, he limited his testimony to a denial of the authority of the foreman to sell them, and of report of their sale. Neither the vice president, the ranch foreman, nor the entrywomen were produced as witnesses.

[2] The defense of a bona fide purchase includes the concept of a lack of notice and the burden of pleading and of proof of this absence of notice rests upon the one making such a defense. 2 Pom. Eq. Jur. § 785; Boone v. Chiles, 10 Pet. 177, 9 L. Ed. 388; Smith v. Orton, 131 U. S. lxxv, appx., 18 L. Ed. 62; Balfour v. Hopkins, 93 Fed. 564, 35 C. C. A. 445; United States v. Lewis I. Brannan, 217 Fed. 849, 133 C. C. A. 559, Oct. 31, 1914, Circuit Court of Appeals, 5th Circuit.

The facts already stated and others not necessary to detail, demonstrate that the appellant, at and before the time the conveyances were made to it, was not without notice of facts which should have incited a person of reasonable prudence to an inquiry, and this inquiry would have disclosed the fraudulent character of the entries. Shauer v. Alerton, 151 U. S. 607, 14 Sup. Ct. 442, 38 L. Ed. 286; Houston Oil Co. of Texas v. Wilhelm, 182 Fed. 474, 104 C. C. A. 618; Reed v. Munn, 148 Fed. 737, 80 C. C. A. 215; Coder v. McPherson, 152 Fed. 951, 82 C. C. A. 99; Rexford v. Brunswick-Balke-Collender Co., 181 Fed. 462, 104 C. C. A. 210.

The decrees of the lower court are affirmed.

CLARK HARDWARE CO. et al. v. SAUVE.

(Circuit Court of Appeals, Eighth Circuit. January 4, 1915.)

No. 136, Original.

1. BANKRUPTCY ~~248~~—SALE OF PROPERTY—APRAISEMENT—APPRAISERS—QUALIFICATIONS.

That one of the appraisers appointed to appraise the property of a bankrupt mining company was a lessee of a portion of the property and was required to work the same on a royalty did not disqualify him to act as an appraiser; he having no interest in the land owned by the bankrupt, nor in the proceedings, nor in the sale of the property, under Bankr. Act July 1, 1898, c. 541, § 701, 30 Stat. 565 (U. S. Comp. St. 1913, § 9654), requiring the appraisement to be by three disinterested appraisers.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. ~~248~~.]

2. EVIDENCE ~~571~~—EFFECT OF OPINIONS—PROBABLE VALUE.

On an application for the sale of a bankrupt's property free from liens, the court was not bound by the opinions of witnesses, even if uncontradicted, that the property would not bring enough to pay the liens thereon, but was entitled to consider the sworn estimate of the appraisers in bankruptcy, which was at variance with the opinions of such witnesses.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2395-2398; Dec. Dig. ~~571~~.]

3. BANKRUPTCY ~~266~~—SALE OF ASSETS—PURCHASE BY LIEN CREDITOR—PAYMENT OF BID—CREDITS.

It was proper for the court, on directing a sale of a bankrupt's assets free from liens, to provide, in case of purchase by the holder of a valid lien, that he was entitled to credit against the purchase price of the amount that otherwise would accrue to him by reason of his lien.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. ~~266~~.]

Petition to Revise Order of the District Court of the United States for the District of Colorado; Robert E. Lewis, Judge.

In the matter of bankruptcy proceedings of the Pewabic Consolidated Gold Mines Company. Application of David B. Sauve, as trustee, etc., to sell the bankrupt's property free from liens. Application by the Clark Hardware Company and others to set aside the appraisement. An order was entered denying the motion, and granting the application of the trustee, and the objecting creditors filed a petition to revise. Denied.

Leroy J. Williams, of Denver, Colo., for petitioners.

J. E. Robinson, of Denver, Colo., for respondent.

Before CARLAND, Circuit Judge, and T. C. MUNGER and YOUNG, District Judges.

T. C. MUNGER, District Judge. In the course of the administration of the estate in bankruptcy of the Pewabic Consolidated Gold Mines Company, three appraisers were appointed to value the property of the estate. After the appraisers' report was filed certain creditors, who held some of the bonds secured by a deed of trust upon a portion of the property appraised, moved to set aside the appraisement on the ground that one of the appraisers was not disinterested, but the motion was overruled. The trustee filed a petition asking to have the

bankrupt's property sold free of liens, and to this the creditors filed objections, which were also overruled, and an order was entered for the sale of the property as prayed.

A petition for review of these orders of the referee was filed, and upon a hearing thereon the District Court affirmed them, and thereupon this petition for revision of the proceedings was prosecuted.

[1] Section 70b of the Bankruptcy Act provides for the appraisal of all property belonging to bankrupt estates by "three disinterested appraisers." One of the appraisers in this case was the lessee of a portion of the property under a mining lease, which required work to be done and royalties to be paid in consideration of the lease. This lease had been made more than four months before the petition in bankruptcy was filed, and is not claimed to be subject to attack, and the order made directed the sale of the bankrupt's property subject to the lease. While the lessee had an interest in land owned by the bankrupt, he is not shown to have had any interest in the bankruptcy proceedings, or in the sale of the property, and no error was committed in the refusal to set aside the appraisement.

In support of the objections made to the order of the court directing the sale of the bankrupt's property free of liens, it is claimed that no advantage will accrue to the estate thereby, because the undisputed evidence shows that the property is not worth the amount of the valid incumbrance thereon; that some of the holders of liens intend to purchase the property at the sale at a price that will sacrifice the rights of other lien holders; and that there was error in directing that the purchaser, if a lien holder, might have credit on the purchase price for the amount of his distributive share of the price paid.

[2] Witnesses testified that in their opinion the property ordered sold would not bring enough to pay the liens thereon; but the lower court was not bound by the opinions of these witnesses, even if uncontradicted. *The Conqueror*, 166 U. S. 110, 17 Sup. Ct. 510, 41 L. Ed. 937; *Head v. Hargrave*, 105 U. S. 45, 26 L. Ed. 1028; *Forsyth v. Doolittle*, 120 U. S. 73, 7 Sup. Ct. 408, 30 L. Ed. 586; *Harrison v. Clarke*, 164 Fed. 539, 90 C. C. A. 413; *Taintor v. Franklin National Bank of New York (C. C.)* 107 Fed. 825.

The court had the right to consider the sworn estimate of the appraisers in bankruptcy, which was at variance with the opinions of value given by the witnesses, in determining whether the estate might be benefited by a sale of the incumbered property, and its decision on a question of fact is not reviewable in this proceeding. *Elliott v. Toepper*, 187 U. S. 327, 23 Sup. Ct. 133, 47 L. Ed. 200.

[3] The evidence presented to the lower court did not require a finding that a sale of the property would sacrifice the interests of minority lien holders. The order of sale provides for a sale by parcels, at auction, at which the petitioners have the right to bid. Nor did the court below act beyond its discretion, in allowing, upon confirmation of the sale, a credit to the purchaser, if the holder of a valid lien on the property, of the amount that otherwise would accrue to him by reason of his lien, as it was needless for the purchaser to pay into court money that must be repaid to him. *In re Harralson*, 179 Fed. 490, 103

C. C. A. 70, 29 L. R. A. (N. S.) 737; *In re Waterloo Organ Co.* (D. C.) 118 Fed. 904; *In re Saxton Furnace Co.* (D. C.) 136 Fed. 697; *In re Fayetteville Wagon-Wood & Lumber Co.* (D. C.) 197 Fed. 180.

The petition to revise is denied.

LOVATO v. STATE OF NEW MEXICO.

(Circuit Court of Appeals, Eighth Circuit. January 4, 1915.)

No. 4076.

COURTS ~~405~~—**FEDERAL COURTS**—**CIRCUIT COURT OF APPEALS**—**WRIT OF ERROR FROM STATE COURT**—**PROSECUTION BEGUN IN TERRITORIAL COURT**.

New Mexico Enabling Act (Act June 20, 1910, c. 310, 36 Stat. 557) § 14, provides for appeals or writs of error in proceedings previously prosecuted or pending in the Supreme Court of the United States or in the proper Circuit Court of Appeals, on any record from the Supreme Court of the territory, etc.; and section 15 declares that all cases pending and undisposed of in the Supreme Court of the territory at the time of admission shall be transferred to the highest appellate court of the state, and shall be heard and determined thereby, and that appeal to and writ of error from the Supreme Court of the United States shall lie to review all such cases in accordance with the rules and principles applicable to the review by that tribunal of cases determined by state courts. *Held*, that the appellate jurisdiction of the Circuit Court of Appeals under such act was expressly limited to judgments of courts of the territory, and did not extend to decisions of the Supreme Court of the state of New Mexico on appeal from judgments of the territorial courts, though the case was pending in the territorial Supreme Court when the state was admitted; such judgments being reviewable by the Supreme Court of the United States under the same circumstances that that court is given the right to review similar decisions of state courts.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 1097–1099, 1101, 1103; Dec. Dig. ~~405~~.]

On Motion to Quash Writ of Error to the Supreme Court of the State of New Mexico.

Benito Lovato was convicted of an offense, and he brings error. On motion to quash the writ for want of jurisdiction. Sustained.

Catron & Catron, of Santa Fé, N. M., for plaintiff in error.

Frank W. Clancy, Atty. Gen., for defendant in error.

Before CARLAND, Circuit Judge, and T. C. MUNGER and YOUNG, District Judges.

T. C. MUNGER, District Judge. Benito Lovato was convicted of a criminal offense in the district court of the territory of New Mexico, and afterwards prosecuted proceedings to reverse the judgment in the Supreme Court of the territory. The case was pending in the territorial Supreme Court when New Mexico was admitted to the Union on January 6, 1912, and several months afterwards was submitted to the Supreme Court of the state, and from its decision a writ of error was allowed to this court.

The state of New Mexico has presented a motion to quash the writ

of error, on the ground that this court has no jurisdiction to hear and determine the cause. The plaintiff in error claims that a right of review by this court of the decision of the Supreme Court of the state is given by the provisions of sections 14 and 15 of the act of Congress of June 20, 1910, enabling the people of New Mexico to form a state government (36 Stat. 557, c. 310).

Section 14 is as follows:

"That all cases of appeal or writ of error and all other proceedings heretofore lawfully prosecuted and now pending in the Supreme Court of the United States or in the proper Circuit Court of Appeals upon any record from the Supreme Court of said territory, and all cases of appeal or writ of error and all other proceedings heretofore lawfully prosecuted and now pending in the Supreme Court of the United States upon any record from a district court of said territory or in any matter of habeas corpus upon any return or order of a district Judge thereof, and all and singular the cases aforesaid which, hereafter shall be so lawfully prosecuted and remain pending in the Supreme Court of the United States or in the proper Circuit Court of Appeals, may be heard and determined by the Supreme Court of the United States or the proper Circuit Court of Appeals, as the case may be. And the mandate of execution or of further proceedings shall be directed by the Supreme Court of the United States or the Circuit Court of Appeals to the circuit or district court, hereby established within the said state, or to the Supreme Court of such state, as the nature of the case may require. And the circuit, district, and state courts herein named shall respectively be the successors of the Supreme Court and of the district courts of the said territory as to all such cases arising within the limits embraced within the jurisdiction of said courts, respectively, with full power to proceed with the same and award mesne or final process therein; and that from all judgments and decrees or other determinations of any court of the said territory, in any case begun prior to admission, the parties to such cause shall have the same right to prosecute appeals and writs of error to the Supreme Court of the United States or to the Circuit Court of Appeals as they would have had by law prior to the admission of said state into the Union."

That portion of section 15 which is relied upon is as follows:

"Provided, however, that all cases pending and undisposed of in the Supreme Court of the said territory at the time of the admission thereof as a state shall be transferred, together with the records thereof, to the highest appellate court of the state, and shall be heard and determined thereby, and appeal to and writ of error from the Supreme Court of the United States shall lie to review all such cases in accordance with the rules and principles applicable to the review by that tribunal of cases determined by state courts."

The claim on behalf of plaintiff in error is that the latter portion of section 14, which reads, "and that from all judgments and decrees or other determinations of any court of the said territory, in any case begun prior to admission, the parties to such cause shall have the same right to prosecute appeals and writs of error to the Supreme Court of the United States or to the Circuit Court of Appeals as they would have had by law prior to the admission of said state into the Union," should be read as if the words "or state" were added to the word "territory," so that the right of review in this court would exist from decisions of the state Supreme Court.

It is argued that, unless this construction of the statute is adopted, the words "in any case begun prior to admission" are meaningless. That conclusion does not follow. The clause "in any case begun prior to admission" may be redundant, because the territorial courts

could not have rendered judgments in any cases except those which had been begun before the admission of the state; but it emphasizes the fact that only judgments of the territorial court may be reviewed by the United States courts. By the proviso quoted from section 15 of the act of Congress, cases pending and undisposed of in the Supreme Court of the territory at the time of the admission of the state are transferred to the Supreme Court of that state, to be there heard and determined. The proviso then gives to such cases, when determined by the state Supreme Court, the same right of review before the Supreme Court of the United States that was given to similar decisions by state courts. Reading the provisions of this act together, it is clear that the right of this court to review decisions of the Supreme Court of the state was not granted by the act of Congress cited, and the review is expressly limited to the judgments of courts of the territory. This conclusion is confirmed, because it is in accord with the history and plan of appellate proceedings from territorial and state courts generally. Sections 702, 703, Rev. Stat.; Act March 3, 1891, c. 517, § 15, 26 Stat. 830.

The motion to quash the writ of error will be sustained.

VULCAN SHEET METAL CO. et al. v. NORTH PLATTE VALLEY IRR. CO.

(Circuit Court of Appeals, Eighth Circuit. January 4, 1915.)

No. 4026.

1. BANKRUPTCY ~~65~~—ADJUDICATION—RIGHT.

Bankr. Act July 1, 1898, c. 541, § 18d, 30 Stat. 551 (Comp. St. 1913, § 9602), provides that, if the bankrupt or any of his creditors shall appear within the time limited and controvert the facts, the judge shall determine as soon as may be the issues presented, and make the adjudication or dismiss the petition. *Held* that, where the essential allegations of a creditors' petition were formally admitted, the petitioners were entitled to an adjudication, and it was no objection that after the bankruptcy petition was filed suit was brought by a creditor to foreclose a mortgage on a portion or all of the bankrupt's property, even though the value of the property was less than the lien.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 54, 121; Dec. Dig. ~~65~~.]

2. BANKRUPTCY ~~127~~—APPOINTMENT OF TRUSTEE.

Whether a trustee should be appointed for a bankrupt's estate is a matter for determination after an adjudication has been entered.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 183; Dec. Dig. ~~127~~.]

Appeal from the District Court of the United States for the District of Wyoming; John A. Riner, Judge.

Petition by the Vulcan Sheet Metal Company and others for adjudication of bankruptcy against the North Platte Valley Irrigation Company. From a decree denying adjudication, petitioners appeal. Reversed, with directions.

Ernest Morris, of Denver, Colo. (William W. Grant, Jr., of Denver, Colo., on the brief), for appellants.

William C. Kinkead, of Cheyenne, Wyo. (Eldon Bisbee, of New York City, on the brief), for appellee.

Before CARLAND, Circuit Judge, and T. C. MUNGER and YOUNMANS, District Judges.

T. C. MUNGER, District Judge. In July, 1912, creditors of the North Platte Valley Irrigation Company (hereinafter referred to as the bankrupt) filed a petition in the court below, asking to have that company adjudicated a bankrupt. An answer was filed, denying the allegations of the petition as to insolvency and the commission of acts of bankruptcy, and demanding a jury trial. Afterwards a suit in equity was begun in the same court to foreclose a mortgage lien on property of the bankrupt. The court entered, in the bankruptcy proceedings, a stay of the suit for foreclosure, but at a later date set aside the stay. The case in bankruptcy came on for trial. The bankrupt waived its demand for a jury, confessed its insolvency, and the commission of one of the acts of bankruptcy. The court announced that an adjudication probably would have to be made, but held the case under advisement for seven months, when an order entered denied the prayer of the petition in the following words:

"Heretofore, to wit, on the 19th day of November, A. D. 1912, the motion of petitioning creditors by Morris & Grant, their attorneys, to have the North Platte Valley Irrigation Company declared a bankrupt, having been presented to the court and by the court taken under advisement—

"Now, on this 30th day of June, A. D. 1913, it appearing to the court from the records thereof that the Continental & Commercial Trust & Savings Bank and Wm. P. Kopf, as trustees, having heretofore and on the 1st day of October, A. D. 1912, filed their bill of complaint to foreclose their mortgage on all of the property in the hands of the receiver appointed by this court, it is ordered by the court that said motion to have the North Platte Valley Irrigation Company adjudged a bankrupt be and the same is hereby denied, and the petition of creditors herein to have the North Platte Valley Irrigation Company adjudged a bankrupt is hereby dismissed."

From that order the creditors have prosecuted this appeal.

[1] Section 18d of the Bankruptcy Act is as follows:

"If the bankrupt, or any of his creditors, shall appear, within the time limited, and controvert the facts alleged in the petition, the judge shall determine, as soon as may be, the issues presented by the pleadings, without the intervention of a jury, except in cases where a jury trial is given by this act, and make the adjudication or dismiss the petition."

As the essential allegations of the creditors' petition were formally admitted to be true, the court should have speedily entered an adjudication of bankruptcy. In *Acme Harvester Co. v. Beekman Lumber Co.*, 222 U. S. 300-309, 32 Sup. Ct. 96, 100 (56 L. Ed. 208), the court said:

"It was the duty of the bankruptcy court, if it intended to administer the property under the Bankruptcy Law, to promptly determine the question of adjudication, to proceed with the selection of a trustee and the administration and distribution of the estate, as required by the act. This it evidently declined to do, and permitted the creditors' committee, which had been organized for the avowed purpose of defeating court proceedings, to adminis-

ter the estate, to buy and sell property, and mature a plan for the reorganization of the concern. This may have been for the benefit of the creditors, but it was not the administration of the law as laid down in the Bankruptcy Law. It is not within the province of the bankruptcy court to deny an adjudication in bankruptcy, and then hold jurisdiction over the property for the purpose of allowing some of the creditors to effect a reorganization and distribution of the property."

The fact that a suit was begun, after the petition in bankruptcy was filed, for the foreclosure of a mortgage on a portion, or on all, of the bankrupt's property, even if the value of the property were less than the amount claimed to be due on the mortgage, was not a sufficient reason for denial of the adjudication of bankruptcy. By section 4b of the Bankruptcy Act it is provided that a petition may be filed against certain persons if they owe debts to the amount of \$1,000 or over; and by section 3b of that act a petition may be filed against a person who is insolvent, and who has committed an act of bankruptcy within four months. While it is necessary that the defendant owes debts, it is not necessary that he has assets. See *In re Hirsch* (D. C.) 97 Fed. 571-573; *In re J. M. Ceballos & Co.* (D. C.) 161 Fed. 445-450.

[2] Whether or not in this case, a trustee should be appointed (General Order in Bankruptcy XV) and whether or not the trustee should assume, as part of the estate, property which was incumbered for more than its probable value, were matters for later consideration. The petitioning creditors had complied with the provisions of the Bankruptcy Act, and were entitled to a judgment fixing the status of the defendant as a bankrupt, and declaring the law applicable to the administration of its estate to be that formulated by the Bankruptcy Act.

The decree of the court below must be reversed, with directions to enter an adjudication of bankruptcy.

NORTHERN PAC. RY. CO. v. UNITED STATES.

(Circuit Court of Appeals, Ninth Circuit. February 1, 1915.)

No. 2432.

MASTER AND SERVANT ~~§~~13 — RAILROADS — HOURS OF SERVICE ACT — TEMPORARY RELEASE FROM DUTY.

The temporary release from duty of a train crew during a run, because of delay in waiting for other trains to pass, does not break their continuity of service within the meaning of Hours of Service Act (Act March 4, 1907, c. 2939) § 2, 34 Stat. 1416 (Comp. St. 1913, § 8678), making it unlawful for an interstate railroad company to permit its train employés to remain on duty for a longer period "than sixteen consecutive hours."

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 14; Dec. Dig. ~~§~~13.]

Hours of service of employés, see note to *United States v. Houston Belt & T. Ry. Co.*, 125 C. C. A. 485.]

In Error to the District Court of the United States for the Northern Division of the Eastern District of Washington; Frank H. Rudkin, Judge.

Action by the United States against the Northern Pacific Railway Company to recover penalties. Judgment for plaintiff, and defendant brings error. Affirmed.

For opinion below, see 213 Fed. 539.

Edward J. Cannon, of Spokane, Wash., and Emerson Hadley, of St. Paul, Minn., for plaintiff in error.

Francis A. Garrecht, U. S. Atty., of Spokane, Wash., and Philip J. Doherty, Sp. Asst. U. S. Atty., of Washington, D. C., for the United States.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

ROSS, Circuit Judge. The plaintiff in error was defendant in the court below to an action brought by the government to recover penalties for the alleged violation of the act of Congress of March 4, 1907, entitled "An act to promote the safety of employés and travelers upon railroads by limiting the hours of service of employés thereon" (34 Stat. p. 1415).

The complaint contained several counts based upon alleged excessive hours of service by the several members of the same train crew, and the case was submitted to the court below without a jury upon a written stipulation of facts, and an additional stipulation between counsel made on the trial. The written stipulation, in addition to stating the incorporation of the railroad company, and that it is a common carrier engaged in interstate commerce, etc., is as follows:

"That on January 10, 1912, two employés of the said defendant, to wit, C. W. Hoffman, an engineer, and J. E. Rainey, a fireman, constituting the engine crew of defendant's engine No. 1507, hauling an extra freight train east-bound from Tacoma, in the state of Washington, to Cle Elum, in the same state, respectively went on duty as such engineer and fireman at 5:30 a. m. on said January 10, 1912; that said employés went off duty temporarily at Auburn, in the state of Washington, at 8:25 a. m., and returned to duty at 10 a. m. on said date, at said Auburn; and that said employés thereafter remained on duty as such engineer and fireman until 11 p. m. on said date. That on said January 10, 1912, four additional employés of the said defendant, to wit, R. E. Walsh, a conductor, and Thomas Kilcoyne, A. T. Feilds, and J. H. Wilson, trainmen, constituting the train crew of an extra east-bound freight train hauled on said date by defendant's locomotive No. 1507 from Tacoma, in the state of Washington, to Cle Elum, in the same state, respectively went on duty as such conductor and trainmen at 5 a. m. on said date; that said employés went off duty temporarily at Auburn, in the said state of Washington, at 8:25 a. m., and returned to duty at said Auburn at 10 a. m. on said date; and that said employés thereafter remained on duty as such conductor and trainmen until 10:30 p. m. on said January 10, 1912."

On the trial it was further agreed between the attorneys for the respective parties as follows:

"The train was ordered to leave Tacoma at 6 a. m., but was delayed at that point 45 minutes waiting for an engine which had been delayed between roundhouse and yard by derailment of yard cut, and therefore did not reach Auburn until 8:25 a. m., and it was then seen by the dispatcher, the witness here, that train would sustain a long delay at Auburn meeting superior trains, which were No. 603, No. 41, No. 257, and let No. 4 pass, and to take advantage of a release period the crew was instructed, on arrival at Auburn, that they were relieved from duty for 1 hour and 30 minutes, so that the train could, if possible, make Ellensburg within the allowed time."

Upon the foregoing facts, so agreed to, the judgment of the court below in favor of the government was based. From the delay of 45 minutes in starting the train from Tacoma, the railroad company must have anticipated that there would necessarily be delays en route because of the meeting of other trains, and of course knew that the law prohibited the service of the crew with which it started for more than 16 hours. One of such delays, it appears, occurred at Auburn, extending for a period of 1 hour and 30 minutes, during which time the crew was relieved from duty.

The sole question in the case is whether that temporary release of the crew from duty broke the continuity of its service within the meaning of the statute. We are of the opinion that it did not, and think such is the effect of the decision of the Supreme Court in the case of Missouri, K. & T. Ry. Co. v. United States, 231 U. S. 112, 34 Sup. Ct. 26, 58 L. Ed. 144. The run of the crew was not ended; it remained *the* crew of the train, temporarily relieved because of delays, the first of which occurred at its starting point, liable to be called at any moment, and not at all, as said by the counsel for the plaintiff in error, "at liberty to go away if they wished." In all essential particulars the delay in this case was like the delay while the engine was sent off for water and repairs, involved in the case cited, concerning which the Supreme Court said, at page 119 of 231 U. S., at page 27 of 34 Sup. Ct. (58 L. Ed. 144):

"In the meantime the men were waiting, doing nothing. It is argued that they were not on duty during this period, and that, if it be deducted, they were not kept more than 16 hours. But they were under orders, liable to be called upon at any moment, and not at liberty to go away. They were none the less on duty when inactive. Their duty was to stand and wait. United States v. Chicago, M. & P. S. Ry. Co. (D. C.) 197 Fed. 624, 628; United States v. Denver & R. G. R. Co. (D. C.) 197 Fed. 629."

The judgment is affirmed.

In re YUNGBLUTH.

(Circuit Court of Appeals, Ninth Circuit. February 1, 1915.)

No. 2418.

BANKRUPTCY ~~395~~—PROPERTY PASSING TO TRUSTEE—POWER OVER EXEMPT PROPERTY.

A court of bankruptcy is without jurisdiction to order the sale for any purpose of property which it has set apart to a bankrupt as his homestead exemption.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 658; Dec. Dig. ~~395~~.]

Petition for Revision of the Judgment of the District Court of the United States for the Northern Division of the Western District of Washington; Edward E. Cushman, Judge.

In the matter of Jacob Yungbluth, bankrupt. On petition to revise an order setting apart property as a homestead, subject to certain conditions. Reversed.

E. C. Million, of Seattle, Wash., Paul W. Houser, of Renton, Wash., George Friend, of Seattle, Wash., and I. E. Shrauger, of Mt. Vernon, Wash., for petitioner.

L. H. Hadley, A. M. Hadley, W. H. Abbott, and J. W. Romaine, all of Bellingham, Wash., for appellees.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

ROSS, Circuit Judge. The judgment of the court below confirmed the order of the referee in bankruptcy, which sustained the claim of the bankrupt to lots 13, 14, 15, and 16, block 15, of Hamilton Townsite Company's Second addition to the town of Hamilton, Skagit county, Wash., as a homestead, and as exempt under the laws of the state of Washington, and set aside that property to the bankrupt as so exempted, but, based upon his finding of fact to the effect that the lots of land covered by the homestead were to the extent of \$500 paid for by money borrowed from the copartnership mentioned, and evidenced by his promissory note, which the referee found was a fraud upon the creditors of the copartnership, undertook, by his order sustaining the exemption, to impose upon the homestead property the amount due upon the promissory note referred to, including interest thereon, which amount should be an—

"offset against said homestead, and if not paid then an order should be made authorizing and directing the trustee to sell said homestead property and out of the proceeds from such sale pay said note and interest and pay to the bankrupt the remaining proceeds of such sale."

The order of the referee having been, as above said, confirmed by the court, such is the effect of the judgment complained of. No complaint being made on the part of the estate of the bankrupt, or of any of its creditors, of the judgment of the court below, the question whether the exemption claimed should have been denied on the ground of the fraud found is not open for consideration. The sole question presented here is as to the validity of the charge imposed upon the homestead by the referee and confirmed by the court, with direction to the trustee to sell the homestead in the event the \$500, with interest, was not paid, and out of the proceeds thereof pay the note and interest, and pay to the bankrupt the remaining proceeds of such sale. To do so the bankruptcy court would necessarily be administering the homestead property, which the Supreme Court in the case of *Lockwood v. Exchange Bank*, 190 U. S. 294, 23 Sup. Ct. 751, 47 L. Ed. 1061, distinctly adjudged could not be done. In that case the court, after pointing out that under the Bankruptcy Act of 1867 (Act March 2, 1867, c. 176, 14 Stat. 517) exempt property constituted no part of the assets in bankruptcy, held that the same thing is equally true of the present Bankruptcy Act (Act July 1, 1898, c. 541, 30 Stat. 544 [Comp. St. 1913, 9585-9656]), saying (190 U. S. at pages 299, 300, 23 Sup. Ct. at page 753 [47 L. Ed. 1061]):

"The fact that the act of 1898 confers upon the court of bankruptcy authority to control exempt property in order to set it aside, and thus exclude it from the assets of the bankrupt estate to be administered, affords no just ground for holding that the court of bankruptcy must administer and dis-

tribute, as included in the assets of the estate, the very property which the act in unambiguous language declares shall not pass from the bankrupt or become part of the bankruptcy assets. The two provisions of the statute must be construed together and both be given effect. Moreover, the want of power in the court of bankruptcy to administer exempt property is besides shown by the context of the act, since throughout its text exempt property is contrasted with property not exempt; the latter alone constituting assets of the bankrupt estate subject to administration. The act of 1898, instead of manifesting the purpose of Congress to adopt a different rule from that which was applied, as we have seen with reference to the act of 1867, on the contrary exhibits the intention to perpetuate the rule, since the provision of the statute to which we have referred in reason is consonant only with that hypothesis. Though it be conceded that some inconvenience may arise from the construction which the text of the statute requires, the fact of such inconvenience would not justify us in disregarding both its letter and spirit. Besides, if mere arguments of inconvenience were to have weight, the fact cannot be overlooked that the contrary construction would produce a greater inconvenience. The difference, however, between the two is this: That in the latter case—that is, causing the exempt property to form a part of the bankruptcy assets—the inconvenience would be irremediable, since it would compel the administration of the exempt property as part of the estate in bankruptcy, whilst in the other the rights of creditors having no lien, as in the case at bar, but having a remedy under the state law against the exempt property, may be protected by the court of bankruptcy, since, certainly, there would exist in favor of a creditor holding a waiver note, like that possessed by the petitioning creditor in the case at bar, an equity entitling him to a reasonable postponement of the discharge of the bankrupt, in order to allow the institution in the state court of such proceedings as might be necessary to make effective the rights possessed by the creditor."

Cause remanded, with directions to modify the judgment in accordance with the views above expressed; the petitioner to have costs on this proceeding.

COURTNAY et al. v. KING et al.

(Circuit Court of Appeals, Ninth Circuit. February 1, 1915.)

No. 2427.

1. APPEAL AND ERROR ☞87—**RULINGS ASSIGNABLE—ORDER DENYING NEW TRIAL.**

An order of a federal court denying a motion for a new trial is not assignable for error.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 559-569, 577-596; Dec. Dig. ☞87.]

2. TRIAL ☞419, 420—**MOTION FOR NONSUIT—INSTRUCTED VERDICT—FAILURE TO RENEW—WAIVER.**

Defendants, by taking testimony after denial of their motions for nonsuit and for an instructed verdict, and by failing to renew the motions at the close of all the testimony, waived both.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 982, 983; Dec. Dig. ☞419, 420.]

3. APPEAL AND ERROR ☞1052—**HARMLESS ERROR—RULINGS ON EVIDENCE—CURING ERROR.**

Error in overruling an objection to a question whether a witness took possession of certain property was cured by subsequent testimony disclosing his acts.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4171-4177; Dec. Dig. ☞1052.]

☞For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

4. EVIDENCE ~~355~~—RELEVANCY.

Where a mining partnership executed a bill of sale of its property to trustees for the benefit of laborers, a list of the names of laborers, not claimed to contain any names of persons who were not entitled to the benefit of the bill of sale, was not objectionable because a previous list had been made, not containing the same names.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1444, 1484-1491; Dec. Dig. ~~355~~.]

In Error to the District Court of the United States for the Fourth Division of the Territory of Alaska; Frederick E. Fuller, Judge.

Action by Tom P. King and another against R. M. Courtney and another. Judgment for plaintiffs, and defendants bring error. Affirmed.

McGowan & Clark, of Fairbanks, Alaska, for plaintiffs in error.

Before GILBERT and ROSS, Circuit Judges, and WOLVERTON, District Judge.

GILBERT, Circuit Judge. The defendants in error, as trustees for laborers who had worked for the Russian Mining Company, a copartnership, brought an action against the plaintiffs in error to recover certain personal property alleged to have been taken from the possession of said trustees by the plaintiffs in error. The plaintiffs in error answered, alleging that they had taken possession of the property in the discharge of their official duties, by serving writs of attachment on the same. The jury returned a verdict in favor of the defendants in error for the recovery of the possession of 75 cords of wood, one double cylinder hoist, one carrier, one bucket, and one trolley cable, all of the value of \$575.

[1, 2] It is unnecessary to cite authorities to the proposition that the ruling of the trial court in denying the motion for a new trial is not assignable as error, or to the proposition that the defendants in the action, by taking testimony after their motion for a nonsuit and their motion for an instructed verdict were overruled, and by failing to renew said motions at the close of the whole testimony, waived both motions. It remains only to consider the rulings of the court on the admission of testimony.

[3] It is assigned as error that the court denied the motion of plaintiffs in error to strike out the testimony given by Serafino, in answer to the question, "Now, state what you did under those instruments, as trustees, that same day." To which he answered, "Well, we went down on the claim and took possession of it." The ground of the motion to strike out was that the answer stated a conclusion. The mining company had made two bills of sale to trustees for the benefit of laborers. The first was made on April 29, 1912, and covered the property which was described in the jury's verdict. The second was made on June 11, 1912, and was for other property. It appears elsewhere in his testimony that it was as to the property described in the second bill of sale that Serafino testified that he took possession. On the trial the

~~For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes~~

defendants in error, through their attorney, waived their claims as to all property except that which was described in the first bill of sale, and it follows, of course, that error cannot be predicated upon any ruling of the court as to the admission of evidence affecting property described in the second bill of sale. But if the testimony be taken as referring to the property described in both instruments, there was no error, for later Serafino described the acts which he did to take possession.

[4] Error is assigned to the admission of the paper marked "Plaintiffs' Exhibit 3," which was a list of the names of 16 laborers signed by the members of the Russian Mining Company, and was intended to furnish the names of the beneficiaries of the first bill of sale; that instrument having been made to C. H. Ward, as trustee, for the benefit of the laborers, and subsequently assigned by him to Serafino with the Mining Company's consent. The only objection made to the admission of Exhibit 3 was that there were names thereon which did not belong there, that the defendants had first set forth a list of names in Russian, and that "now they come in with another list containing entirely different names." What the first list so referred to in the objection was does not appear in the record, but Serafino testified that the list, Exhibit 3, was made out by the Russian Mining Company, and was signed by all the men, and that, if it differed from the list made out in Russian in that it contained more names, the reason might be that some of the men were not around there, and were not put on the other list. There is no evidence whatever that the list which was admitted in evidence as Exhibit 3 contained names of laborers that were not entitled to the benefit of the bill of sale. There was no error, therefore, in admitting that paper in evidence.

The judgment is affirmed.

WHITAKER v. UNITED STATES.

(Circuit Court of Appeals, Fifth Circuit. January 25, 1915. Rehearing Denied March 1, 1915.)

No. 2713.

1. CRIMINAL LAW ~~1092~~—BILL OF EXCEPTIONS—PRESENTATION, EXAMINATION, AND SIGNING BY JUDGE.

A paper, referred to as a bill of exceptions, and not signed by the judge, nor appearing of record to have ever been examined by or presented to him, cannot be regarded as a bill of exceptions.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2803, 2829, 2834–2861, 2919; Dec. Dig. ~~1092~~.]

2. CRIMINAL LAW ~~1122~~—APPEAL—BILL OF EXCEPTIONS—REVIEW.

Where an alleged bill of exceptions contained only a part of the evidence received on the trial, and the charge was entirely pretermitted, errors assigned on the court's ruling in refusing to give a peremptory instruction in behalf of plaintiff in error could not be reviewed.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2940–2945; Dec. Dig. ~~1122~~.]

3. CRIMINAL LAW ~~956~~—NEW TRIAL—AFFIDAVIT.

Where an exculpatory affidavit, executed by one jointly indicted and convicted with accused, postdated his conviction, he could avail himself thereof only by submitting it to the trial court on a motion for new trial.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2373-2391; Dec. Dig. ~~956~~.]

In Error to the District Court of the United States for the Southern District of Mississippi; Henry C. Niles, Judge.

Charles M. Whitaker was convicted of using the mails in execution of a scheme to defraud, and he brings error. Affirmed.

Charles M. Whitaker, in pro. per.

R. C. Lee, U. S. Atty., and J. W. George, Asst. U. S. Atty., both of Jackson, Miss.

Before PARDEE and WALKER, Circuit Judges, and MAXEY, District Judge.

MAXEY, District Judge. The plaintiff in error was indicted, tried, and convicted, under section 215 of the Penal Code (Act March 4, 1909, c. 321, 35 Stat. 1130 [Comp. St. 1913, § 10385]), of the offense of using the mails in the execution of a scheme to defraud. At a former term of this court a writ of certiorari was ordered, requiring the clerk of the District Court to send up a complete record of the proceedings appearing in the court below. In compliance with the order the clerk sent up the record, which discloses, among other matters not necessary to enumerate, the following orders and proceedings: (1) The indictment, verdict of the jury, and the sentence of the court; (2) a paper, designated by the plaintiff in error a bill of exceptions; and (3) an assignment of errors. The paper referred to as a bill of exceptions was not signed by the judge, nor is there anything in the record to show that it was ever examined by or presented to him.

[1] It is evident that such a paper cannot be treated as a bill of exceptions. "There is but one mode," said the Supreme Court, in Insurance Co. v. Lanier, 95 U. S. 171, 24 L. Ed. 383, "of bringing upon the record and making a part of it the rulings of a judge during the progress of the trial, or his charge to the jury, and that is by a bill of exceptions allowed and sealed or signed by the judge."

[2] From an examination of this paper it appears that it contains only a "part of the evidence offered and received" on the trial of the cause, and the charge of the court is entirely pretermitted. In this condition of the record, it is equally apparent that error, assigned upon the ruling of the court in refusing to give a peremptory instruction in behalf of the plaintiff in error, cannot be considered by this court.

In view of the fact that the plaintiff in error is unrepresented by counsel and that he is prosecuting his case in forma pauperis, we desire to say that we have given the record a careful and critical examination, for the purpose of ascertaining whether a plain error absolutely vital to him was committed. We have failed to find such error, if, indeed, any error whatever was committed by the trial court.

The objections urged to the indictment are manifestly not well taken. The indictment clearly and distinctly charges an offense under section 215 of the Penal Code, and the sentence of the court is regular in form.

The trial court evidently considered the evidence, which we have shown is not fully set out in the record, sufficient to authorize a verdict of guilty.

[3] There appears in the record an affidavit, made by Ike Kirby, who was jointly indicted and convicted with the plaintiff in error, in which the former seeks to show that the latter was guiltless of the offense charged in the indictment. This affidavit was made on August 8, 1913, and the cause was tried July 10, 1913. It is thus perceived that the trial antedated the affidavit by approximately a month. If the plaintiff in error desired to avail himself of the affidavit, he should have submitted it to the trial court on a motion for a new trial. That court, in the exercise of a sound discretion, could have made such order as justice required. But, even had a motion been made and overruled, which was not the case, the overruling order could not be reviewed by this court.

In view of the foregoing, it is our duty to affirm the judgment; and it is so ordered.

SILVAS v. ARIZONA COPPER CO., Limited.

(Circuit Court of Appeals, Ninth Circuit. February 1, 1915.)

No. 2465.

1. COURTS ~~357~~—FEDERAL COURTS—STATE LAWS AS RULES OF DECISION—SECURITY FOR COSTS.

Whether plaintiff in an action in a federal court shall be required to give security for costs, in the absence of a federal statute or rule of court on the subject, is to be determined by the statutes of the state.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 938; Dec. Dig. ~~357~~.

State laws as rules of decision in federal courts, see notes to Wilson v. Perrine, 11 C. C. A. 71; Hill v. Hite, 29 C. C. A. 553.]

2. COSTS ~~109~~—SECURITY FOR PAYMENT—CONSTRUCTION OF STATUTE—“GUARDIAN.”

Civ. Code Ariz. 1913, par. 643, provides that, where it is shown by affidavit that a plaintiff is not the owner of property out of which costs could be made by execution, he shall be required to give security for costs; but section 646 creates an exception in favor of “guardians appointed under the laws of the state.” Held, that a guardian ad litem is a “guardian,” within the meaning and purpose of such statute.

[Ed. Note.—For other cases, see Costs, Cent. Dig. §§ 439–461; Dec. Dig. ~~109~~.

For other definitions, see Words and Phrases, First and Second Series, Guardian.]

In Error to the District Court of the United States for the District of Arizona; Wm. H. Sawtelle, Judge.

Action at law by Richard Silvas, an infant, by Ransom Silvas, his guardian ad litem, against the Arizona Copper Company, Limited.

From a decree dismissing the complaint, plaintiff brings error. Reversed.

For opinion below, see 213 Fed. 504.

L. Kearney, of Clifton, Ariz., and William M. Seabury, of Phoenix, Ariz., for plaintiff in error.

W. C. McFarland, of Clifton, Ariz., for defendant in error.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

GILBERT, Circuit Judge. This action was brought on behalf of an infant plaintiff, a resident of Arizona, by his guardian ad litem, to recover damages for personal injuries alleged to have resulted from the negligence of the defendant, a foreign corporation doing business in Arizona. On the ground that neither the infant nor his guardian ad litem owned property in the district out of which costs could be made on execution, the court below ordered that the plaintiff give security for costs, and because the plaintiff failed to furnish such security a judgment was entered dismissing the complaint. From that judgment the appeal is taken.

[1] The question which was before the court below was not affected by Act Cong. July 20, 1892, c. 209, 27 Stat. 252 (Comp. St. 1913, §§ 1626-1630), providing for proceedings in forma pauperis. The case involved no attempt to proceed in forma pauperis. The question presented was whether the plaintiff should be required to give security for costs, and, there being no federal statute on that subject, the question was determinable either by a rule of the court or by the state statute on the same subject made applicable by section 914 of the Revised Statutes. *Hugunin v. Thatcher* (C. C.) 18 Fed. 105; *Miller, Adm'r, v. Norfolk & W. R. Co.* (C. C.) 47 Fed. 264; *O'Brien v. Hearn* (C. C.) 125 Fed. 95; *Schofield v. Palmer* (C. C.) 134 Fed. 753; *Winkley Co. v. Bowen Mfg. Co.* (C. C.) 180 Fed. 624.

[2] It does not appear that there was any rule of court upon the subject, but section 643 of the Revised Statutes of Arizona provides that if it appear by affidavit that the plaintiff is a nonresident of the state, or is not the owner of property out of which costs could be made by execution sale, the court shall order the plaintiff to give security for costs. Section 646, however, creates an exception to the rule in favor of certain state officers, and executors, administrators, or guardians appointed under the laws of the state. The only question on which doubt arises is whether a guardian ad litem is a "guardian," as that term is used in the statute. Inasmuch as the purpose of the exception is to extend indulgence to infants or others under guardianship, it would seem that to effect its object a guardian ad litem should be included within its protection, and we so hold. If the case had been brought in a court of the state, the guardian ad litem would properly be held to be a guardian "appointed under the laws" of the state.

The judgment is reversed, and the cause is remanded for further proceedings.

BOYCE et al. v. STEWART-WARNER SPEEDOMETER CORPORATION.

(Circuit Court of Appeals, Second Circuit. December 15, 1914.)

No. 119.

1. PATENTS ~~297~~—SUIT FOR INFRINGEMENT—PRELIMINARY INJUNCTION.

The granting of a preliminary injunction against infringement of a patent rests in the sound discretion of the court; but, while a previous adjudication of the validity of the patent is not indispensable, when the patent is new and there is a substantial controversy as to its validity, the case must be exceptional in its circumstances to justify such action, and the necessity for the injunction should be clearly shown.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 481-488; Dec. Dig. ~~297~~.

Ground for denial of preliminary injunctions in patent infringement suits, see note to Johnson v. Foos Mfg. Co., 72 C. C. A. 123.]

2. PATENTS ~~126~~—VALIDITY—CLAIMS NOT WITHIN ORIGINAL APPLICATION.

An amendment to an application for a patent must be within the scope of the original disclosure, and a claim made by amendment to matter not disclosed in the application as originally filed is invalid.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 178; Dec. Dig. ~~126~~.]

3. PATENTS ~~129~~—SUITS FOR INFRINGEMENT—DEFENSES.

A defendant in an infringement suit is not at liberty to raise the question of want of utility of the patented device, if he has himself infringed; infringement being an admission of utility.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 182½-186; Dec. Dig. ~~129~~.]

4. PATENTS ~~328~~—VALIDITY AND INFRINGEMENT—MOTOMETER.

The granting of a preliminary injunction against infringement of the Boyce patent, No. 1,090,776, for a motometer, or device for indicating the condition of internal combustion engines, especially automobile engines, *held* within the discretion of the court, although the patent was new and its validity unadjudicated; it clearly appearing that the device is within the specification, was not anticipated, and is of great utility.

Appeal from the District Court of the United States for the Southern District of New York.

This cause comes here upon appeal from an order entered by the District Court of the United States for the Southern District of New York granting a preliminary injunction restraining defendant from an alleged threatened infringement of letters patent No. 1,090,776, issued March 17, 1914, to Harrison H. Boyce, for an indicating system for internal combustion engines.

The Stewart-Warner Speedometer Corporation, a corporation organized under the laws of the state of New York, is the defendant. The bill alleges that the Stewart-Warner Speedometer Corporation of Virginia and the Stewart-Warner Speedometer Corporation of New York have conspired and are conspiring to perform certain specified acts of infringement or of threatened infringement; but the Stewart-Warner Speedometer Corporation of Virginia is not made a party to the suit, not being within the jurisdiction of the court. The Motometer Company, a corporation organized under the laws of the state of New York, is the exclusive licensee of Boyce, and is joined with him as a complainant.

S. E. Darby, of New York City, for appellant.

Frederick P. Fish and Clifford E. Dunn, both of New York City, for appellees.

Before COXE, WARD, and ROGERS, Circuit Judges.

ROGERS, Circuit Judge (after stating the facts as above). The complainants have sought and obtained a preliminary injunction restraining defendant from the threatened infringement of their patent, and the question is whether the preliminary injunction should have been granted upon the facts as disclosed by the affidavits, or whether relief should have been withheld until a hearing upon the merits.

The patent in suit is for an invention known in the trade as a motometer, and it relates to a system for indicating the condition of internal combustion engines, and particularly engines with water-jacketed cylinders. It is an invention particularly applicable to automobile engines of internal combustion type. The object of it is well set forth in the specification of the patent which is as follows:

"This invention relates to a system for indicating the condition of internal combustion engines of various types, and particularly of those styles wherein the cylinders are cooled by a fluid medium which is circulated therearound or thereabout, the indicating means being located without or not in direct contact with the cylinders.

"While my invention is generally applicable to stationary and other explosive engines of any character and under varying conditions of service, it is especially adaptable for use in connection with automobiles and the like, wherein the engine cylinders are cooled by a liquid delivered or supplied thereto through any suitable medium, as, for instance, from a radiator or the like, which is customarily situated some distance away from the engine cylinders, though I would have it expressly understood that I in no wise limit myself to this specific application or embodiment of my invention, which I have selected as a basis for illustrating and describing my invention, merely for the purpose of rendering a clear and comprehensive understanding of the scope and novel features thereof.

"My invention broadly comprehends the provision or arrangement of means for indicating the condition or temperature of the engine, the action of the temperature indicating means being governed or controlled by the water or other circulating medium employed for producing such variations in the temperature of the cylinders as may be necessary or desired by the operator.

"I have found that many, if not most, of the troubles to which internal combustion engines are subject, result directly or indirectly in a change in the temperature of the engine and cooling system, this being true, for instance, of such contingencies as imperfect lubrication, improper adjustment of the carburetor, insufficient water in the radiator, failure of proper circulation of the cooling water, broken fan belt, etc., and it is the object of the present invention to provide an effective indicator governed by such changes of temperature which will call to the attention of the operator the existence of conditions inimical to the satisfactory operation of the engine, arising from any of these or similar causes."

The complainant's device embodies the idea primarily of affording protection against the great evil of engine overheating, for which previously there had existed no remedy. It also provides an indication to the operator of the thermal condition of his engine. Both of these results are accomplished by the use of a temperature responsive device

located in the air space at the top of the radiator of the engine cooling system. Through this instrument a continuous temperature indication is given for the guidance of the operator. This indication is not of exact water temperatures, but shows changes in thermal condition. When the point of danger is reached and steam is formed in the radiator, the instrument affords an unmistakable trouble signal. This is due to the peculiar organization of the apparatus whereby the temperature responsive element or thermometer normally indicates a lower, but substantially proportional, temperature with relation to the water temperature, which jumps to the actual temperature upon the occurrence of dangerous conditions.

The device which defendant proposes to put on the market, and which is called the Stewart radiator meter, is an instrument of exactly the same character as the Boyce motometer. The circular which defendant has put out shows conclusively that it is designed for exactly the same purpose, and that it does exactly the same work in exactly the same way. Like the Boyce motometer, it is designed to be attached to the radiator cap of an automobile, and it has an indicator which provides temperature readings visible from the driver's seat. The indicator is governed by a temperature responsive element which differs from that in plaintiff's device in length by about one-half an inch, which projects downwardly through the radiator cap exactly as does the Boyce device. In the latter device the temperature responsive element is located in the air space above the water, while in defendant's it extends into the water. But it appears from defendant's own circular that it, like the complainant's device, "is affected by the temperature of the air over the water." And as an automobile cannot run more than a few miles before a certain proportion of the water in the radiator is dissipated and lost by evaporation, expansion, and overflow, and that ordinarily the radiator does not begin to heat until the machine has run 10 miles, it is perfectly clear to us that the thermostat bar or temperature responsive element in defendant's device constitutes a palpable and obvious infringement, and one that would be enjoined upon the merits, if at final hearing the complainant's patent was found valid.

It appears that gasoline engines such as are now universally used in automobiles differ from other types of power units in that the power is produced in the cylinder by the explosion of a gaseous mixture. This explosion generates so much heat that unless provision, in addition to lubrication, is made for cooling the engine parts, they would be destroyed. All automobile engine cylinders are now provided with a water jacket, through which cool water is forced to circulate by means of pumps, siphon, and other arrangements. And a well-designed engine, if properly lubricated, operates efficiently so long as its cooling system works satisfactorily. But any derangement of the system means overheating, whether it be from low water, a broken or clogged water pump, a broken fan belt, or faulty lubrication. In order to secure the highest efficiency of operation and regular and flexible action in an automobile engine, it is essential that the cooling be not carried to an excess. In a cold engine the charge is not exploded with regularity in the cylinders and fuel is wasted. Engines cannot be safely operated at a temperature which raises the cooling water in the cylinder

jackets above boiling, as such a temperature causes the water to boil away and fail to perform its cooling function. The closer the temperature is kept to the boiling point, the more efficient is the operation of the engine. In standard makes of automobiles the temperature of the water in the cooling system will be from 190 degrees to 202 degrees F. when representing safe conditions, while 212 degrees F., or boiling, indicates danger. The mere attaining a dangerous degree of heat in the engine is not necessarily fatal. But the damage is done by continued operation of the engine at the dangerous temperature.

[1] It is necessary to keep in mind that the granting of a preliminary injunction rests in the sound judicial discretion of the court of original jurisdiction. The question is not whether, on the facts as disclosed, the appellate court would have issued the injunction. It is rather whether the trial court abused its discretion in the course it adopted. The question for us is whether the record clearly establishes that the court below abused its discretion and departed from the rules and principles established for the guidance of the courts of equity in cases of this character. American Grain Separator Co. v. Twin City Separator Co., 202 Fed. 202, 206, 120 C. C. A. 644 (1912).

It was at one time thought in England that a court of equity should not interfere for the protection of a patent by injunction until the validity of the patent had been established at law. But the rule became established in that country to the contrary. Universities of Oxford and Cambridge v. Richardson, 6 Vesey, 689. And in this country the federal courts have been inclined to view with considerable liberality the issuance of an injunction, although the complainant may not have established the validity of his patent in a trial at law before making application for an injunction for the protection of his rights. This court has never held that a preliminary injunction will not be issued in any case where the validity of the patent has not been previously established. But while recognizing the fact that it is not necessary that the validity of the patent should have been previously determined, we have been reluctant to approve the granting of a preliminary injunction where the patent was comparatively new. And it has been our practice to disapprove of its issuance in a case at all doubtful and where there appeared to be any substantial controversy between the parties. The case at bar must be exceptional in its circumstances to justify any departure from the practice so well established. If a patent alleged to have been infringed is an old one, that circumstance in itself affords some reason for allowing a preliminary injunction to issue to restrain an alleged infringement. But where a patent is new, its validity necessarily having been neither adjudicated nor acquiesced in, the issuance of a preliminary injunction without a hearing upon the merits is usually regarded as unwarranted and improper. But the fact that a patent was issued as of yesterday may not always lead a court to refuse a preliminary injunction. The case must be very exceptional in its circumstances, however, to justify such a course. The matter rests in the discretion of the court, and the right to and the necessity for the injunction should be clearly shown.

In the case at bar there has been no prior adjudication of the validity

of the patent. The patent itself is of very recent date, having been issued but three weeks before the suit was commenced. The patent sued on, as above stated, was issued on March 17, 1914, and this suit was commenced on April 11, 1914, just 25 days after the issuance of the patent. The order to show cause why the preliminary injunction should not be granted was made without notice and served upon the defendant on April 14, 1914. The defendant filed its answer on May 1, 1914, and the motion for the injunction was heard and subsequently granted and the order entered on May 21, 1914. Ordinarily a proceeding of so summary a character would afford very little opportunity for investigation and research to discover what the prior art might disclose concerning the patent alleged to have been infringed. It appears, however, that the matter of the complainant's device was brought to the defendant's attention early in October, 1913, by one of the complainant's associates while the matter was still pending in the Patent Office. At that time defendant made full inquiry as to the patents then pending and as to the device itself. This was at an interview which took place between Mr. Townsend and one Whitney, who was the "right-hand man" of Mr. Stewart, of the Stewart-Warner Corporation. Mr. Townsend in his affidavit states:

"He seemed particularly interested in the patent situation, and asked me what patents we had. I informed him that at that date we only had design patents, but that we had other patent applications in the office relating to the taking of the temperature of the air above the water, which we knew to be the only practical method. He stated that design patents were practically worthless as a slight change could be made to avoid them. However, he stated there might be something good in the basic idea of recording the temperature of the air above the water. He asked for particulars as to why we found it advisable to patent and use this method of construction.

"I went into detail, showing him the disadvantage of submerging the bulb or temperature responsive element of the motometer and the benefits to be derived by not submerging the bulb, viz.: Quick rise in case of danger, best method of recording broken water pump, and particularly the fact that a submerged bulb was almost useless on a hot summer day on thermo-syphon cars, because the rise in temperature from normal running conditions to a condition of danger was so slight. From a commercial standpoint, I explained that the instrument not taking the temperature of the air above the water would be almost useless on Fords and Overlands, as these cars employ the thermo-syphon system of cooling and build (include?) almost half the cars made in the United States."

The defendant at once proceeded to get up the device which is alleged to infringe and in January, 1914, had it on exhibition in Chicago. It appears that Mr. Whitney had stated immediately after the interview with Mr. Townsend that he did not believe the complainant's patents were good. The defendant, therefore, had actual knowledge of the complainant's device and patent claim for more than six months prior to the hearing of the motion for the preliminary injunction. And as with full knowledge of the plaintiff's claims it proceeded to get up its infringing device, it has no right to complain that it was called upon to show its justification and submit its defense six months later.

If there is an arguable question as to the patent's validity, clearly the injunction should not have issued at this stage of the proceedings. Courts do not attempt to decide doubtful questions on motions for a

preliminary injunction, and it is of course well settled that in case of doubt such an injunction will not be granted, especially where the defendant is financially responsible. And in this suit no question is raised as to the financial responsibility of the defendant. The defendant company and its subsidiaries constitute an immense organization having a capital of over \$13,000,000, and it is said to be the largest manufacturer and distributor of automobile accessories in the world.

While giving full recognition to the general rule that ordinarily, where the validity of a patent has neither been adjudicated nor acquiesced in by the public, an injunction should be refused, we have not applied it to cases where no doubt was entertained as to the validity of the patent. In *Fuller v. Gilmore* (C. C.) 121 Fed. 129 (1902), Judge Lacombe said:

"Defendant calls attention to the circumstance that the patent has never been adjudicated, and is of such recent date that long acquiescence cannot be shown, as sufficient ground for refusing preliminary injunction. * * * When the specification shows that, assuming facts of common knowledge, it will probably need some affirmative evidence to indicate the presence of invention, or when some testimony put in by defendant as to the prior state of the art, slight though it be, indicates that there may be some arguable question as to validity, or as a construction of the claims broad enough to cover the device complained of, then preliminary injunction on affidavits is refused. But where the patent appears to be novel, useful, and ingenious, and there is no evidence at all assailing its validity, the presumption arising from issue of letters patent will be sufficient to warrant injunctive relief. The same rule should apply where the sole evidence as to prior art is wholly unpersuasive."

In *Lambert Snyder Vibrator Co. v. Marvel Vibrator Co.* (C. C.) 138 Fed. 82 (1905), we held that the fact that a patent had not been adjudicated was not sufficient ground for refusing a preliminary injunction against its infringement, where the infringement was clear, unless there was a substantial question as to its validity. And in *Palmer v. Wilcox Mfg. Co.* (C. C.) 141 Fed. 378 (1905), we held that the fact that a patent was unadjudicated would not defeat the right to a preliminary injunction against its infringement, unless it also appeared from common knowledge or from the prior art shown that there was reasonable ground for doubt as to its validity; the presumption arising from its issuance by the Patent Office being sufficient to warrant injunctive relief against an infringer.

[2] The defendant claimed that the Boyce patent was void because as issued it was for an invention entirely different from that presented in the application originally filed. An applicant must in his application describe not merely the principle of his invention, but the best mode in which he contemplates applying the principle, and he must describe the means he proposes to employ in such full, clear, and exact terms as will make it possible for those skilled in the art without other aid to make and use the invention. And if his application is amended the amendment must be within the scope of the original disclosure. A claim made by amendment to matter not disclosed in the application as originally filed is invalid. *Hobbs v. Beach*, 180 U. S. 383, 21 Sup. Ct. 409, 45 L. Ed. 586 (1901).

It appears that changes were made in the specification of the application resulting in the patent in suit. Those changes tended to greater clearness and fuller explanation of the invention, and thus made the patent as issued more valuable to the public as a disclosure of the patented invention. But we are unable to discover that the patent as issued is not the identical invention which Boyce described in his application as filed. Both the specification and drawing of the application as filed clearly show that the temperature responsive element or thermometer was mounted, and was intended to be mounted, in the air space at the top of the radiator, and not in the water in the radiator. The inventor does not state that the temperature of the atmosphere in the radiator air space will be the same as the temperature of the water, but that it will correspond thereto, by which was meant simply that there would be a relation or correspondence between the two temperatures. That there is such a correspondence is of course indisputable. The temperature of the air space does correspond with the temperature of the water temperature. It is this fact which gives to Boyce's device the great advantages it possesses and causes it to operate in the novel manner it does.

The defendant claimed that the complainant's device was anticipated by the prior art. To authorize the allowance of a patent there must be a substantial difference in principle from prior inventions. To amount to anticipation it is essential that there should be identity in substance, and the two things must accomplish the same purpose by substantially the same means, operating in substantially the same way. And a patentee's claim to an invention is anticipated when it appears that another made the invention before the date when the patentee made it. The anticipation may consist of prior patents or publications. And if prior invention is shown to have existed and been in use, it is clearly of no consequence whether it was patented or not. In the case at bar our attention has been called to a number of prior patents which defendant alleges show that the complainant's device was anticipated. But an examination of the patents referred to convinces us that there is absolutely nothing in the claim of anticipation by the prior art. The prior patents do not disclose or in any way suggest the invention of the patent in suit. The Vissering patent, No. 904,163, which is the only one of these patents we deem it necessary to refer to, was a device which had for its object to provide a gauge or indicator which would show the true height of the water in the radiator. It has no relation whatever to the Boyce invention, except that it was mounted on top of an automobile radiator and that the complainant's motometer is also mounted on the radiator. The Vissering gauge is certainly incapable of performing the functions of the Boyce motometer. Its mode of operation is certainly absolutely different, and it has no temperature responsive element and indicating means controlled thereby. The record discloses absolutely nothing antecedent to the Boyce invention even remotely suggesting the inventive thought embodied therein. No prior use which has ever been made of a thermometer was brought to the attention of the court which contained any suggestion of the novel mode of operation used in the Boyce device, nor did it appear that any

thermometer was ever used to secure any result at all analogous to that secured by the invention of the patent in suit.

The evidence shows that prior to 1912 there was absolutely nothing known in the automobile art which would enable one running an automobile to discover an undue heating of the engine in time to rectify it and avoid irremediable damage. It was not until complainant's motometer was invented that any instrument existed which could be used in connection with automobiles to give warning of a dangerous condition of the engine. In the face of the affidavits which were presented, the utility of the complainant's device cannot be doubted. The affidavit of one who had been driving racing cars in this country and abroad since the year 1904 was presented to the court, in which the affiant declared:

"For my own part, I would not think now of driving a car in a race without a motometer, and the consensus of opinion of the other drivers to whom I have talked is the same. The instrument not only gives warning of serious trouble in ample time to rectify it, but it enables a driver to know at every moment and without moving from his seat, exactly what his engine is doing and whether or not it is operating with the greatest efficiency. It enables him to regulate his speed and power so as to get the greatest possible efficiency out of the car, and the rapid rise of the indicator is a sure sign of serious trouble. In my judgment the motometer is one of the most important contributions to the automobile which has been made in years, and it has supplied a want which was long felt and appreciated, but which it seemed impossible to fill. Prior to its invention there was absolutely nothing of the kind known here or abroad, and we were compelled to drive cars blindly, and only knew of heating troubles after it was too late to remedy them."

An affidavit presented to the court, made by one who had been engaged in the occupation of a driver of racing automobiles continuously since 1909, stated:

"In my opinion the Boyce motometer is an exceedingly valuable addition to the equipment of any automobile, and is well-nigh indispensable in racing or touring under severe conditions. I would not think of driving in a race to-day without having my car equipped with one, nor would I go on a long tour without one. I believe it to be one of the most useful automobile accessories that has ever been placed upon the market."

An affidavit presented to the court, made by a dealer in automobiles and accessories, stated:

"I first heard of the Boyce motometer when I attended the Indianapolis races on May 30, 1913. Previous to that time in all my experience I had never heard of any device or apparatus for warning the driver of an automobile of the overheating of his engine, or of any of the troubles leading thereto, or for indicating to the driver the condition of the engine or cooling system. When I was in Indianapolis, as stated, I noted that most of the drivers in the 500-mile race had their cars equipped with motometer which, as an entirely new device to me, attracted my attention. I was acquainted with many of the drivers, and talked with them about the motometer, and they all without exception praised it highly and recommended it as a very useful device. I thereupon procured a motometer, and on my return to Chicago I applied it to my automobile, a Mercer raceabout. Soon after I purchased additional motometers, with which I equipped the three demonstrating cars belonging to the Schillo Motor Sales Company, of which I was vice president. * * * My experience with the motometer as dealer and user has convinced me that the device is an invaluable addition to automobile equipment. I would never think of driving a car without one at this date. In my opinion, the motometer has filled an important place in the automobile art, for which

nothing ever existed before. I believe that there is a tremendous field for this device, and every car ought to be, and doubtless in a few years will be, equipped with one. In my opinion it is a more useful and necessary part of the equipment of an automobile than the speedometer, which is now universally employed."

An affidavit presented to the court, made by the vice president of the Auto Supply Company of New York, stated:

"For the past year the Auto Supply Company has been handling the motometer in connection with its business and has sold a large number of them to automobile users. So far as I have been able to observe they have given great satisfaction to their purchasers, and I have never had a single instrument returned as unsatisfactory in operation or for failing to accomplish the results claimed for it. I believe that the Boyce motometer is a useful and meritorious addition to automobile equipment, and that it is the first device ever placed on the market for accomplishing the special and important functions for which it is designed."

An affidavit presented to the court by a consulting engineer, who had been engaged in engineering work for 22 years and for the last 8 years in automobile engineering, stated:

"The Boyce motometer was first brought to my attention at the New York Automobile Show in January, 1913. Prior to that time I had never heard of any apparatus or construction enabling the driver to obtain timely information of the existence of dangerous conditions in the engine or for exhibiting to him while driving the conditions under which the engine was operating. There was absolutely no instrument in use for accomplishing these purposes, so far as I am aware. Moreover, if any such device had been known I believe I should have heard of it, as in the year 1909 I made an exhaustive investigation and conducted extensive experiments on apparatus for the thermal control of steam generation for steam driven vehicles. In the course of this investigation, I looked up everything I could find about the thermal control of engines, but I never came across anything like the motometer.
* * * I was soon so convinced of the merits of the motometer that I had them put on all of the Mercer racing cars, as a protection against accidents from overheating, which is very common under the severe conditions of racing. The motometers proved their value many times on these cars.
* * * My experience has emphatically convinced me that the motometer is a most useful and valuable addition to automobile equipment, and I believe that it will meet with a large and ever increasing sale in the future. In my opinion it will eventually be demanded by every automobile user as an essential part of the equipment of his car. It fills a real need in the industry."

It also appears that upward of 10,000 Boyce devices have already been sold in the short time they have been on the market and that, although sold on a condition that the device might be returned within 30 days, if found unsatisfactory, and the money refunded, not one single instrument was ever returned.

[3] The defendant claimed that the patent in suit is for a device which is lacking in utility. To warrant the allowance of a patent it must be capable of some beneficial use. An invention is deemed useful when it will operate to perform the functions and secure the result intended and its use is not contrary to public health or morals. The issuance of a patent is *prima facie* evidence of utility, and the burden is always on the defendant to show that it is not useful. *Parker v. Stiles*, Fed. Cas. No. 10749, 5 McLean, 44. But the defendant is not at liberty to raise the question of a want of utility if he has himself infringed, because

infringement amounts to an admission of utility. International Tooth Crown Co. v. Hanks' Dental Association (C. C.) 111 Fed. 916, affirmed in 122 Fed. 74, 58 C. C. A. 180. The court below found infringement and in our opinion was clearly justified in so doing. Therefore the defendant is estopped from setting up a want of utility. It is perfectly evident, however, that there is no want of utility in the complainant's device, which is one of very great usefulness.

The evidence to show that the device is without utility is wholly unpersuasive, and the criticism of it contained in the affidavits of the experts on behalf of the defendant is so evidently based upon an entire misunderstanding of the invention that we feel justified in absolutely disregarding it. The theory of these experts is that a device which merely indicates when water temperature of 212 degrees F. is reached is useless. In the first place, the Boyce device indicates temperature changes at all times, although it does not indicate exact water temperature. Changes in the water temperature cause changes in the air temperature in space about it. And in the second place the mere attainment of a water temperature of 212 degrees F. is not necessarily destructive of the automobile engine or disastrous to the mechanism. The damage to the engine and the mechanism is not wrought the moment threatening conditions arise. The danger arises from disregarding the conditions after they arise and continuing to operate the machine in disregard of them. The Boyce device, by providing a warning signal indicating that the point of excessive heat has been reached, is an effective and timely warning that a dangerous degree of overheating has been reached, and if it is not disregarded all serious trouble can be avoided.

[4] If we entertained a doubt as to the utility of this device, or as to its having been anticipated by the prior knowledge and use, or as to its being a different invention from that originally disclosed and claimed in the application on which the patent was granted, we should think an abuse of discretion had been committed in granting an injunction before final hearing. But being convinced as we are in respect to these matters, we see no reason to think that the court abused its discretion in awarding the injunction.

The order granting the preliminary injunction is affirmed.

J. F. ROWLEY CO. V. COLUMBUS PHARMACAL CO.

(Circuit Court of Appeals, Sixth Circuit. January 5, 1915.)

No. 2512.

1. PATENTS ~~328~~—VALIDITY AND INFRINGEMENT—ARTIFICIAL LIMB SUSPENDER.

The Rowley patent, No. 644,464, for an artificial limb suspender intended for use on artificial legs for amputations above the knee, which combines in one suspender passing over the shoulder a carrying strap slidingly attached to the thigh section, and slidingly connected to an operating strap attached to the leg or shin section, discloses invention; also construed, and held infringed.

2. PATENTS ☞162—EFFECT OF PATENT OFFICE PROCEEDINGS.

Applicant foresaw the variation from his form which defendant subsequently made, chose language which well covered that later form, and explained to the Patent Office that the language was selected with that purpose and did have that effect. Thereupon the claim was allowed. *Held*, that the claim in the patent should receive the construction thus given by Office and applicant.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 237; Dec. Dig. ☞162.]

3. PATENTS ☞155—EFFECT OF DISCLAIMER.

When necessary to construe a claim limitation in order to determine the question of infringement, a specification disclaimer of an older patent will not control the meaning of the claim limitation, unless the respect in which defendant's device differs from the patent is the same respect in which the patent differs from the reference.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 227½; Dec. Dig. ☞155.]

4. PATENTS ☞168—EFFECT OF PATENT OFFICE PROCEEDINGS.

When the examiner inquired regarding the meaning of a phrase which might or might not limit a claim in a material particular, and the applicant explained that it was used in the broader and nonlimiting sense, and the Office acquiesced, and the patent issued, that may be sufficient to turn the scale in favor of the broader construction.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 243½, 244; Dec. Dig. ☞168.]

5. PATENTS ☞172—DEFENDANT ACTING UNDER LATER PATENT.

The existence of a later patent, under which defendant's structure is made, has no tendency to show noninfringement.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 247; Dec. Dig. ☞172.]

Appeal from the District Court of the United States for the Eastern Division of the Southern District of Ohio; John E. Sater, Judge. Suit in equity by the J. F. Rowley Company against the Columbus Pharmacal Company. Decree for defendant, and complainant appeals. Reversed.

W. R. Rummier, of Chicago, Ill., for appellant.

C. C. Shepherd, of Columbus, Ohio, for appellee.

Before WARRINGTON, KNAPPEN, and DENISON, Circuit Judges.

DENISON, Circuit Judge. In this infringement suit, based on patent No. 644,464, issued February 27, 1900, to Rowley, for an "artificial limb suspender," the court below, assuming the validity of the patent, thought the claims must be so limited that there would be no infringement, and dismissed the bill. The plaintiff below, the owner of the patent, appeals.

While the ultimate disposition of the case must depend upon the construction of the claim in respect to an express limitation found therein, this in turn depends in part upon the advance which Rowley made over existing knowledge; and the inquiry may well be approached along the road adopted in *Davis Co. v. New Departure Co.* (C. C. A. 6, October 16, 1914) 217 Fed. 775, — C. C. A. —. This is

to inquire: First, what was Rowley's real advanced step or new concept? Second, is defendant's structure within the limits of such advance? And, third, if so, do the terms of the claim, when fairly read, require such an interpretation as to sanction defendant's appropriation of Rowley's idea?

[1] The controversy has to do with artificial legs for amputations above the knee, and comprising a thigh section, in the upper open socket end of which the leg stump is inserted, and, pivoted to the thigh section at its lower end, what is called in the patent the leg section (but which we hereafter call the shin), comprising the foot and the leg below the knee. To approximate natural conditions, two things must be accomplished: The thigh must be held to the wearer's leg stump and body so as to permit free motion at the waist and at the hip joint; and also there must be some means of controlling the action of the shin in addition to its mere gravity-caused oscillation. To hold the thigh in position, it was natural to carry over the shoulder a strap fastened to the front and rear of the thigh at its top, and as the front and rear straps would slacken and tighten with the motions of walking or sitting, and as the resulting chafing or rubbing over the shoulder would be troublesome, it would seem that this supporting strap might be, at the bottom, a continuous loop attached to the top of the thigh on one side and sliding through its point of attachment, so that the strap would remain always tight. This thought was elaborated by making the lower part of the strap in the form of a cord which would slide easily through guides or loops at the point of attachment, by providing two of such sliding attachments for the cord forward and back of the side center of the top of the thigh, and by doubling this arrangement on the other side of the thigh, so that there were either two separate loops and straps passing over the shoulder, or so that the strap depending from the shoulder was bifurcated; one section slidingly attached to the outside, and the other to the inside of the thigh near its top. All this had been done by Collins, in 1884 (patent No. 295,675), and by Winkley in 1887 (patent No. 371,239), as well as by others. These devices were carrying straps, and carrying straps only, and in each embodiment the carrying strap was not connected to the shin, save by that indirect connection which was inherent in the knee joint, and whereby, when the thigh was lifted and moved, the shin would swing by the force of gravity, sometimes aided by interposed flexor and extensor spring connections.

To accomplish the other necessary object, viz., control of the shin, various elastic and spring connections between thigh and shin had been provided, and a cord or strap attached directly to the shin and running upward over the thigh was not new. We cannot find that the idea of operating the shin through such cord by the voluntary movement of the upper part of the body had ever been clearly disclosed. Reichenbach, by patent No. 41,238 of 1864, had such a cord attached to a belt, and the belt was connected to a strap over the shoulder; but this seems to be a mere carrying device, and Reichenbach depended on the motion of the thigh to affect the shin. In the construction illustrated, it is possible that lifting the shoulder would have a tendency

through this cord to swing the shin forward, but that is doubtful; and the idea never occurred to Reichenbach, so far as his specification indicates. Legran, by patent No. 52,057, of 1866, provided a cord attached to the front of the shin carried upward over the thigh and attached to a "breast plate," which in turn was held in position by a bandage passing under one and over the other shoulder. This cord and breast plate were entirely disconnected and separate from the carrying suspender. Legran's construction was more likely to permit some control of the shin through a shoulder movement than was Reichenbach's; but this idea had not occurred to Legran, unless he refers to that function when he says that his cord and his breast plate and shoulder bandage press the leg and hold it firm, "and they also greatly assist in the movements of the leg by the movements of the body of the wearer." Monroe, by patent No. 58,351, shows a flexible strap connected to the shin at front and sides, and passing up the front of the thigh; but he says that these straps are to sustain the weight of the limb, and that they are "firmly secured" to the thigh, so that obviously there cannot be any shin effect from a shoulder movement. Frees, No. 401,426, comes closer than any one else; but the motion of what corresponds to the lower loop of his strap was automatic, rather than voluntary, and if this motion operated the shin by the connection shown, that function was only vaguely disclosed, and was not known to Frees. He calls the connection a spring. We are inclined to think that this function of shin control through the raising of the shoulder cannot be found in any earlier device, except by uniting thereto the ideas first disclosed by Rowley; but, however that may be, certain it is that no one of these shin operating cords had ever been attached to or made unitary with the carrying strap passing over the shoulder.

In 1899, Rowley had been engaged for many years in the manufacture of artificial legs, and was actually familiar with all the devices on the market, and with the old patents which have been mentioned. It occurred to him that he could unite into one device the old carrying strap and an operating strap for the shin. He did this by cutting off the shin strap of Legran or Monroe just above the knee and throwing away all of it above that point, and at that point slidingly connecting it to the loop of the carrying strap, which itself was slidingly connected to the thigh. See his Figs. 1 and 2, below. Obviously, this amounted to taking the lower free end of the loop of the carrying suspender, between its front and rear points of sliding attachment to the thigh, extending or carrying this loop downward, and by sliding connection attaching it to the front of the shin at a point far enough below the knee so that a pull would be operative to straighten the knee. In the form which he showed in his drawing, the sliding connection between the carrying suspender and the thigh consisted of leather loops or guides through which the cord which formed the lower loop part of the suspender would easily slide, and the sliding connection between the carrying suspender and the shin consisted of a pulley at the upper end of the shin strap, through which pulley the carrying cord also passed intermediate of its front and rear attach-

ments to the thigh section.¹ The result was that if, while the knee was bent, the wearer's shoulder was lifted, the depending loop at the bottom of the carrying suspender was correspondingly lifted, and the extensor cord reaching to the shin section correspondingly pulled, and the knee was straightened, while the compound sliding connection promoted ease of operation, and the pull upon the knee extensor cord was equalized between the front and rear parts of the carrying strap.

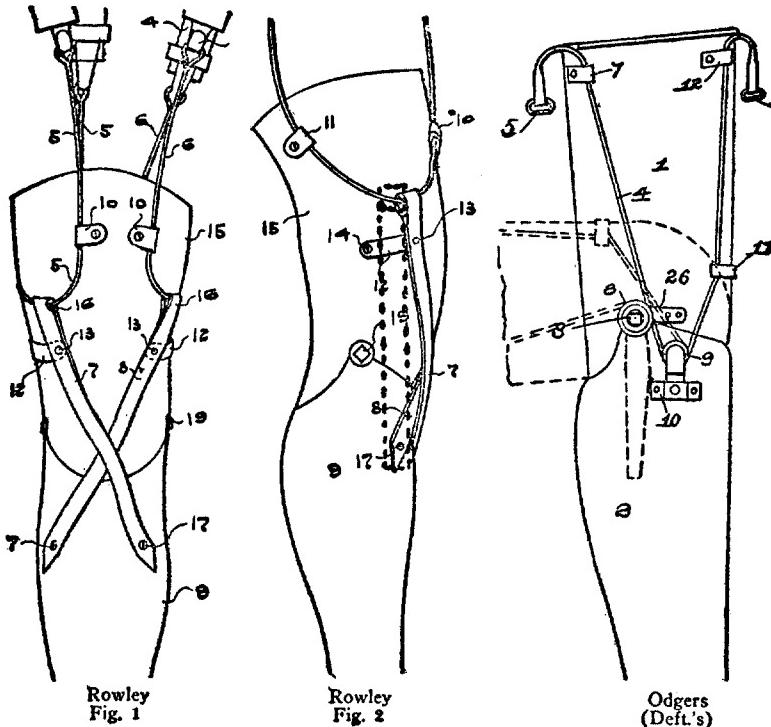
In one point of view (and if, indeed, the idea of an operating cord worked from the shoulder was not new) Rowley made only a slight change. Carrying the lower end of the suspending loop down to a point of front attachment to the shin was only uniting in one strap the former functions of the two; but when he also provided a sliding connection with the shin, which permitted the carrying strap to accommodate itself to the wearer's motions just as freely as before and in spite of the added function, he displayed ingenuity which we think amounted to invention. That it was not so obvious as might now be thought perhaps sufficiently appears from the fact that, though it has proved very useful and has greatly promoted the use of artificial legs, no one ever did think of it during the 33 years between 1866 and 1899; and, indeed, the thought might well have been discarded as impracticable, because it might seem that the same device could not be sufficiently tight to hold the thigh in position and sufficiently loose to permit the vertical shoulder motion necessary for operating the shin. We are satisfied, also, that Rowley's real invention did not lie in any specific arrangement of the cords or straps or guides or pulleys. These details of his device involved only skill and experience in exact places of attachment or precise selection of form. The real inventive thought was that the sliding carrying cord could reach down and be, by a sliding connection, operatively united to the shin.

This conclusion is perhaps inconsistent with the opinion expressed by the District Court for the Northern District of Illinois granting a preliminary injunction based on this patent in *Rowley v. Koeber*, 135 Fed. 363. The patent was there considered as resting on a narrower basis of invention; but it is to be observed both that the scope of the patent was not very material, since the defendant imitated closely, and that the opinion makes its result depend on its finding that "the combination of a leg holder and controller in one suspender is not new." If this means that it was not new to combine in one suspender a leg holder or carrier and means of directly controlling the shin section by voluntary motion of the body, then it must be assumed to be founded on proof not in the present record. In the instant case, the novelty of this combination is not disputed by expert or by counsel; indeed, defendant's superintendent and practical man and patentee in the patents under which defendant manufactures, and who had been engaged in the artificial limb business since 1880, says that as late as 1905 the Rowley suspender was the only one he knew of

¹ In his commercial form, Rowley departed from his patent drawing by not crossing the straps but running them straight down, as indicated by the dotted lines which have been added to Fig. 2.

that was intended to accomplish the purpose of controlling the shin by means of the shoulder movement.

The defendant has used two forms of artificial leg, said to infringe. The first form has been abandoned, and we pass to the second, which is here shown by the side of Figs. 1 and 2 of the Rowley patent.



In this second form, the lower loop of the carrying cord (4) passes through and depends between front and rear points of sliding attachment to the thigh (12, 11, in front and 7, 8-26 in rear). This loop itself, without any flexible strap, is then carried down and passed around a pulley (9) on a pivoted bar (10) attached to the shin four or five inches below the knee joint (3). By reason of the swing of the lower end of the thigh within the upper end of the shin section in the knee-bending motion, the knee joint or pivot is situated several inches above the lower end of the thigh, and defendant has selected for its lowermost rearward point of sliding attachment to the thigh section a point near this pivot. The cord here passes through a guide upon the outer surface of the thigh. This guide consists of a bracket (26) opposite a grooved pulley (8) mounted loosely on the pivot bolt (3), which is, for that purpose, projected outside of the leg surface. Plainly, what we have considered as Rowley's essential idea is incorporated in this construction. The only difference between it and the form shown in Rowley (except a detail hereafter discussed) is

that the sliding connection between the carrying loop and the shin is made by extending the loop downward and passing it through a pulley on the shin instead of passing it through a pulley on a strap attached to and extending upward from the shin; and this is no departure from the substance of the Rowley invention.

[2] The remaining question is whether the claims are broad enough to protect the invention against this appropriation. There are three claims in suit, 1, 3, and 4. The first is given in the margin.² The second is to the same effect, with the expressed qualification (probably implied in the first) that the point of connection to the shin is between the two points of sliding attachment to the thigh; the fourth specifically calls for the strap as the means of connecting the shin to the carrying loop. The first limitation suggested upon claim 1 is that the reference in the claim to "a loop slidably connected to the leg section" must be confined to a strap connection, as shown in the drawing, and does not extend to the somewhat more direct connection used by defendant. It would be a sufficient answer that in defendant's actual construction a strap is employed, the only difference being that the strap is made of metal and is short, not extending above the knee; but it is further clear that neither the language employed nor the state of the art requires this limitation, and that its presence is almost necessarily negatived, by comparison with claim 4, which is differentiated alone by the inclusion of this limiting feature. If, still, there could be doubt, reference to the Patent Office proceedings shows that the examiner objected to claim 1, because the invention was definitely set forth in (present) claim 4, and because he did not see that claim 1 could refer to any structure which did not contain the strap and which could, at the same time, be operative. He referred to the strap as the "element in which, in view of the state of the art, applicant's entire novelty is held to rest." In answer to this action, applicant said:

"The strap 7 might be omitted entirely in making an operative device like applicant's invention. By providing a staple, an eye, or a ring for the upper front part of the leg section, the loop 5 might pass down through said staple, eye, or ring. In such case, the loop 5 must have a sliding movement through said staple. The device will not operate as well in this form as in the form shown, but would be an embodiment of applicant's invention, and applicant is therefore entitled to a claim covering same."

Applicant foresaw the variation from his form which defendant subsequently made, chose language which well covered that later form, and explained to the Patent Office that the language was selected with that purpose and did have that effect. Thereupon, the Patent Office allowed claim 1. After this common construction of the language by both parties, no room for doubt as to its meaning, in this respect, remains.

² "Claim 1—The combination of an artificial limb comprising a thigh section and a leg section, pivotally connected together, a suspender comprising a loop slidably connected to the leg section independently of said pivotal connection and adapted to pass over and be supported on the shoulder of the wearer, and guides on said thigh section slidably engaging said loop, all arranged to swing the leg section forward on its pivotal connection, through an upward tension on said loop."

The other matter of claim limitation gives far more trouble; indeed, the natural impression is that the limitation exists, and only a further study has led us to the opposite conclusion. The claim, after a reference to the pivotal connection between the thigh and leg [shin], requires that the loop should be slidingly connectd to the shin "independently of said pivotal connection." The defendant makes the loop run over—and, in certain motions, bear upon—a pulley which is in fact mounted on and thus physically connected to the knee pivot; and so defendant says that it has not made the connection between loop and leg section "independently of said pivotal connection."

It is of some significance that the mounting of this pulley on the knee bolt is fortuitous, or, at most, only a matter of mechanical convenience. There is no inherent functional relation between them. The pulley, as a pulley, is of no importance, save as an anti-friction device. It forms a part of the guide which slidingly engages the loop, and which guide might be mounted on the thigh at any other point in this vicinity as well as directly in line with the knee bolt. That this is true, and that the guide of which the pulley forms one side is in real effect mounted on the thigh, and not upon the knee bolt itself, is demonstrated by the exhibit in which defendant's structure has been altered by cutting off the knee bolt flush with the outer surface of the thigh and carrying the pulley in the same position, but without any physical connection with the knee bolt, and mounted wholly upon the thigh. It operates precisely as before the change was made, and shows that nothing was gained by the physical connection between pulley and knee bolt, except perhaps strength. In effect, and because thigh and shin sections here overlap, defendant found the end of the knee pivot projecting through the surface of the thigh section, and used that projection as a convenient means of mounting its loop guide on the thigh.

This dissection of defendant's structure strongly suggests that defendant's connection of the loop to the shin is really made "independently of" the knee pivot, in every fair sense of the word "independently"; but another reason leads to the same result. In all the earlier cases of carrying suspenders, the shin was "connected" to the suspender through the medium of the knee pivot. This was an indirect connection, but distinctly operative. The suspender loop, in moving the thigh forward or back, caused the shin to move correspondingly. This was because there was a secondary connection, through the knee pivot. Rowley, for the first time, connected this loop to the leg section more primarily or directly; that is, without relying upon the knee pivot as the means of the connection. That means still remained, and still had its indirect effect; but his idea was to control more completely the action of the shin in response to the loop, by providing a further and more direct connection—which he did by means of his strap, and which the defendant does by carrying the loop itself down and attaching it to the shin. This connection is made "independently of" the knee pivot, and there is nothing on the face of the patent which prevents giving merely this meaning to the phrase in question, and assuming that it means "connected directly and by means in ad-

dition to the knee pivot." If it is entitled to bear this meaning, then defendant does not escape infringement merely because its loop on its way to a point of direct connection with the shin is brought into indirect and really nonfunctional physical contact with the pivot.

[3] Aside from the descriptive language itself, there are two considerations bearing on the propriety of this construction. One is the disclaimer found in the specification in these words:

"I am aware of the patent to Reichenbach, of January 12, 1864, and do not claim the construction therein shown."

Reichenbach carries his shin-operating cord down through guides on the thigh and then over a pulley mounted on the knee bolt. In this respect, his structure is essentially like defendant's; and the Reichenbach disclaimer might mean that Rowley distinguished from Reichenbach because the Rowley loop did not run over a pulley on the knee bolt. If the differentiation in this respect was the only office properly attributable to the Reichenbach disclaimer, it would be controlling upon the meaning of the claim limitation now being examined; but this was not the only point of difference, and so this was not, necessarily, the difference on which Rowley was depending. Reichenbach did not have at all the combination of the carrying suspender and the operating suspender which was the real essence of Rowley's invention; to this difference the disclaimer attaches, and by it the disclaimer is satisfied. Indeed, since it was perfectly obvious that Rowley did not use the knee joint and pulley construction, there would have been the less reason for making a disclaimer directed to this point. It follows that the Reichenbach disclaimer, while somewhat persuasive towards giving to the claim limitation a construction which will exclude defendant's device, is only persuasive, not convincing; and even this persuasiveness is removed by examining the file wrapper contents. It appears that the limitation had been inserted in the claims and had been interpreted as is below recited before Reichenbach was cited as a reference. It was, in fact, inserted to distinguish from Gault, who had only an indirect connection through the joint.

[4] The other consideration is that the very question was raised in the Patent Office. The examiner, at one point, said:

"Why was the clause 'independently of said pivot connection' introduced in the claims? Does any reference show a connection to the pivot, or could the suspender operate at all if connected to the pivot? By the pivot, we understand the applicant means the knee joint."

Applicant replied:

"Applicant's object in inserting 'independently of said pivotal connection' * * * was merely to definitely distinguish between the connection of the loop whereby the leg [shin] is moved, and the connection which exists indirectly through the thigh section."

Without further objection in this respect, the claim was allowed and the patent issued. Here, again, we have a problem of construing ambiguous language in the claim, and we find that applicant explained what it did mean, distinctly giving it the broader of two possible constructions, that the examiner acquiesced, and that the patent issued. Of course, such a statement by an applicant, made argumentatively

and merely acquiesced in or possibly overlooked by the examiner, could not avail by way of estoppel against the public to make a claim broader than it reads; but we see no reason why it is not sufficient to turn the scale in favor of the broader construction, as against doubtful inference and inconclusive argument, when the only question is whether the claim shall have a breadth which its language fairly permits, and which is necessary in order that it be commensurate with the actual invention. We conclude that in this claim "independently of" means "not relying upon, but by means in addition to," and that defendant infringes.

Stress is put by defendant's counsel and expert on the claim that by running the cord over a pulley on the knee pivot defendant gets a "leverage" which greatly increases the ease of moving the shin, and demonstrates that he employs a different principle from that used by Rowley. So far as we can comprehend this claim, we think it has no force. There is really no question of leverage involved, because there is no lever. Mechanically, the shin is a crank, of which the knee pivot is the shaft and the crank axis is the straight line passing from the pivot down through the point where the cord is attached to the shin. True, in a precise sense, a crank is a lever, and the exact center of its shaft is its fulcrum; but, in that sense, the "leverage" would depend on the distance between the knee pivot and the point where the cord pulls on the shin, and clearly this is not what the defendant is talking about. The real problem is one of angle—one of direction of pull. Its force will be greatest if at right angles to the swinging shin, and will decrease as the angles diminishes, reaching *nil* when the pull is in a direct line. It follows that, if the thigh-bearing point of the pulling cord was exactly at the center of the knee pivot, there would be no leverage whatever; the crank would be on the dead center. Out of the pull of this cord, defendant gets *no* "leverage," excepting as it moves its bearing point away from the pivot; and this it does only by the length of the radius of the pulley revolving on the pivot. All this is only confusing, because, in truth, this "leverage" or efficiency of pull depends on the angle between the supposed crank and a line from its cord attachment to the cord's effective bearing point on the thigh. That effective bearing point will be midway between the two actual bearing points—the loops or points of sliding engagement—and, manifestly, will change as the shin swings. The extent of the desired forward pull will, at each moment, depend on the average distance by which the two thigh attachment points are forward of the shin crank line projected upward. When defendant moved one of these points—the bearing edge of its knee pivot pulley—back almost to this dead center line, the "leverage" was diminished, not increased. The fact is that defendant's pulley contact with the cord simply insures that when the knee is bent this cord cannot fall back so that the pull will be in the wrong direction, and insures that at least one bearing point shall always be forward of the shin axis. Rowley got the same result in his patent by making his straps cross over the front of the knee, and in his commercial form by anchoring the strap so it could not fall back too far.

[5] Defendant was manufacturing under later patents granted to its superintendent. We have had occasion to hold that the existence of such later patents, while they imply that defendant's structure made thereunder embodies patentable improvement over plaintiff's device, yet have no tendency whatever to show noninfringement. *Herman v. Youngstown*, 191 Fed. 579, 584, 112 C. C. A. 185. If there are exceptions to this rule, as was intimated in the case cited might be possible, the present case is not one of them. Each of defendant's patents is directed to the details of its construction; plaintiff's whole theory is that his patent is relatively generic. If that theory is wrong, he has no case; if that theory is right, it makes no difference how many patents have been granted to others for later modifications.

The decree must be reversed, with costs, and with directions to order the usual injunction and accounting.

SIROCCO ENGINEERING CO. v. B. F. STURTEVANT CO.

(Circuit Court of Appeals, Second Circuit. December 15, 1914.)

No. 31.

1. PATENTS ☞328—VALIDITY AND INFRINGEMENT—CENTRIFUGAL FAN.

The Davidson reissue patents, No. 12,796 and No. 12,797 (original No. 662,395), for a centrifugal fan or pump, *held* void for anticipation by the Fournier & Cornu French patent, No. 254,064, of February 18, 1896; also *held* not infringed.

2. PATENTS ☞66—RIGHT TO PATENTS—PRIOR FOREIGN PATENT.

That a foreign patent duly granted was permitted to lapse for nonpayment of the required annual fee, or was never printed, or that the device was not commercially successful, does not change its effect as an anticipation, which, under Rev. St. § 4886, as amended (Comp. St. 1913, § 9430), will defeat the right to a subsequent patent for the same device in the United States.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 79, 81; Dec. Dig. ☞66.]

Appeal from the District Court of the United States for the Southern District of New York.

On appeal from an interlocutory decree sustaining the validity of two reissued letters patent No. 12,796 (reissue A) and No. 12,797 (reissue B) granted May 26, 1908, to Samuel B. Davidson of Belfast, Ireland, for a centrifugal fan or pump. These patents were assigned to the Sirocco Company, complainant herein.

The original patent was granted November 27, 1900, on an application filed September 21, 1898. Attached to the description were 11 sheets of drawings containing 28 separate figures. No model was filed. The patent contained 17 claims. The reissue was applied for March 16, 1908, over 7 years from the date of the original, and the patents were reissued in 3 divisions containing 36 claims. Reissue C is not involved in the present controversy as it is conceded that it is not infringed.

The District Court sustained claims 1, 5, 7, 10 and 13 of reissue A and 1, 3, 4, 5, 10 and 14 of reissue B, and allowed the complainant three-fourths of the costs, charges and disbursements. The court ordered a perpetual injunc-

☞ For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

tion against the defendant and referred it to a master to take an account of the gains, profits and advantages derived by the defendant by reason of its infringement. Judge Ray's opinion is published in 208 Fed. 147. His opinion holding that it was not incumbent upon the trial judge to pronounce judgment upon claims which were not relied on by the complainant or discussed by either party is reported in 209 Fed. 624. The opinion of Judge Holt holding that the Sirocco Company was not a mere licensee of Davidson but was an assignee, and therefore entitled to reissue the patents, is reported in 184 Fed. 84. The opinion of Judge Noyes sustaining a demurrer to a bill on the reissued patents because of a delay of 7 years in applying for the reissue, but permitting an amendment excusing the delay, is reported in 171 Fed. 440. The opinion of Judge Hough holding, after the amendment that the reissues were not so clearly void as to justify a decision dismissing the bill on demurrer is reported in 173 Fed. 378.

William H. Kenyon, of New York City, Benjamin Phillips and Alfred H. Hildreth, both of Boston, Mass., and Omri F. Hibbard, of New York City, for appellant.

Frederick P. Fish and Arthur C. Fraser, both of New York City, for appellee.

Before LACOMBE, COXE, and ROGERS, Circuit Judges.

COXE, Circuit Judge. The immense size of the record, the vast number of exhibits and illustrative models, the complex questions of mechanics and the six hundred and eleven pages of argument found in the briefs, where nothing, apparently, is conceded, combine to make this one of the most complex and annoying patent controversies which has come to the attention of the court. We shall endeavor, therefore, to localize the issue, as far as possible, and confine it to those references which approach nearest to the combinations of the Davidson patents. If any one of these shows the Davidson centrifugal fan or pump, it is not necessary to examine numerous other patents that may or may not show it. If, on the other hand, the nearest approach in the prior art does not show Davidson's fan, it is safe to assume that it will not be found in others more remote. In other words, the court should do what the members of the bar are usually reluctant to do, viz., limit the issue of patentability to a comparison of the patented structure with the few structures of the prior art which most nearly resemble it.

[1] Section 4886 of the Revised Statutes (Comp. St. 1913, § 9430) provides, inter alia, that one who has invented a new and useful machine not known or used by others in this country and not patented or described in any printed publication in this or any foreign country before his invention or discovery thereof may obtain a patent therefor. Broadly speaking, Davidson's fan consists, First: Of a rotary member having a plurality of elongated blades arranged lengthwise in an axial direction so as to inclose within them a relatively large and practically unobstructed intake chamber and receive and carry with them the air as they revolve and discharge it tangentially. Second: It consists of means for mounting the rotary member so as to permit the tangential escape of the air. The first claim of the reissue, which seems to be identical with the first claim of the original patent, sufficiently describes the invention for the purpose now under consideration. It is as follows:

"1. A centrifugal fan or pump, comprising a rotary member having numerous elongated blades arranged lengthwise in approximately axial direction, and in substantially drum form, so as to inclose within them a relatively large and practically-unobstructed intake-chamber, and in transverse section arranged, relatively to the axis and direction of rotation, to carry the fluid with them rotatively and discharge it tangentially, and a means for so mounting said rotary member as to permit the tangential escape of the fluid discharged from said blades."

The other claims are printed in the opinion of the District Court and need not be repeated here.

The claims are alike in using broad general language, and it will be observed that almost every element is limited or defined by some adjective or qualifying phrase. Little that is definite or certain is found in the claims. Take the first claim, previously quoted, as an example. The first element of the centrifugal fan as there stated is a rotary member having *numerous* elongated blades. Sixty would be numerous; so would 16, and any number between the two. They are to be arranged in an *approximately* axial direction and in *substantially* drum form so as to inclose within them a *relatively* large and *practically* unobstructed intake-chamber. In transverse section they are arranged, *relatively* to the axis and direction of rotation.

The other claims use the same and other qualifying adjectives, all designed to bring within their terms a wide range of equivalents.

But such indefinite language enables the defendant to invoke the rule that what infringes if made afterwards, anticipates if made before the alleged invention. Prior to Davidson's contribution to the art the idea of agitating air by a rapidly revolving wheel with a plurality of vanes or paddles attached to its spokes had been embodied in a number of structures. The patents which in our judgment most closely approach the Davidson fan are the British patent to Ser, 1884, and the French patents to Levet and Fournier & Cornu, issued, respectively, in 1890 and 1896.

Ser's patent is chiefly important in that it shows a steel plate or paddle wheel with a large number of blades. The drawing shows 32 inclined forwardly in the direction of their rotation. In the number, width and forward slant of the blades mounted in the usual snail-shaped casing, the Davidson idea is found, although embodied in a somewhat different machine.

The French patent to Levet was issued April 25, 1890, for a new fan having guides for the streams of fluid. The fan is inclosed in a snail-like shell having interior conduits for dividing the air and discharging it into the outlet tube. In the inlet of the case are guides for directing the entrance of the air. There are 48 blades in the Levet fan, all of them curved, in the direction of the rotation and alternating in width. The intake chamber is large, being about three-quarters of the total diameter of the wheel. The direction of the curvature of the blades varies according to the speed of the wheel, the inventor expressly stating that the blades are curved, "so that the component shall be in proportion to the speed of the wheel and of the air." It is true that Levet's is a double inlet fan, but it could require no inventive genius to split it in two or use one side only. In a similar way, it would

require no inventive genius to put two Davidson fans back to back and use them as a double fan.

We incline to the opinion that the best single reference cited by the defendant is the Fournier & Cornu patent No. 254,064 dated February 18, 1896. In this conclusion we, apparently, agree with the complainant, for it was this patent which induced the complainant to dismiss the suit on the original Davidson patent No. 662,395 and petition for a reissue in three divisions. In the amended bill the complainant avers:

"That your orator and said patentee were advised by their counsel that said foreign patent, considered in connection with the previous citations, constituted a prior art approaching so closely to the wording of certain of the claims of said letters patent as to render them void or of doubtful validity, and that said Letters patent were too broadly worded."

It further alleges that for these reasons the patent was reissued in three divisions, as previously stated. As this patent is commendably short and concise in its statements, it is here given in full:

"Specification annexed to the patent of fifteen years applied for the 18th of February, 1896, by Fournier & Cornu, represented by Marillier & Robelet, 42 Boulevard Bonne-Nouvelle, Paris, and which was granted to them by decree of the Minister of Commerce, Industry, Post and Telegraph on the 30th of May, 1896, for 'new system of ventilator called the rational.'

"This application for a patent has for its object to guarantee us the temporary exclusive ownership, in accordance with the law, of a new system of ventilator to which we have given the name of *the rational*. In order that its construction and operation may be fully understood, we shall hereinafter describe it with the aid of the figures of the drawings thereof annexed to this specification.

"Fig. 1 is a longitudinal exterior elevation.

"Fig. 2 is an exterior plan view according to Fig. 1.

"Fig. 3 is a longitudinal sectional elevation on line X Y, Fig. 2.

"Fig. 4 is a vertical section on line X' Y', Fig. 3.

"This ventilator consists essentially of a wheel A having curved iron blades B, and mounted centrally upon a disc shaped casting C. The blades B, whose width is equal to $\frac{14}{100}$ of the exterior diameter of the wheel A, are connected at their ends by two circular sheet metal bands D, D', having an exterior diameter equal to that of the wheel A, and an interior diameter equal to $\frac{72}{100}$ of their exterior diameter.

"The disc shaped casting C is splined upon the shaft F of the wheel A. The total width of the paddle wheel may vary, but should equal at least two-thirds of the exterior diameter. The blades B are in the shape of an arc of a circle, the tangent G to a blade at the point H where it meets the outer circumference of the turbine and the tangent G' of said circumference at the same point and directed in the direction of rotation intersect at an angle of 115 degrees.

"The wheel A rotates in a casing I which may be a casting or consist of iron, and the lateral walls of which are provided with circular openings, J, J', whose centers are on the axis of the shaft F of the wheel A and whose diameter is equal to the diameter of the circle formed by the inner edge of the circular bands D, D'. The two openings constitute the suction orifice of the ventilator. A single exhaust opening is formed at K in the cylindrical wall of the casing I, having a width equal to that of the interior of the casing, and a section less than the sum of the sections of both the suction openings J, J'.

"If it is desired to exhaust from a great distance, the suction openings J, J', will each be provided with a tube communicating with a single passage ending at the supply pipes.

"The wheel A turning with the desired speed, the blades B throw out the

air between them and draw in the air contained in the middle portion *L*, which in turn draws in the air at the outside of the casing *I* through the openings *J*, *J'*, said air thus entering naturally the central portion *L* and passing through the spaces *M* between the wings *B*, and out freely by the exhaust opening *K*.

"When it is desired to conduct the exhausted air to some distance, or to have a considerable water pressure shown by a manometer, a tube of gradually diminishing diameter is attached to the exhaust opening *K*. It will then be found that the smaller the outlet, the greater the pressure obtained.

"We have shown by experiment that the velocity of the air in leaving is substantially equal to the outer circumferential velocity of the turbine.

"Résumé.

"We claim as our invention and as our exclusive property temporarily according to law, the system of ventilator called *the rational* above described and shown in one embodiment in the figures of the drawings annexed to the specification, reserving to ourselves the right to vary the shapes, dimensions, combinations and materials composing its different members; to apply it broadly and to make therein hereafter, all improvements which experience may suggest to us, provided that we do not depart from the essential spirit of our invention."

The drawings of this patent so closely resemble those of the patents in suit that to the casual observer the only important differences are in the number of the vanes, the manner in which they are mounted on the wheel and the manner in which the wheel is mounted on its axis. Unquestionably the patent shows a multivane fan having 16 blades on the wheel. The drawings of the patent in suit show more than this and the brief for the complainant asserts that there are 80 such blades, but the claims are not limited to any specific number and the complainant is seeking to hold structures having a much smaller number of blades.

We think that Fournier & Cornu blades are within the terms of the Davidson patents and claims. There is nothing in the specifications or claims limiting them to a particular number of blades or fixing definitely their length or breadth. Certain limits are fixed within which all subsequent fans will infringe and all prior fans will anticipate. We think the Fournier & Cornu fan is within these limits. Whether it incloses within its blades a relatively large and practically unobstructed intake chamber depends upon the question whether or not "the disc shaped casting *C* splined upon the shaft" is such an obstruction. But the complainant will hardly contend for a ruling which, if sustained, might relieve the defendant from the charge of infringement. If the casting *C* constitutes an obstruction, it is not easy to see why the spider arm contrivance of the defendant is not much more of an obstruction.

The Fournier & Cornu blades are in length about five times their radial depth and are within the language of the reissues in suit which require that the length of the blades shall approximate at least three times their radial depth. In other words, the length and depth of the Fournier & Cornu blades are well within the description of the Davidson blades. We cannot resist the conclusion that the Fournier and Cornu structure, in the construction of its paddle wheel, in the number, length, width and circular form of the blades and in the size and lo-

cation of the intake chamber, is within the claims of the reissues and, having been made before, anticipate those claims.

Compare it with claim 1 quoted above:

"A centrifugal fan or pump, comprising a rotary member having numerous elongated blades."

It has such a fan.

"Arranged lengthwise in approximately axial direction."

Its blades are so arranged.

"In substantially drum form."

It has such form.

"So as to inclose within them a relatively large and practically unobstructed intake-chamber."

It has such a chamber.

Blades "in transverse section arranged relatively to the axis and direction of rotation, to carry the fluid with them rotatively and discharge it tangentially."

It has such blades.

"A means for so mounting said rotary member as to permit the tangential escape of the fluid discharged from said blades."

It has such a means.

Though differing in many minor details, the Fournier & Cornu fan has the same object in view and operates upon the same general principle as the Davidson fan, having a large intake chamber and a fan of many vanes. As the catalogue of 1900 states:

"The width of the fan may, without any inconvenience, be equal to, or even greater than its diameter, the production of air varies according as its width is of greater or less dimension."

We quote the above not because we consider the catalogue which was published in France, as evidence, but because it is a concise statement of what seems to us a self-evident proposition.

The Davidson blades, as shown in the model, are narrower, in proportion to their length, than are the Fournier & Cornu blades, as shown, but the Fournier & Cornu patent states that the total width of the paddle wheel may vary but should equal at least two-thirds of the exterior diameter, so that the instruction of the patent may be followed and a Davidson fan produced.

[2] It is asserted and not disputed that under the French law an annual tax of 100 francs is necessary to keep a patent alive and that both the French patents lapsed by reason of the failure to pay such tax. It is also asserted, and not denied, that these patents were never published or printed, although certified copies of such patents may be procured from the French patent office. We are not at all sure as to complainant's position regarding these French patents. At pages 96, 97, of volume 1 of its brief, it recites in detail the facts above stated, relating to the proceedings in the French Patent Office, but we do not find that it deduces any definite conclusion therefrom further than that the patents "are entitled to no serious weight."

However, we are clearly of the opinion that we must consider these prior patents, irrespective of the fact that the tax was not paid. There can be no doubt that the Levet and Fournier & Cornu structures, in question, were *patented* in France. Nothing more is needed. That is all that the statute makes necessary; no patent can issue here for that which is *patented* in a foreign country, and it is patented there the moment it is sealed or enrolled. *Ireson v. Pierce* (C. C.) 39 Fed. 795.

It is not essential to a valid patent that the description and claims should be printed. It is enough that the officials have acted upon the application and granted the patent. We do not see how, in view of the statute and the decisions, we can ignore these French patents because they were not generally known and were not commercially successful. The law does not make these features essential in considering the structures of the prior art. As was said in *New Departure Bell Co. v. Bevin Bros.*, 73 Fed. 469, at page 476, 19 C. C. A. 534, 540:

"It may be a hardship to meritorious inventors, who, at the expenditure of much time and thought, have hit upon some ingenious combination of mechanical devices, which for aught they know, is entirely novel, to find that, in some remote time and place, some one else, of whom they never heard, has published to the world, in a patent or a printed publication, a full description of the very combination over which they have been puzzling; but in such cases the act, none the less, refuses them a patent."

The question of infringement turns principally upon whether, or not the defendant's fan has "a practically unobstructed intake chamber," which is an element of each of the claims in issue. In other words, if the intake chamber is obstructed to any appreciable extent, it is not within the claims. What the patentee meant by "practically unobstructed" is made clear by the following from the original specification:

"The blades are extended approximately parallel to the axis of rotation being arranged in drum form, so as to inclose within them an approximately cylindrical intake-chamber which is practically unobstructed by blades or other parts."

These "other parts" are precisely what the defendant has placed in the intake chamber. It has a wheel centrally mounted on a large hub having a diameter apparently about four times the width of the blades, with six spokes made of angle iron extending from the hub and fastened to the center of the blades. In this respect the defendant's fan resembles closely the old paddle wheel fan. That such a device obstructs the intake chamber seems to be the opinion of the patentee himself, for in his British patent, accepted February 23, 1889, he claims a rotary fan—

"the vanes having no other support from the spindle than that given by the disc, so that a free and unobstructed passage for the air from the center of the fan to the vanes is provided."

We can think of but one rational interpretation of this language, viz., that if support be given to the vanes from the spindle by other means than the disc, the free passage of air from the center of the fan to the vanes will be obstructed. In other words, that spokes extending from the hub to the vanes are obstructions which prevent the

free and unobstructed passage of air. The spokes present quite a different situation from the one heretofore presented when considering the Fournier & Cornu smooth disc shaped casting. Here we have a wheel with six spokes revolving rapidly in the center of the chamber. It would seem that these spokes must necessarily cut, agitate and make cross currents in the inward flow of the air. To this extent, at least, the intake chamber is obstructed.

The decree is reversed with costs.

McCLAVE-BROOKS CO. v. M. H. TREADWELL CO. et al.

(Circuit Court of Appeals, Third Circuit. January 20, 1915.)

No. 1872.

PATENTS ☞328—VALIDITY AND INFRINGEMENT—GRATE.

The McClave patent, No. 831,178, for a grate designed for burning culm or other very fine coal by the use of double-beveled overlapping grate bars having a narrow, inclined opening between them instead of a vertical one, discloses a device novel in conception, useful in results, and inventive in character, and is valid; also *held* infringed.

Appeal from the District Court of the United States for the Middle District of Pennsylvania; Chas. B. Witmer, Judge.

Suit in equity by the McClave-Brooks Company against the M. H. Treadwell Company and the Stoever Foundry & Manufacturing Company. Decree for defendants, and complainant appeals. Reversed.

For opinion below, see 212 Fed. 442.

Melville Church, of Washington, D. C., and Welles & Torrey, of Scranton, Pa., for appellant.

Edwards, Sager & Wooster, of New York City, and A. A. Vosburg, of Scranton, Pa., for appellees.

Before BUFFINGTON, McPHERSON, and WOOLLEY, Circuit Judges.

BUFFINGTON, Circuit Judge. In the court below the McClave-Brooks Company, the plaintiff, owner of patent No. 831,178, granted September 18, 1906, to William McClave, for a grate, charged the M. H. Treadwell Company and the Stoever Foundry & Manufacturing Company with infringement thereof. On the question of infringement that court, in an opinion reported at (D. C.) 212 Fed. 442, held:

"That the defendants' device embodies the structural features and functions shown in the complainant's grate cannot be successfully denied. An effort at comparison is useless, and would indeed be difficult, on account of similarity."

On the question of validity, it held the patent did not involve invention and was void. From a decree dismissing the bill, the plaintiff took this appeal.

In our view this case is of more importance than a mere patent dispute over conflicting types of furnace grates for ordinary coal. Mc-

Clave's patent concerns the use as fuel of the culm banks of the anthracite coal fields of Pennsylvania—a very different problem from the burning of common coal. It is, as its specification states, "designed principally for use in the burning of exceedingly fine anthracite fuels"; and, unless the uncontradicted testimony that this invention has successfully solved difficulties in the economical and satisfactory use of that fuel is untrue, it would seem the device before us is of more than ordinary moment. The extent of culm waste is apparent, when it is recalled that the Pennsylvania State Commission of 1893 reported that, since the commencement of mining, the coal and coal dirt sent to the culm banks has been 35 per cent. of the total production; or to put this in concrete form, it is estimated the workable coal that has been dumped in the anthracite coal field of Pennsylvania would cover the state of Rhode Island evenly with solid workable coal 125 feet deep. These great culm banks were for years regarded as worthless and as nuisances in the way of haulage and use of valuable space. In that regard they resembled the dump heaps of gold and silver mining referred to by this court in *Moore v. Tonopah*, 201 Fed. 532, 119 C. C. A. 626, where we said:

"Great quantities of treated ore went to the dump heap; and while laboratory filtration methods showed the presence, and indeed the extraction, of such metals, yet no one devised any commercial means or process by which this metal-laden dumperage or slime could be avoided or utilized. As a value containing, but unavailable, feature these ore dumps occupied a relation to gold and silver mines like that of a slag pile to a blast furnace or a culm bank to an anthracite mine."

It is clear, therefore, that any discovery which substantially contributes toward the utilization of such supposedly worthless dumperage challenges the careful attention of those charged with the administration of the patent laws.¹

The proofs in this case show that William McClave, the patentee, was a resident of the anthracite regions, and had for many years been engaged in a study of the fuel use of bituminous duff, anthracite culm, and of coals generally. In 1882 he began a series of experiments to improve methods, and since then has taken out a number of patents preceding the one here involved. The successful burning of very fine coal involves several problems. To get the desired heat from such fuel there must be a thick, deep bed of culm. Such fine coal packs closely, and combustion must take place from below. This was effected by a draft forced up from a sealed ash pit. To utilize, while it was still in the bed of the coal, the gas produced by such forced combustion, it was necessary to keep the blast from breaking through such bed in spots. In case it so broke through the draft would center in such paths of least resistance, and two results would follow: First, such

¹ The problem of culm use is one which has caused much discussion. See *Engineering Magazine*, vol. 11, p. 655; *Engineering News*, vol. 34, p. 426; *American Electrician*, vol. 13, p. 434; *Engineering and Mining Journal*, vol. 80, p. 1113; *American Contract Journal*, vol. 16, p. 314; *Transactions of the American Institute of Mining Engineers*, vol. 20, p. 628; *Same*, vol. 22, p. 581; *Railroad Gazette*, vol. 34, p. 466; and *Journal of the Franklin Institute*, vol. 142, p. 26.

gases of combustion as were generated would not be burned in the coal body, with the undesirable results hereafter noted; and, second, the coal body outside of these paths of least resistance would not be thoroughly and economically burned. It will thus be seen that the maintenance of a bed of uniform resistance to the passage of the draft was of vital importance. The difficulty of doing so was increased by the necessity of frequent cleanings of the grate caused by the rapid forming of ashes and clinkers incident to this fuel. To do this it was necessary to push or pull the burning mass to one end of the furnace chamber and then tilt the grate bars at the other end to discharge such clinkers. The fuel was then redrawn over to the chamber end thus cleaned. In addition to draft difficulties, others arose from grate bars. Under intense heat it was found that grate bars increase in length. This increase is not the usual contraction and expansion of iron, but is a growth which permanently lengthens the bar. Thus, a scientific witness of the defendants says:

"The expansion referred to in the patent in suit is a phenomenon familiar to artisans. It is not the temporary expansion which takes place when metal is heated, but is a permanent expansion, continuing even after the metal is cold. It is produced gradually during weeks or months of exposure to high temperatures and is observed more particularly in the case of iron. The percentage of expansion is small, but has nevertheless, under some circumstances, to be taken into account."

One of the plaintiff's witnesses says:

"When heat of a high temperature, such as that emanating from incandescent carbonaceous fuel, which is in contact with said metal, the crystalline structure, and probably also the molecular structure of the iron, is thrown so far apart that the crystals become disarranged to an extent that they do not nest back into the same positions or nestings that they formerly occupied, and the metal is said to have grown and really has grown permanently to the extent of the stoppage by such disarrangement."

Referring to caps of grate bars such as are here involved, the witness adds:

"Caps about 12 inches long under the intense heat of some boiler furnaces would grow from three-eighths to half an inch or more."

It is therefore manifest that, where sectional, dumping grates are used, their adjacent ends must be initially spaced far enough apart to allow for this metallic growth, otherwise the grate bars will jam, buckle, or overlap. But this initial, and substantially wide, opening would be highly objectionable where culm was used. When culm becomes red hot it runs like dry sand and drops through and makes an opening in the fuel bed through which the forced draft finds a path of least resistance. The mischief caused by such breaks through the bed is shown in testimony quoted below. These difficulties McClave overcame by a device which, in the afterlight of accomplishment, is very simple, but which no one had ever suggested. Mechanically speaking, he simply double-beveled the one end of an abutting, sectional dumping grate bar. As the court below rightly said, "Any foundryman would know how to do it;" but the significance of McClave's instruction to the art did not lie in telling how to double-bevel the end of a grate bar, but in disclosing the important functional use that could

be made of such double-bevel in successfully burning fine coal. This double-bevel, overlapping grate bar—shown, for example, in the accompanying patent drawing—made possible, amongst others, three essentials to the successful burning of culm: First, the initial spacing apart of the grate bars without allowing the fine coal to run through the spacing. This was done by providing an inclined, instead of a vertical, opening between the ends of adjacent grate bars. Second, it provided a harmless path or outlet for the metallic growth of grate bars. This was done by paralleling instead of abutting the grate bar ends, so that their growth, instead of jamming each other or closing the initial opening, allowed the growing bars to parallel each other and maintain an opening between them. Third, the upper bevel kept the growth of the bar from making the furnace floor so abruptly uneven as to catch the fireman's scraper and prevent the rapid shift of the fuel requisite to its use. It will thus be seen McClave's device by its narrow inclined space prevented fuel escape, provided initially, and thereafter maintained, suitable air passages where the sections met, prevented the forced draft concentrating at these openings, and thereby secured uniform draft passage through the entire fuel bed, caused the gases of combustion to be burned in the coal bed, and kept the growth of the bars from creating unevenness in the furnace floor. Mechanically, by the use of a stop, he effected complete control over the size of the opening, and by maintaining such opening between the ends of the grate bars he lessened their burning out. These features were pointed out to those familiar in the art in his specification:

"In forming a rocking grate for the fuels commonly in use it is generally sufficient to bring the edges of the adjacent bars within a quarter of an inch of each other, and the fuel will not run through. When, however, the very small grades of anthracite fuel are burned upon the grate, an opening of the size of a quarter of an inch is usually too large and will militate against the general efficiency of the whole grate, principally because small coal sifts through between the bars; and where a forced draft is used the air rushes through these lines of least resistance with such force as to tear a bed of small anthracite fuel badly. * * * In this manner also a small space may always be maintained between the adjacent and overlapping ends or teeth of the caps to permit of a small feed of air at that point, which not only assists in the even distribution of air for combustion, but maintains the parts of the grate bars and their caps at a slightly cooler temperature than if they were permitted to rest one upon the other."

That these and other valuable results have been brought about by McClave's device is shown by his uncontradicted testimony:

"The construction that I invented to solve this problem and the one which is now in suit has met with very great success and has practically solved the difficulties that confronted us previous to that time. For the construction named is so arranged that it has a small and uniform mesh throughout the entire grate surface, including spaces between the edges of the bars, said uniformity of spaces being an absolute necessity to the uniform combustion of the fuel, for, if any such meshes are larger than the others, it causes lines of least resistance for the blast to pass through in excess over that of the other portions of the grate surface, thereby blowing such fine fuel above such points into humps and ridges, not only producing unequal depths of fuel in the fire bed, but also making some portions of the bed so thin that



the excess of blast passing through same without combining chemically with the fuel and without even having time to become highly heated would act simply as a dilutent of temperature through the combustion chamber generally, with the consequent loss of efficiency in the furnace. It will be noted also that my construction provides a means for overcoming any deleterious obstruction to the use of fireman's cleaning tools arising from the permanent expansion or growth of the bars caused by the intense heat of the fuel resting upon them, in that the edges of the dumping bars are so beveled from the surface downward in opposite directions to a certain depth forming depressions thereby below the general surface of the grate when the bars are in normal position and form thence in the same direction, so that they may grow and lap upon each other to cover the space necessary for the extreme limit of said growth without having the upper edges project upwards to an extent that would materially interfere or obstruct in any appreciable manner the passing to and fro of the fireman's hoe, or other tools, in the process of cleaning or redistribution of the unconsumed fuel after such cleaning. It may be noted also that this construction provides the use of a space between the edges of the bars (never larger than the mesh in the bars themselves) for the purpose of furnishing additional air that may be required for some kinds of fuel and also for the purpose of taking up, so to speak, a portion of the growth which occurs in such grate bars, thereby preserving for a longer period the plane surface of the entire grate before the edge of one grate bar begins to creep or climb up the beveled edge of the other grate bar. It may be readily seen, however, that the edges of the bars may be started in use with their edges in contact, but in such case, when the bars obtain their full growth, the edge of the bar on the upper side will have traveled to a greater height and the plane surface of the entire grate will have more of a wave line than when an initial space is made in the start. Some kinds of fuel need more air than others, in which case it is more desirable to have such initial space. In no case, however, will the upper edge of the bar project upward in a manner that will interfere to any appreciable degree with the use of the tools heretofore described. It will also be noted that adjustable means have been provided for the maintenance of such space between the edges of the bars where increased air space is necessary, but in case the fireman is negligent in the matter of preserving such space, and the bars grow together, the beveled edge of the bar in front provides a way for the other edge to automatically adjust itself with respect to the adjacent edge without liability of any of the bars becoming wedged between each other on account of such growth, thereby preventing interference in any way with the operation of the dumping of the grate."

The problems confronting McClave, and which he attempted to solve by the patent in suit, are thus stated by him, and were wholly different from those involved in the use of ordinary commercial coal:

"The problem that confronted me when I invented that particular grate arose out of the fact that neither I nor any one else, as far as I could see, had a construction of grates that would serve the purpose of economically burning very small sizes of anthracite fuel, generally known as Nos. 1 and 2 buckwheat. All the grate constructions, so far as I could see or know, had too large a mesh to prevent such fuel sifting through into the ash pit in a large measure, especially when the fire was cleaned and the fuel redistributed on the surfaces of the grate, and had, at the same time, a means for quickly dumping the consumed portions of the fuel when the fire was cleaned. There were some grates of a stationary character, known as perforated plate grates, that would hold the fuel up fairly well, but they were undesirable, inasmuch as they were not very durable, and it took such a long time to clean the fire that the temperature of the furnace would go down very low during the operation, thereby causing a loss of efficiency in the fuel. Aside from this perforate plate grate there were no forms of grate construction, so far as I could see, that did not have too large a mesh for the economic burning of the fine fuel above named, or that did not have a lack of uniform-

ity in size in the air spaces throughout their entire surface, or when made with imperforate plates with a side draft, as may be found in one or two cases, that were not subject to some of the objections already named, i. e., lack of uniformity of air space or means for sifting into the ash pit, of the unconsumed fuel. The problem also involved a construction in which the mesh would be small enough to hold up such fuel and prevent it from sifting, but that it could be operated quickly when it became necessary to clean the fire and at the same time interfere but little, if any, with the tools used by fireman for purposes of cleaning and redistribution of the unconsumed portion of the fuel left in the furnace for the purpose of kindling a new fire of fresh fuel."

After a careful study of the proofs, we have reached the conclusion that his device was novel in conception, useful in result, and inventive in character. Its gist, from the standpoint of utilizing culm—and the utilization of such fuel was its aim—lies in the distribution of the forced draft through the entire fuel bed—a method not unlike in its sphere that whereby Moore's patent in the case above cited (201 Fed. 536, 119 C. C. A. 626) treated the refuse of ore mines. So far as is now shown, such draft uniformity does not seem obtainable without using a grate bar with a double-beveled end. In reaching our estimate of McClave's device, we have not overlooked the large number of prior patents cited. Nearly all of them were devices for burning ordinary coal. They threw no light on the problem of successfully using fine coal. The few specially addressed to the fine coal problem did not solve it and left no impress on the art. Possibly the most pertinent one is that of Hildreth, No. 112,246, of 1871. It is lacking in the features which make McClave's device a success. Apart from the fact that its date shows it long preceded successful efforts to solve the fuel use of culm, it will be noted that Hildreth had a solid, imperforate grate bottom as contrasted with McClave's perforate grate-bar bottom, and the space between his sections was vertical. Whatever piecemeal anticipation may be suggested by the general resemblances of stray parts of the appliances of the numerous patents cited, it may be said of them all that in none of them is there any suggestion of any use of such appliances for functional purposes as McClave first utilized in his device. Nor have we overlooked the Linde Company grate bar, the upper end of which is rounded so as to resemble a bevel. The pattern from which that bar was cast shows a straight, unbeveled top. The rounded contour, which the well-burned bar in evidence now shows, is palpably but the dropping of the point through the action of heat. Not only is this contour accidental, undesigned, and nonfunctional, but there is no evidence that the Linde furnace was one in which culm was or could be successfully burned.

The Treadwell Company pleads to the jurisdiction of the court and contends it is not answerable for the acts of the other defendant Stoever Foundry & Manufacturing Company. Without detailing the facts, we may say they are such as to bring the case within the principle of Smith v. Elberfeld, 203 Fed. 476, 121 C. C. A. 598. As that case commends itself to us the plea cannot be sustained.

We are of opinion, as was the court below, that there is substantial similarity between the two devices. We therefore hold infringement has been shown.

The decree below will therefore be reversed, and the case remanded, with directions to enter a decree adjudging the patent valid and infringed, and the customary relief.

AMERICAN GRAIN SEPARATOR CO. et al. v. TWIN CITY SEP-
ARATOR CO.

(Circuit Court of Appeals, Eighth Circuit. January 12, 1915.)

No. 4148.

PATENTS ~~328~~—INFRINGEMENT—GRAIN SEPARATOR.

The Froslid patents, No. 668,175 and No. 684,751, each for a grain separator, held infringed as to claim 1 of each patent.

Appeal from the District Court of the United States for the District of Minnesota; Charles A. Willard, Judge.

Suit in equity by the Twin City Separator Company against the American Grain Separator Company and Robert J. Owens. Decree for complainant, and defendants appeal. Affirmed.

See, also, 202 Fed. 202, 120 C. C. A. 644.

Amasa C. Paul, of Minneapolis, Minn., for appellants.

James F. Williamson, of Minneapolis, Minn., for appellee.

Before HOOK and CARLAND, Circuit Judges, and REED, District Judge.

REED, District Judge. The Twin City Separator Company, appellee, hereinafter called the plaintiff, sued the appellants, the American Grain Separator Company, a corporation, and Robert J. Owens, its president, hereinafter called the defendants, for alleged infringements of claim 1 of United States letters patent No. 668,175, issued February 19, 1901, and the three claims of United States letters patent No. 684,751, issued October 15, 1901, both to Anton S. Froslid, for improvements in fanning mills or grain separators, and for an injunction and accounting of profits and damages. The hearing resulted in a decree for the plaintiff that defendants infringed claim 1 of each of said patents by its machines known as "Winner No. 1" and "Winner No. 2," and granted an injunction restraining defendants from further infringing said claims, with the usual order for an accounting of profits and for damages. The defendants appeal.

Both of the patents in suit were before this court in the case of J. L. Owens Co., Appellant, v. Twin City Separator Co., this appellee, in 168 Fed. 259, 93 C. C. A. 561, where they were adjudged valid February 25, 1909, and to have been infringed by the machine made and used by the J. L. Owens Company, defendant in that suit, called the "Superior" machine. We refer to the opinion in that case for a full description of the principle and mode of operation of the mill of the two patents in suit, and of the mill there held to be an infringement thereof. We are now to determine whether or not these pat-

ents are infringed by the Winner machines No. 1 and No. 2, made by these defendants.

At the time of the suit against the J. L. Owens Company, above mentioned, the defendant Robert J. Owens was a stockholder in and superintendent of that company, and was familiar with the "Superior" machine, held in that case to infringe the "Hero Mill," as it is called, of the patents in suit. He subsequently sold his stock in that company, and organized, or assisted in organizing, the corporate defendant in this suit, the American Grain Separator Company, became its president, and the owner of a majority of its stock. After the decision of the J. L. Owens Company Case, the defendants engaged in the manufacture and sale of the alleged infringing machine, Winner No. 1, involved in this suit. In this mill the defendants substitute, for the long flexible aprons between the sieves of the "Superior" mill of the J. L. Owens Company, aprons consisting of thin slats of wood an inch and a half wide and $\frac{3}{16}$ of an inch apart, held together by straps of leather fastened across the centers of the slats, which are placed diagonally across the sieves on which they ride, and slanted in the opposite direction from the slats in the aprons above and below the sieves. The plaintiff, claiming that these aprons of the Winner mill No. 1 infringed the mill of the Froslid patents, brought this suit September 27, 1911, against the defendants to restrain such infringement, and asked for a preliminary injunction against the use of the Winner mill No. 1. Upon a hearing of this application on the bill, affidavits and counteraffidavits the court held the Winner mill No. 1 to be an infringement of the claims of the Froslid patent in suit, and on October 23, 1911, granted a preliminary injunction restraining them from further infringement of said patents by that mill or in any other way. The defendants then made their Winner mill No. 2, which differs from the Winner mill No. 1 in that the wooden slats are $2\frac{1}{16}$ of an inch wide and $\frac{5}{16}$ of an inch apart connected by wooden strips laid directly across the slats and fastened to the stationary parts of the mill by rigid strips of metal. After the defendants had made and sold some of these mills, the plaintiff moved against them for contempt in violating the injunction of October 23, 1911, by the use of that mill. After a full hearing of both parties upon affidavits and counteraffidavits, the court early in March, 1912, held the Winner mill No. 2 to be an infringement of claim 1 of each of the Froslid patents, and imposed a fine upon the defendants, which they paid.

The defendants then devised a plan for a mill called the Winner No. 3, submitted a drawing thereof to, and moved the court for permission to use its mills furnished with aprons as described in this drawing for a period of 30 days, and for a modification of its opinion in the contempt proceedings. The proposed Winner No. 3 differed somewhat from the Winner mills Nos. 1 and 2; but it need not be further noticed, as the motion was denied, and the proposed Winner No. 3 mill is not involved in this appeal.

Thereafter the defendants moved to dissolve the injunction of October 23, 1911, and upon a hearing of this motion, on the affidavits and counteraffidavits theretofore used upon the former hearing and addi-

tional affidavits, and upon a full hearing accorded to both parties, the motion to dissolve was denied, and from that order an appeal was brought to this court under section 129 of the Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1134 [Comp. St. 1913, § 1221]). Upon the hearing in this court the order appealed from was affirmed. *American Grain Separator Co. et al. v. Twin City Separator Co.*, 202 Fed. 202, 120 C. C. A. 644. Reference to the opinion in that case is made for a statement of the facts, and the grounds upon which the refusal to dissolve the injunction of October, 1911, was affirmed, from which, and the record before us in this case, the foregoing statement is condensed.

Thereafter the case proceeded to a hearing in the District Court, upon which an interlocutory decree was rendered, holding that Winner machines No. 1 and No. 2 each infringed claim 1 of the two Froslid patents, but that neither infringed the second and third claims of the second of said patents. The usual decree for an injunction and for an accounting of profits, and for damages, was rendered, and the case is here upon an appeal from such decree.

The principal errors assigned are that the court erred in refusing to dismiss the bill, and in decreeing that said Winner machines Nos. 1 and 2 infringe, respectively, claim 1 of the first and claim 1 of the second Froslid patents.

Claim 1 of the first Froslid patent, No. 668,175, reads in this way:

"In a grain separator, the combination with a series of overlapping sieves receiving the passed stock, one from the other, the lower sieves projecting successively in a given direction, of a corresponding series of main or head decks underlying each higher sieve for receiving from the head portion of the overlying or higher sieve and delivering to the head of the next lower sieve, and a corresponding series of lap decks underlying the lower portion of each higher sieve and overlying the upper portion of each lower sieve, said lap decks inclining in the same direction as said main decks and sieves, for receiving from the lower portion of the overlying sieve and delivering to the central portion of the lower or underlying sieve, substantially as and for the purposes set forth."

Claim 1 of the second Froslid patent, No. 684,751, reads as follows:

"In a grain separator, a series of overlapped sieves, and a series of overlapped dividing aprons, with the sieves extending beyond the ends of said aprons, and with the delivery ends of the overlying aprons overlapping the receiving ends of the underlying aprons, substantially as described."

The contention in behalf of the defendants is in effect, if we correctly understand their counsel, that the thin wooden slats or grids of the defendants' Winner machines perform the office of a rider, and keep the oats in a horizontal position to prevent or retard their falling through the sieves of the mill, as do the riders of the mill of the Froslid patents, but in a wholly different way from the flexible rider of that mill; that in the Froslid invention it is the weight of the flexible rider moving with the sieve or screen which keeps the oat kernels in a horizontal position thereon, and that such rider must be sufficiently flexible at all times to meet the irregularities of the sheet of stock beneath it; that in the Winner machines the slats do not move with the sieves, but are anchored by some means in a sta-

tionary position, and the sieves move between them, instead of reciprocating with them, as in the Froslid patents; that the result is that the slats of the Winner machines operate to level the oats on the sieves, not by weight, but by reason of the relative movement of the sieve and the slats, which continually push the oats along the sieves in a horizontal position, so that it is immaterial whether the slats used are or are not flexible; that the slats of the Winner machines are not carriers, as this term is used by this court in its opinion in the J. L. Owens Company Case, for the stock passing through a sieve, if any may strike on the sieve or screen below or on the slats, but if in the latter position it at once seeks the sieve between the riders, and cannot be delivered from one slat to another below, because the slats are not in overlapping relation; that the slats are not dividing aprons or carriers, as are those of the Froslid patents, but are simply spreaders or levelers of the grain, and their mode of operation is radically different from the parceling aprons or carriers (lap decks so-called) of the Froslid patents; that the separating action of the slats or riders of the Winner machines is exactly the same as it would be if those slats were not present.

In so contending no account seemingly is taken of the fact that in the Winner machine No. 1 the slats are $1\frac{1}{2}$ inches wide and less than $\frac{1}{4}$ of an inch apart, and in the Winner machine No. 2 the slats are $2\frac{1}{16}$ inches wide and $\frac{5}{16}$ of an inch apart. This permits of a considerable degree of flexibility, and for the definite purpose of adjustment of the slats to the sheet of stock upon which they ride; otherwise, the slats might as well be in one piece, covering the entire sieve, without any opening in it. With the machine in operation the shaking movement lengthwise of the series of sieves, and its effect upon the stock, practically all of the stock will fall between the slats, and will be thus carried forward to the faces of the underlying slats, until it passes the entire set of sieves. The slats in the Winner machine, in relation to each other and to the sieves between them, are therefore in such position that the unseparated stock is delivered from the upper sieves to the lower slats, substantially as in the so-called lap decks or dividing aprons of the mill of the Froslid patents. Such slats, therefore, perform the same function, accomplish the same results, and in substantially the same way as the so-called lap decks or dividing aprons of the mill of the Froslid patents, and the imperforate aprons with transverse slots or openings in them of the "Superior" mill of the J. L. Owens Company. The fact that the aprons of these Winner machines are divided into thin slats, with narrow spaces or openings between them, instead of a single apron for each sieve, as in the Froslid mill, and of different material, is not sufficient to save them from infringement of the Froslid patents.

We have carefully considered the evidence upon the question of the alleged infringement of the Froslid patents by these Winner machines, and the briefs of counsel of the respective parties bearing thereon; and without reviewing the testimony, or the briefs of counsel further, we deem it sufficient to say that in our opinion the decree of the District Court, finding infringement of claim 1 of each of the

patents in suit by defendants' Winner mills Nos. 1 and 2, is amply sustained by the greater weight of the evidence, and that the decree should therefore be affirmed.

The appellants complain of the admission in evidence of the letter of the J. L. Owens Company to Rollef Berg of November 11, 1904, and an advertising folder or circular of said company, used in the hearing of the case of the J. L. Owens Company, and the testimony of Anton S. Froslid in relation thereto upon his examination in this case. It is the contention of the plaintiff that the testimony shows that this letter and advertising circular was prepared by the defendant Robert L. Owens, or by his direction, when superintendent of the J. L. Owens Company, and is therefore admissible as against him. This testimony was taken under the prior equity rules, and whether or not properly admissible in this case, we are of opinion that no possible prejudice could result to the appellants, because of its admission. See present equity rule No. 47 (198 Fed. xxxi, 115 C. C. A. xxxi).

The decree of the District Court is affirmed.

STROMBERG MOTOR DEVICES CO. v. ZENITH CARBURETOR CO.

(District Court, N. D. Illinois, E. D. February 3, 1915.)

No. 225.

1. PATENTS ~~297~~—PERSONS CONCLUDED—INFRINGEMENT SUIT—PERSON PARTICIPATING IN DEFENSE.

A manufacturer of an alleged infringing device is not estopped by an interlocutory decree finding infringement in a suit against a dealer to which it was not a party, although (but not openly and avowedly) it paid the expense of the defense and took an appeal in the name of the defendant; nor is it bound by the final decree where, after the appeal, defendant discharged the attorneys it had employed for him and employed another, who dismissed the appeal and consented to a final decree against his client, waiving an appeal therefrom.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 481-488; Dec. Dig. ~~297~~.]

2. PATENTS ~~328~~—VALIDITY AND INFRINGEMENT—CARBURETOR.

The Ahara patent, No. 684,662, for a carburetor, and the Richard patent, No. 791,501, for an improvement thereon, both *held* valid and infringed by two forms of carburetors made and sold by defendant, but not infringed by a third.

3. PATENTS ~~328~~—VALIDITY AND INFRINGEMENT—CARBURETOR.

The Sturtevant reissue patent, No. 12,611, and the Anderson patent, No. 1,063,148, each for a carburetor, *held* valid, but not infringed.

In Equity. Suit by the Stromberg Motor Devices Company against the Zenith Carburetor Company. On final hearing. Decree for complainant.

Silas H. Strawn, Arthur H. Boettcher, and Charles A. Brown, all of Chicago, Ill., for complainant.

Frank H. Culver and Edward Rector, both of Chicago, Ill., Clarence P. Byrnes, of Pittsburgh, Pa., and William M. Swan, of Detroit, Mich., for defendant.

SANBORN, District Judge. This is a suit similar to Stromberg Co. v. John A. Bender Co., decided in this court February 13, 1914, and reported in 212 Fed. 419. It is brought on the Ahara patent, No. 684,662, October 15, 1901, and the Richard patent, No. 791,501, June 6, 1905, which were in the Bender Case, as well as the Sturtevant re-issue of February 19, 1907, No. 12,611, and the Anderson patent, No. 1,063,148, May 27, 1913, applied for July 26, 1912.

In the Bender Case the decision turned on the distinction between suction-controlled and gravity-controlled nozzles, and infringement was found because it was thought the Zenith device there shown, like Ahara, was not gravity-controlled in its secondary nozzle. This case must also turn on the same distinction so far as the Ahara and Richard patents are concerned.

The Zenith device which was decided to be an infringement in the Bender Case was made with a circular air-inlet in the U-shaped tube of one-eighth inch. This was decided in that case to be so small as not to prevent subatmosphere in the U-tube, and it was supposed by the court, and so decided, that subatmosphere was likewise created in the U-tube of Ahara. Thus it was concluded that the two devices worked substantially the same, Zenith being only an improved extension of Ahara, and infringement was therefore adjudged. It was also thought that, if Zenith had followed the true Baverey principle, there would have been no infringement.

In the present case the proof as to infringement shows substantially the following: Three devices made by defendant were produced, Nos. 1, 2, and 10. No. 1 has four sixteenth inch vent holes (which are equal in area to one eighth inch); No. 2 shows two three-sixteenth inch vents; and No. 10 one eighth inch vent. In other respects the devices are identical with those held to infringe in the Bender Case, except that a later form has an additional restriction on the air entering the starting well. No. 1 was made between August, 1911, and August, 1912, and has four small holes as air-intakes. No. 2 was made between March, 1913, and April 19, 1914, when it was sold. No. 10 was made in March, 1912, was later discontinued, and No. 2 substituted for it.

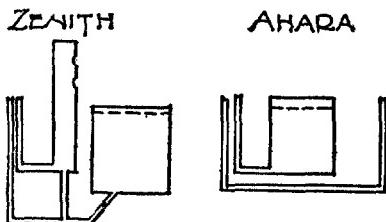
At the time this suit was begun No. 2 was being made, and is the one defendant is furnishing to customers. The other two types have been discontinued, but a few of them may have been still sold at the filing of the bill. Before that time the device had so changed as to contain two vent holes in the U-tube, each of three-sixteenths inches diameter. This type was first made in December, 1913, or January, 1914. In June, 1913, the enlargement of the vents was begun. The particular device shown as Exhibit No. 2 in evidence was sold in April, 1914, just after the interlocutory decree in the Bender Case, with two eighth inch vents, having been originally sold in February, 1914, returned to the factory, and resold in April without change. The defendant has not intended to sell any devices since that decree with less than two three-sixteenths vents. So the matter practically comes down to the question whether carburetors with two three-sixteenths vents, said to create no vacuum at all in the U-tube, should be held to infringe.

By referring to the small accompanying diagrams it is obvious that during normal operation there is partial vacuum in the Ahara U-tube. Mr. Miller says:

"I concede that the subatmosphere in Ahara's well may be very considerable, but I do not think the amount of it entered into Ahara's calculations. I want to make myself clear on that, and I confess to do so by referring to Anderson. I think Anderson intended to get for a given purpose a subatmosphere. I think Ahara has a subatmosphere, but I do not think it was for any intentional purpose, and I do not think that it was a regulatable one. I have stated many times that when the Ahara device is operating on a multi-cylinder engine the suction affects the amount of fuel which can drop from the L-tube to the U-tube."

Miller also states that there is practically no suction in that form of the Zenith device shown in Fig. 3 of the Zenith catalogue of 1911. In other words, the U-tube nozzle in Ahara is affected by suction, and the Zenith is not, so far as Fig. 3 is concerned. In the Bender Case it was thought that both the actual devices of Ahara and Zenith were suction-controlled, but that if the latter were not there would be no infringement. It is, however, insisted by complainant that the forms of the Zenith device in evidence (Nos. 1, 2, and 10) work just like Ahara on a variable speed, multi-cylinder engine.

The first cut shows the Zenith device with the suction nozzle at the left and the gravity nozzle on the right. The second shows the Ahara device, both nozzles being suction-controlled, the first because it is a tube of uniform size, and the other because it is not open to the atmosphere. The dotted lines show the fuel level.



[1] *The Question of Estoppel.* A preliminary question is presented, whether the Zenith Company is bound by the decree in the Bender Case. The Zenith Company was wholly in control of the defense of the Bender Case up to the interlocutory decree, and until after an appeal from that decree had been taken by the Zenith Company in Bender's name. Down to that time it employed Bender's solicitor and counsel, paid them, and bore all expenses of every kind without any expense to Bender. But such acts on its part were concealed as far as possible; they were not "open and avowed," as those words are used in the authorities.

While that appeal was pending, however, a radical change in the situation occurred. Bender was still the sole nominal defendant, in absolute control if he desired to assert it. He discharged the attorneys who had been provided for him, employed a new attorney, and dismissed the appeal taken in his name by the Zenith Company. Then, as the final step, Bender's new attorney consented to the entry of a final decree and waived an appeal therefrom. The Zenith Company was thus entirely excluded from the case before final decree. That decree was by consent, and was directly contrary to its interest. It is not estopped by the interlocutory decree, because finality is essential. Harmon v.

Struthers (C. C.) 48 Fed. 260; Bradley Mfg. Co. v. Eagle Mfg. Co., 57 Fed. 980, 6 C. C. A. 661. It is not concluded by the final decree, because it is not a party of record, and because a consent decree binds no one but the parties thereto. It is apparent that the Zenith Company never did absolutely control the defense, nor was such defense as it did make up to the interlocutory decree an open or avowed one.

The interlocutory decree was entered early in March, 1914, and on March 30th a motion was made by complainant to bring in the Zenith Company as a party defendant to the Bender suit. This was denied. On this date Bender's attorneys were discharged, and a new one substituted, a final consent decree entered, and Bender's appeal dismissed. At the time of the hearing complainant's attorneys suggested or offered in court to Bender's former attorneys that they could appeal if the Zenith Company would appear. Obviously that company on its own initiative could have applied to the court to become a party to the record for the purpose of appeal, so this suggestion by complainant's attorneys amounted to nothing more than that they would not oppose such an application by the Zenith Company. Persons whose interest is affected by a decree may be made parties and allowed to appeal. *Sage v. Central Railroad*, 93 U. S. 412, 23 L. Ed. 933. This could have been done with respect to either decree.

Because the Zenith Company lost control of the proceedings, the final decree entered by consent of complainant and Bender's new attorney, and the Zenith Company's defense was never open and avowed, so as to make the estoppel mutual between the complainant and the Zenith Company, there is no estoppel. The rule of *res judicata* does not apply, whatever may be the rule of *stare decisis*.

Cases holding the "open and avowed" rule are cited by defendant as follows: *Lane v. Welds*, 99 Fed. 286, 39 C. C. A. 528; *Andrews v. Pipe Works*, 76 Fed. 166, 22 C. C. A. 110, 36 L. R. A. 139 (this circuit); *Cramer v. Singer Mfg. Co.*, 93 Fed. 636, 35 C. C. A. 508; *Singer Mfg. Co. v. Cramer*, 109 Fed. 652, 48 C. C. A. 588; *Hanks Dental Ass'n v. International Tooth Crown Co.*, 122 Fed. 74, 58 C. C. A. 180; *Lacroix v. Lyons* (C. C.) 33 Fed. 437; *Plumb v. Goodnow's Adm'r*, 123 U. S. 560, 8 Sup. Ct. 216, 31 L. Ed. 268; *Litchfield v. Goodnow's Adm'r*, 123 U. S. 549, 8 Sup. Ct. 210, 31 L. Ed. 199.

Cases for plaintiff, to the effect that the participation of the Zenith Company made it a substantial party, are cited as follows: *Theller v. Hershey* (C. C.) 89 Fed. 575 (patent case); *National Folding Box & Paper Co. v. Dayton Paper Co.* (C. C.) 95 Fed. 991 (patent case); *Bemis Car Box Co. v. J. G. Brill Co.*, 200 Fed. 749, 119 C. C. A. 229 (patent case); *Ward v. Clendenning*, 245 Ill. 206, 91 N. E. 1028; *Bradley Mfg. Co. v. Eagle Mfg. Co.*, 57 Fed. 980, 6 C. C. A. 661 (patent case); *Gilbert v. American Surety Co.*, 121 Fed. 499, 57 C. C. A. 619, 61 L. R. A. 253; *Penfield v. Potts & Co.*, 126 Fed. 475, 61 C. C. A. 371 (patent case); *Confectioners' M. & M. Co. v. Racine E. & M. Co.* (C. C.) 163 Fed. 914 (patent case); *Bryant El. Co. v. Marshall* (C. C.) 169 Fed. 426 (patent case).

[2] *Comparison of Ahara and Zenith.* The validity of the Ahara and Richard patents, including the prior art, has been most fully and

thoroughly presented, from every possible point of view, with an abundance of illustrative charts, including a searching attack upon both of these patents. This will serve to present the questions to the best advantage on review; but, so far as I am concerned, I have seen no reason to change the conclusions reached in the Bender Case as to the validity of these patents. I think Ahara is valid, that Richard is an extension or improvement thereof, and that both should also be sustained here on the rule of stare decisis. This trial has, however, clarified what seem to be the controlling principles of the various devices, making it easier to deal with the question whether the change in the Zenith carburetors has relieved them from the charge of infringement.

The Ahara invention was designed for a constant speed, hit and miss, gas engine. When it is sought to apply it to a changeable speed, multi-cylinder engine, with the exacting demands made upon that type of machine, it should be subjected to a critical examination, and given no more credit than it is fairly entitled to. Under the testimony already recited, supplemented by the Detroit test, and the Grant Park test, it is entirely clear that it is, through a considerable range of its operation, suction-controlled as to its U-shaped nozzle (as well, of course, as to its main nozzle, as in all such devices). It is equally clear that the modified Zenith device No. 2, with the three-sixteenth inlets, is not suction-controlled in its U-shaped tube or nozzle to any substantial degree.

In respect to the principle of the Zenith device the following testimony was given by Prof. Wagner:

"We have in Zenith two jets capable of independent adjustment—one a single jet of the old type, which naturally grows richer as the speed increases; the other the compensating jet, which as I understand is entirely new with Zenith, in which the gasoline delivery is constant, and consequently, if it were mixed with the air alone, the mixture would grow leaner. Now, by so adjusting the relative influence of those two jets, the leaner growing mixture compensates for the richer growing mixture. That is shown by the table."

The ideal carburetor is thus described by Mr. Miller, complainant's expert:

"This compensation, by employing one nozzle, which varies mainly with the suction, and the other nozzle, which varies in less degree with the suction, is one of the important points used in carburetors to-day. In some carburetors, it accomplishes an automatic balancing as between a suction-controlled nozzle and a restricted nozzle, or gravity-controlled nozzle, by which a practically uniform mixture is secured under all working conditions of the engine, whether running very fast or very slow, whether running slow under a heavy load or slow under a light load, or heavy under a heavy load or under a light load. That was an improved result, in that it is the ideal condition that carbureting engineers are trying to attain."

Mr. Miller said (in this case) that the foregoing is a substantially correct quotation from what he said in the Bender trial, where he was referring to and describing the Zenith device.

The Bender decision went upon the theory that an eighth inch hole in the Zenith well would so restrict the U-tube as to create a vacuum therein, and so depart from the principle of the Baverey patent and operate just like Ahara. The vents having now been enlarged, so

that there is no subatmosphere in the well, the Ahara patent is not infringed.

There is a second feature of the Zenith mixer which is claimed to be an infringement of Ahara, and that is the priming device or starting well. This is also claimed to infringe Sturtevant and Anderson, considered further on. This starting device is entirely suction-controlled, in which respect it agrees with Ahara. Defendant insists, however, that this starting well has no constant level reservoir, only a variable level one, and so not within Ahara. For the present I will assume this to be the correct view, and therefore that Ahara is not infringed by the starting well, and consider the matter more fully in connection with the Sturtevant and Anderson patents.

The Richard Patent. This was held valid in the Bender Case, and its infringement not considered. This patent is a development of Ahara, and is of quite a limited character. One of the claims in suit reads:

"8. (1) The combination of a storage chamber; (2) a carbureting chamber connected to the engine cylinder; (3) a mixing chamber in the upper portion of said carbureting chamber; (4) a U-shaped receptacle connected to said storage reservoir; (5) suitable air ports for the other arm of said receptacle; (6) suitable air ports for said mixing chamber; (7) means for controlling said ports; (8) a valve above said carbureting chamber (throttle)."

Defendant does not divide its carbureting chamber, nor does it, in the No. 2 device, as shown in the small diagram, control its U-shaped air port, leaving it open as effectively as though its upper end was free. By the old venturi tube it somewhat restricts the lower part of the mixing chamber. Defendant does not use any form of control of the U-tube like the vane shown in the Richard drawings. Claim 10 omits the seventh element (being such means of control), and thus leaves that claim differing from Ahara only in the division of the mixing chamber and throttle. Zenith has no double chamber, and does not control its U-tube; that being also open to full atmosphere. With its narrow character, and general want of adaptability to the ordinary automobile engine, Richard should not, I think, be held infringed by Zenith mixer No. 2; the one now being made and sold.

[3] *The Sturtevant Patent.* This was not in the Bender Case. The original patent dates from 1904, reissued in 1907. This is a combination of two distinct mixers, the main one for ordinary use and the other for very low speed, and being in operation also when the main one is working. The main device is on the principle of Krebs, the air for mixing with the fuel being taken in through a spring-actuated valve, opening by the engine suction. The other one, on the other hand, is like the U-tube of Ahara, except that its nozzle is between the throttle and the engine cylinders, always subject to the engine pull, without in any way being regulated by the throttle. The Sturtevant device is thus described by Mr. Rector:

"It has always been the practice, in the operation of automobiles, to throttle down the engine by nearly, but not quite, closing the throttle valve, when it is desired to stop the car without 'killing' the engine, either for an emergency stop, or 'slow-down,' or to allow the engine to 'idle' while the car is stopped."

for a longer period. In so throttling down the engine, by nearly, but not quite, closing the throttle valve, there is always danger, particularly when it is done for the purpose of quickly stopping the car, that the throttle valve will be inadvertently or accidentally closed completely, and the engine thus 'killed.' Every one has seen this happen at street crossings and in traffic-crowded streets in the cities, with consequent annoyance to and interference with adjacent traffic. To guard against such inadvertent and accidental closing of the throttle valve, under such conditions, it has long been a common practice to provide an adjustable stop for the throttle valve, to interfere with the closing movement of the valve and prevent it from being completely moved to closed position. With such provision, the driver of the car may quickly and without exercising any care swing his throttle lever over nearly to closed position, and thus slow down his engine and stop his car, and leave the engine 'idling' if desired, without any danger of 'killing' the engine.

"Now, what Sturtevant proposed to do was to provide another means for preventing such accidental 'killing' of the engine by an inadvertent complete closing of the throttle valve. The means which he provided for this purpose consisted in an auxiliary carburetor, of smaller size, independently connected with the air intake of the engine, and *always in open communication therewith*, and not controlled in any manner by the throttle valve of the main carburetor; in other words, a *double* carburetor—a large or main carburetor, and a small or auxiliary carburetor—wholly independent of each other excepting that both are capable of operating at the same time and simultaneously supplying fuel to the engine. No valve whatever is interposed between the small or auxiliary carburetor and the air intake of the engine, so that said carburetor is always in action when the engine is running, and it is described as being of such size and capacity as to supply the engine with sufficient fuel to keep it *continuously running* at low speed. The throttle valve which is interposed between the main carburetor and the air intake of the engine is wholly independent of the auxiliary carburetor, and has no control whatever over it. When it is open the main carburetor and the auxiliary carburetor both operate (but entirely independent of each other) to supply fuel to the engine; and when it is entirely closed the auxiliary carburetor continues to operate precisely as before."

One theory of infringement is that, by providing a set screw stop at the side of the mixing chamber to prevent the throttle being entirely closed, defendant makes use of the Sturtevant second mixer. Obviously any competent driver must keep the sector arm so that the engine will keep going; and any person capable of running a car would readily think of keeping the throttle always slightly open by the use of a set screw, making it necessary to cut off the spark in order to stop the engine.

The more reasonable theory of infringement is the presence of an auxiliary starting well in the Zenith mixers, which may be thus described: The open air end of the Zenith U-shaped well lies at the side of the mixing chamber, so that one point of the circular edge of the throttle is just opposite the upper end of the well. For a starting device a second well or pipe is placed within the upright leg of the U-shaped well, and extends from a point near the bottom of the well to the top, and is then turned and carried through the side of the well, so as to communicate with the mixing chamber just under the edge of the throttle and closed by it when the throttle is shut tight. When the engine stops, fuel will flow into the bottom of this starting pipe up to the constant level. If the throttle is then opened a little and the engine cranked, the air rushing up through the main supply will carry such vapor from the main jet, and also will pull

up into the mixing chamber the small amount of fuel there stored, and thus give a richer mixture for the starting operation.

Instead of leaving the throttle so it can be fully closed, defendant adopts the common practice of providing an adjustable stop for the throttle, so it will always be at least slightly open, and the engine pull will at all times during operation or idling operate on the starting well. But no fuel will be taken in through the latter during this active period, because the bottom of the starting tube is at this time above the fuel level. When the engine stops the starting tube fills up, ready for the early suction strokes of the next start.

The following differences between the Sturtevant extra mixer and the Zenith starting well may be noted: In one the air is supplied through the auxiliary tube, and in the other from the main air supply. One operates all the time, and the other only at the instant of starting. In one the engine is started by the auxiliary mixer alone; in the other by the co-operation of main nozzle and starting nozzle. These are important functional differences, and it may be added that the Zenith starting well is not a carburetor at all, merely an auxiliary fuel supply. Sturtevant was not the first to use a double mixer, this having been done by Schumm, No. 482,201, of 1892. While Schumm does not anticipate Sturtevant, still the latter is distinguished from Zenith in all three of the usual tests of infringement—means, operation, and result. Even result is somewhat different, since in Zenith the main nozzle operates at the starting instant along with the other. Sturtevant is clearly valid, but I do not think it infringed. It is aptly characterized by Mr. Miller as “the fool-proof idea of Sturtevant,” by which the throttle can be closed without “killing” the engine. But the adjustable stop is within the inventive ability of any one who can run a car.

The Anderson Patent. This patent was applied for July 26, 1912, and is a highly specialized development of the earlier forms of the Zenith starting well, together with a complicated carburetor of late type. It is a very ingenious conception, but has not yet gone into any great commercial use. The gist of the invention is the creating and maintaining of a definite vacuum in the auxiliary well or auxiliary carburetor. The auxiliary well is supplied with fuel from a very small passage, and is directly connected with the venturi or pressure inlet, so that (to quote from the claims) there is “a variable subatmospheric pressure in said auxiliary reservoir.”

Denial of infringement rests on four propositions:

1. The earlier forms of the starting well in Zenith, sold in 1911 and 1912, contained a definite subatmosphere in the starting well and in the U-tube, and this form is also shown in the Horseless Age of November 15, 1911.
2. Anderson's auxiliary well operates all the time, just as in Sturtevant; otherwise in Zenith.
3. The Zenith starting tube is not “fed from said constant level supply chamber.”
4. The Zenith does not have “means for maintaining a definite subatmospheric pressure in said auxiliary reservoir.”

As to the first proposition, complainant contends that, although the testimony shows that the earlier forms of Zenith comprehended a vacuum in the U-tube, this feature was merely accidental and purposeless; hence there would be no anticipation under the rule in this circuit declared in General Electric Co. v. Sangamo El. Co., 174 Fed. 141, 98 C. C. A. 175, Tilghman v. Proctor, 102 U. S. 707, 26 L. Ed. 279, and other cases. Anderson adopts as an important feature of his invention the presence of vacuum in the auxiliary well. The No. 1 and No. 10 mixers, which were earlier than Anderson, could not infringe. This leaves No. 2, which has no vacuum in its auxiliary well, but only in its starting well. Here a subatmosphere was always essential, and is not in any sense incidental in Exhibits 1 and 10. Prof. Wagner testified that the vacuum pull is working all the time on the Zenith starting well, but that after the fuel has been pulled out the starting tube does not extend down far enough to touch the fuel again until a period of rest. It is true that he also says that the main difference between Anderson and Zenith is that Anderson has subatmosphere in the well, while Zenith does not; but he is here referring to the auxiliary well, not the starting tube.

It would seem to follow that if any of the Zenith carburetors would infringe Anderson, if his patent had been first, they would anticipate him, because Nos. 1 and 10 were earlier. But this does not meet the questions raised by complainant, since defendant has introduced a valve to restrict the subatmosphere in the starting tube. It not being clear that the Zenith intentionally had a vacuum in its starting well, although there always was a definite one there, anticipation does not appear with the requisite certainty, it seems that it should be held that the earlier forms of Zenith devices should not be held to show "knowledge by others in this country" prior to Anderson.

The second point is that Anderson's well works continuously, as part of his system of furnishing a mixture of variable richness, while the Zenith starting tube is out of commission as soon as the vacuum pull is strong enough to draw down the fuel in the auxiliary well below the bottom of the starting tube. This point is well taken. This is a clear difference in operation.

The third proposition is that the Zenith is not fed from the constant level supply chamber, but from the auxiliary well, which is itself fed directly from the fuel chamber. The gist of this proposition is about the same as the last, which is that when the Zenith starting tube is not supplying fuel it is getting none to supply, either from the fuel chamber or elsewhere. In this view the point is purely technical, although it is true that the two devices in this respect show a difference in operation.

The last point, that Zenith does not have means for maintaining a definite subatmosphere in the auxiliary reservoir, is well taken as far as the Zenith atmospheric well goes, but not as respects the starting tube, where Zenith does maintain, and always did have, a definite vacuum.

It may be further noticed that all of Anderson's jets are suction-controlled, while one of defendant's is gravity-controlled; also that

defendant's starting tube has no connection with the air intake, except at the very top under the throttle, while Anderson has two inlets into it from such intake.

With these differences in the means, operation, and result, particularly in operation and construction, infringement is so doubtful that it should not be decreed.

The question remains whether the feature of the Zenith starting tube infringes on Ahara or Richard, all the nozzles of which are suction-controlled. In my view the starting function is in one respect nearer to Ahara than any other part of the Zenith device. Ahara was principally designed to store fuel for a starting operation after an idle or nonshot period. So the Zenith starting well stores fuel after a period of rest, and gives a richer mixture on starting. Other analogies are not so close. It is not properly a U-tube with one end open to the atmosphere, because its lower end takes up the fuel, and opens into the main U-shaped tube or atmospheric well. Nor does it operate continuously, like Ahara, but only in starting, or for a short time thereafter. It seems, also, that special starting cups are used with the Ahara device on hit and miss engines.

If Zenith does not infringe any of complainant's patents in its main operation, as I think it does not, it should not be held to infringe on a minor operation not clearly disclosed by any of such patents. Infringement is at least doubtful, and should not be decreed.

As no infringement appears by the No. 2 carburetor, no injunction should issue, but there should be a decree to the effect that Ahara and Richard were infringed by the manufacture and sale of carburetors like Nos. 1 and 10, and for an accounting and damages, without costs to either party. The accounting should cover all forms like Nos. 1 and 10, or other forms having an eighth inch inlet, three or four sixteenths, or equivalents of either, or having a less area than one-eighth inch, or less than four sixteenths (equivalent to an eighth).

The motion made December 23, 1914, to vacate the injunction and discharge the bond, is granted.

WRIGHT'S AUTOMATIC TOBACCO PACKING MACH. CO. V. AMERICAN TOBACCO CO.

(District Court, E. D. Virginia. January 15, 1915.)

1. PATENTS ☞328—VALIDITY AND INFRINGEMENT—TOBACCO PACKING MACHINE.

The Rose patent, No. 586,076, for a machine for forming tobacco into packages, which is in fact and in terms for improvements upon the machine of a prior patent to the same patentee, discloses invention and is valid; also, *held* infringed.

2. PATENTS ☞289, 301, 318—SUIT FOR INFRINGEMENT—LACHES—DAMAGES RECOVERABLE.

Complainant contracted to furnish defendant as ordered tobacco packing machines made under a patent, at a stated price. Upon an unwarranted claim that complainant had violated the contract by refusing to furnish further machines, and that it had been advised of the expiration

of the patent, defendant ceased ordering and built 20 infringing machines which it put into use. Complainant notified defendant by letters that it had been informed of the infringement, which defendant repeatedly denied. *Held*, that delay in bringing suit after such denials was not such laches as would bar the suit, but that under the facts shown, and the patent having expired, complainant was not entitled to an injunction to restrain use of the infringing machines, to treble damages, or to an accounting for profits, but was entitled to recover as damages the profits it would have made on the machines if it had furnished them under the contract.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 467-469, 489-495, 566-576; Dec. Dig. ☞289, 301, 318.]

In Equity. Suit by Wright's Automatic Tobacco Packing Machine Company against the American Tobacco Company. On final hearing. Decree for complainant.

Bill in equity to enjoin infringement of patent, and to recover damages, and secure an accounting for profits.

The facts in this case are, briefly, that about the years 1892 or 1893, the complainant, who had secured the exclusive right to vend and sell the Rose machine, designed for making up tobacco into packets, and duly patented under the laws of Great Britain, caused one of the machines to be imported into this country and placed in the factory of the P. Lorillard Company of Jersey City, N. J., upon a royalty basis of 30 cents a hundred pounds of tobacco. Subsequently, others of these machines, nine in all, were acquired under this arrangement with the Lorillard Company. This machine will be hereafter referred to as the "old Rose machine," which was patented in this country the 1st of August, 1893, patent No. 502,637. Finding that the old Rose machine did not work entirely satisfactorily, the complainant caused Rose to construct a new machine designed somewhat after the old machine, but with additions and improvements added, and nine of these machines, the first on the 16th of August, 1895, and eight others between that date and May 2, 1896, were installed in the Lorillard factory. These new machines were found to be a great improvement, especially as respects economy of service and yield in output; so much so that those first furnished under the old Rose patent were quickly discarded, and the new ones substituted in their place, at the same royalty as paid on the old machines. On the 6th of July, 1897, a patent was procured for this improved and new machine, under No. 586,076, being the patent in suit, and hereinafter referred to as the new machine. Subsequently, the exact date does not appear, the Lorillard Company was assimilated with or acquired by the American Tobacco Company, and thereafter, on the 28th day of October, 1898, a contract was entered into between the complainant and the defendant, whereby the complainant contracted to furnish to the defendant 10 machines, and as many more as it might desire, of the new Rose patent, at the contract price of \$3,500 per machine, less a commission of 10 per cent. to one R. L. Patterson, who negotiated the transaction, which complainant agreed to pay, and the defendant agreed to take over the machines then on hand on royalty at a price agreed upon. Under this arrangement, the defendant company acquired in all some 50 of the new Rose machines, and, in addition, some 75 others, which complainant had sold to various tobacco concerns, which afterwards became a part of the defendant company, making in all 125 machines owned by the American Tobacco Company, the defendant here. After making the contract, machines were furnished thereunder from time to time for some years, until by letter of January 29, 1909, a claim was made by the complainant that owing to the increased cost to him of \$500 per machine, caused by the advance in labor and materials in the machines, and incident to the United States tariff rates and regulations, the defendant should bear this increase, which it declined to do, and thereupon advised complainant

that it would expect it to live up to its contract, and the defendant would continue to make further purchases under the contract.

In the early part of January, 1910, the defendant caused to be made in its own machine shop 20 machines substantially of the complainant's improved type, and put the same in operation in its plants. This it did, believing, as it says, that the complainant's patent, assuming the same to be valid, had expired, and besides that complainant's letter of January 29, 1909, was in effect a breach of its agreement to furnish the machines, and that the defendant had the right to procure machines as best it could, and it was its duty to secure them in the most economical way, and, notwithstanding which, it was seriously damaged by complainant's conduct. Complainant, on the other hand, insists that there was nothing in the letter of January 29, 1909, to indicate a purpose on its part to break the contract, and that the defendant's claim in that respect was a mere afterthought, as was apparent from its position taken at the time; that the making of the 20 machines by the defendant was a bold infringement of its patent rights, fraudulently and surreptitiously committed; that it had no positive proof thereof, though its suspicions had been aroused, until a short time prior to the institution of this suit; that it corresponded with the defendant on the subject, during the year 1910, especially warning it as early as March 23, 1910, of the existence of its patent, giving the number and date thereof; and that its apprehensions at that time were entirely allayed by reason of the correspondence of the defendant, in which it assured complainant that there was no purpose to infringe the patent, and gave it to understand it would keep the contract in the matter of future purchases; but that notwithstanding that assurance, between January and March, 1910, the 20 machines in question were made, and during that year installed and operated, and have continued so to be up to the present time, resulting in great loss and damage to the complainant; and that the defendant's conduct calls for the strongest condemnation and disapprobation.

Melville Church, of Washington, D. C., and Charles V. Meredith, of Richmond, Va., for complainant.

Junius Parker, of New York City, George W. Rea, of Washington, D. C., and L. L. Lewis, of Richmond, Va., for defendant.

WADDILL, District Judge (after stating the facts as above). The following questions are apparently presented, for consideration: The validity of the patent in suit; whether there was infringement; whether there was such a breach of the contract to furnish machines on the part of the complainant as warranted the defendant in making the machines; whether the circumstances under which defendant infringed complainant's patent in making machines were such as would warrant the court in awarding damages and profits to the complainant, and in trebling the damages so awarded; whether an injunction should issue, the patent having expired; and whether the complainant should be denied recovery because of laches, in the prosecution of its suit.

[1] First. Is the patent in suit valid? If it is not, then the defendant is not liable, and the relief sought cannot be had, and this suit should be dismissed. The patent upon its face purports not to be an original patent, but in terms for improvements upon the machine; the precise description being:

"The present invention relates generally to machines for forming tobacco or other materials having similar characteristics into compact rectangular masses of equal weight and inclosing the same in wrappers. Such a machine is illustrated in United States letters patent No. 502,637, granted to me (William Rose) under date of August 1, 1893, and the present invention relates to improvements upon the machine therein described and shown."

And the patent sets forth in great detail what the features of the improvements in the new invention are, over and above the devices of the former patent, and especially in the following particulars: Provision for an extra inclined guide to direct the front end of the wrapper into position over the mold box; (2) the presser plate which forces the wrapper down into the mold box across the entire width of the wrapper; (3) the fingers of the presser plate which bend the front flap of the wrapper down over the edge of the mold box; (4) the presser foot for making the first fold of the wrapper, and having a toggle which gives the downward movement to the toe portion of the presser foot; (5) the paper clips which enter the ends of the wrapper during the time it is passing from one position to the other, and operated in such wise as to advance with the wrapper, and then return to their original positions for engagement with the next succeeding wrapper; (6) the tabbers which reciprocate bodily across the ends of the packet; and (7) the guard plate, which has a movement towards and away from the mold wheel.

Defendant insists that none of the alleged improvements involve either inventive genius or novelty of design or construction, but merely such matters of mechanical construction as would be apparent to and suggest themselves to one ordinarily skilled in the making and operating of machinery; that there was nothing in the patent that had not been anticipated in the prior art, and especially by the first or old Rose patent, and two other prior patents for somewhat similar devices, issued to Kinney & Butler and De Freest & Wynkoop, respectively; and that whatever advantages there were in the patent in suit over the old Rose patent were two suggestions secured from Fidell and Boetig, and another from Landfear, which last named was sought to be included in the patent in suit, and denied by the Patent Office, and those of the two former were not asked to be patented.

These suggestions of the invalidity of the patent because of lack of novelty of invention, and the alleged anticipation thereof in the prior art, may be said to be common in defenses to suits for alleged infringements, and the mere making of them carry but little weight; especially where, upon the face of the patent, it purports to be the effort of the patentee to develop and improve the art respecting a matter about which he has already made sufficient progress to entitle him to a patent. The real inquiry, in such a case, is whether the proposed claims present something new and useful in the art and involve inventive genius. If so, such claims are patentable, although, in a sense, they may constitute improvements on the old or former appliance. Necessarily, the subject generally would have been considered in the old patent, if then thought of, and developed before securing the patent, but that does not prevent future advancement and discovery beyond what was originally dreamed of, and the extension and development of proposed improvements along the same line, gained by inventive genius and skill, it may be, from experiments with the old appliances. The advance in the science, the improvement in the art, the making of something useful and beneficial out of something theretofore crude and inoperative, however much the original model may appear to be like the perfect design,

is at least what the public is interested in, and is what the monopoly of the patent is granted for, to the end that the real advantage and benefit secured may become the property of the public at the expiration of the patent period. Such, it seems to the court, is the character of improvement in this case, and in the patent in suit, as respects the claims thereof hereinbefore enumerated, something of value is furnished to the state of the art, valuable and useful in the business for which it was designed, adding much to the economy and efficiency of the machine, which was not anticipated either by the original Rose patent, or others, in the prior art, and this seems to have been fully attested, so far as the defendant is concerned, by the fact that, upon the marketing of the new device, the old machine was discarded and abandoned, resulting in a total loss to the complainant, save as to its "junk" value.

Authorities to sustain this view could be cited almost without number, and reference need only be made to the recent case of Diamond Rubber Co. v. Consol. Tire Co., 220 U. S. 428, 31 Sup. Ct. 444, 55 L. Ed. 527. An extract from the opinion of Mr. Justice McKenna in that case affords an apt answer to the defendant's suggestion that the machines it had used on heavy royalty for many years contained nothing of especial value over the one it had discarded for the improved machine, and that whatever there was of patentable novelty in the machine in suit was the suggestion of others than the patentee, and was not covered by the patent. He says:

"Knowledge after the event is always easy, and problems once solved present no difficulties, indeed, may be represented as never having had any, and expert witnesses may be brought forward to show that the new thing which seemed to have eluded the search of the world was always ready at hand and easy to be seen by a merely skillful attention. But the law has other tests of the invention than subtle conjectures of what might have been seen and yet was not. It regards a change as evidence of novelty, the acceptance and utility of change as a further evidence, even as demonstration. And it recognizes degrees of change, dividing inventions into primary and secondary, and as they are, one or the other, gives a proportionate dominion to its patent grant. In other words, the invention may be broadly new, subjecting all that comes after it to tribute (Railway Co. v. Sayles, 97 U. S. 554, 556 [24 L. Ed. 1053]); it may be the successor, in a sense, of all that went before, a step only in the march of improvement, and limited therefore to its precise form and elements, as the patent in suit is conceded to be. In its narrow and humble form it may not excite our wonder as may the broader or pretentious form, but it has as firm a right to protection. Nor does it detract from its merit that it is the result of experiment, and not the instant and perfect product of inventive power. A patentee may be baldly empirical, seeing nothing beyond his experiments and the results; yet, if he has added a new and valuable article to the world's utilities, he is entitled to the rank and protection of an inventor." Diamond Co. v. Rubber Co., 220 U. S. 435, 31 Sup. Ct. 447, 55 L. Ed. 527.

The validity of the patent in suit, as containing important novel improvements, as well as a combination of instrumentalities, over anything in the prior art, cannot, in the judgment of the court, be doubted.

Second. That complainant's patent, assuming the same to be valid, was infringed, is not disputed by the defendant. One of the new machines made under the patent in suit, and bought by the defendant, was taken to pieces, carried to the machinery plant of the defendant, and reproduced, with the exception of some minor details not of material

importance, though the machine of defendant was made of lighter and less valuable construction than that of complainant's; and the defendant cannot escape liability therefor, although it may have acted under the mistaken supposition that complainant's patent had expired.

[2] Third. Whether there was a breach of the contract to furnish the defendant machines, on the part of the complainant, justifying defendant in infringing and using the machines referred to, and the circumstances under which the infringement occurred, will now be considered.

The conclusion of the court is that while the complainant wrote letters perhaps in an unbusinesslike way to the defendant, complaining of the additional cost to which it had been put in furnishing the machines, and endeavoring to get them to bear this cost, still the letters taken as a whole do not sustain defendant's present contention that complainant purposed abandoning the contract, nor was this correspondence so considered by the parties at the time. The complainant set forth in the letter of 29th of January, 1909, in some detail, the additional cost to which it had been put in building the machines abroad, and the increased expense of importation into this country, and sought to have the defendant assume these extras, but expressly stated that it would make the machines in this country and save the additional expense, if the defendant gave reasonable time to fill its orders; the complainant stating that this request was a reasonable one, as there were then no orders pending for machines. To this letter the defendant replied as follows:

"In reply to your letter of January 29th, would say that if and when we shall desire additional of your machines we will expect to get them upon our order on you in pursuance of the terms of the contract existing between us."

Later in the correspondence between the parties, in which the complainant informed the defendant that it had reason to believe that its patent was being infringed, which the defendant denied, in answer to a letter of the 4th of November, 1910, on the subject of infringement, and inquiring why the complainant was receiving no orders for machines, the defendant under date of November 9, 1910, among other things said: "We do not care at present to purchase foil packing machines."

The defendant manifestly should not have made the new machines, or used the same in its business, and while its conduct in so doing is capable of the interpretation placed thereon by the complainant, namely, that the defendant purposely and surreptitiously infringed its patent, still the court does not feel that this is either a fair view of the transaction, or one that the court, under all the facts and circumstances, would be justified in taking. The defendant apparently dealt disingenuously with the complainant; and before copying the machine, ought in good faith and fair dealing to have advised it of what was proposed to be done. Still, having regard to the magnitude of the defendant's business, the variety of transactions constantly on hand, and the great number of persons to whom it necessarily intrusted the same, scattered over a vast territory in this and foreign countries, and the apparent confusion that existed and resulted therefrom, it does not necessarily follow that there was any improper motive and purpose in what was

done, certainly so far as making the machine was concerned. The defendant evidently proceeded upon the theory that complainant's patent had expired, which the brass tag, claimed to have been taken from one of its new machines purchased from complainant, indicated; and the higher officers of the defendant company, that is to say, the committee composed of the present president of the Lorillard Company, and vice president of the defendant company, and several other vice presidents of the defendant company, who composed the purchasing committee having charge of these matters, took legal advice as to the expiration of this patent, and were advised that it had expired. There was evidently some misunderstanding and confusion about this, growing either out of the fact that the brass tag in question was taken from one of the old and discarded machines on which the patent had expired, or from one of the new machines on which such tag had been inadvertently placed. The opportunity for misunderstanding and uncertainty was still further afforded by complainant's letters being frequently addressed to one official of the defendant company, and answered by another; and, under all the circumstances, the court is disinclined to and does not hold that there was bad faith on the part of the defendant in making the 20 machines in question. Confessedly it should not have used the same after it was warned of the running of complainant's patent. It knew of it on the 23d of March, 1910, about the time of the completion of the machines, and it was, of course, charged with constructive knowledge of the life of this patent; but, under the circumstances, the court adopts the view that it innocently acted and built the machines before the receipt of actual notice.

Fourth. Considering the question of the defendant's liability in this case, while the complainant is clearly entitled to recover for the defendant's infringement of its patent, and the latter cannot escape liability therefrom, still the circumstances under which the infringement was had will tend to affect the extent of such recovery. The complainant demands an accounting by the defendant for the profits arising from the infringement, and asks for treble damages because of the defendant's conduct, all of which can be awarded in a patent suit in equity, if justified by the facts. Rev. Stat. §§ 4921 and 4919 (Comp. St. 1913, §§ 9467, 9464). The court, however, does not think that the complainant in this case is entitled to an accounting of profits for the use of the machines in question, and a recovery upon that theory, nor that the damages awarded should be trebled; but that the recovery should be limited to the damages sustained under the contractual relation with the defendant by reason of the infringement of the patent as claimed. This is a matter of comparatively easy ascertainment; the contract fixed the price at which complainant was to furnish the machines; and, the defendant having admittedly made 20 machines, is liable to the complainant for whatever profits it would have received, if it had furnished those machines, or any other number that it may have made or procured, save from complainant, under the contract, with interest from the time they were made or procured; and an accounting can be had to ascertain the number of machines made or acquired, as

well as what it would have cost complainant to have furnished the same.

Fifth. Complainant insists that an injunction should be awarded to prevent the defendant from the further use of the 20 infringing machines in question, as well as any others made or procured save under the contract with it, and that such machines should be destroyed. This action the court thinks would not be a wise exercise of its discretion in the premises, and refuses to so decree, and to award the injunction. Authorities to support this view may be found (*American Diamond Rock Boring Co. v. Sheldon* [C. C.] 1 Fed. 870, *Underwood Typewriter Co. v. Elliott-Fisher Co.* [C. C.] 156 Fed. 588); but, clearly, in this case, the patent having expired since the institution of the suit, there is no need for any injunction, and to destroy the infringing machines under the circumstances, for which the defendant has been required to pay, would avail the complainant nothing, and result in unnecessary injury to the defendant.

Sixth. The defendant insists that the complainant should not be afforded any relief because of laches in prosecuting its suit—that is to say, that the complainant should not have remained in a quiescent mood, after its communication to the defendant of the 23d of March, 1910, as to its suspicions regarding the infringement of the patent, but should have taken steps to investigate and see whether the defendant was in fact doing so, citing Kerr on Injunction, 383—and further that the complainant did not act in good faith in not so proceeding, but bided its time until just before the expiration of the patent, with a view of mulcting the defendant in heavy profits and damages for the use of the machines manufactured by or for it. This position is not well taken, and is based upon a very uncharitable and unjust view of the action of the complainant. It is true, on the 23d of March, 1910, complainant wrote the defendant, calling special attention to rumors that had come to its knowledge, and of its apprehensions regarding the infringement of the patent in suit. The defendant under date of April 13, 1910, promptly answered, assuring complainant that it had been misinformed as to its having duplicated the machine. On the 4th of November, 1910, complainant addressed communications to two different representatives of the defendant, informing it of its apprehensions respecting the infringement, to which defendant replied under date of November 9, 1910, making denial of the charge; and in answer to a further letter from the complainant, under date of November 10, 1910, in which it was asked for a more positive and explicit denial, the defendant on the 19th day of November, 1910, emphasized its previous denial of in any way infringing the complainant's patent. This correspondence naturally assured the complainant that it had been misinformed respecting the infringement, and that its apprehensions were not well founded; and Mr. Wright, its president, testified that he and the complainant had no direct evidence of the infringement until virtually the date of the institution of the suit.

The court is satisfied there has been no laches in the institution and prosecution of the suit of which the defendant can complain. The correspondence between the parties, and the positive denial of the act of

infringement, not only placed the complainant in a quiescent state respecting the same, but it had the right to rely on the assurances given that its rights were not being violated by the defendant; and the latter will not be heard, in the face of these assurances, to place the complainant at a disadvantage for accepting and acting thereon.

It follows, from what has been said, that a decree will be granted the complainant, sustaining his patent, and awarding damages for the infringement, to be ascertained in accordance with the views herein expressed, with costs.

UNITED STATES METALLIC PACKING CO. v. HEWITT SUPPLY CO.

(District Court, N. D. Illinois, E. D. January 27, 1915.)

No. 72.

PATENTS 328—VALIDITY AND INFRINGEMENT—ROD PACKING RING.

The King patent, No. 914,426, for a rod packing ring of soft metal for packing piston rods, etc., discloses invention and is valid, but, in view of the prior art, must be given a very narrow construction; as so construed, held not infringed.

In Equity. Suit by the United States Metallic Packing Company against the Hewitt Supply Company. On final hearing. Decree for defendant.

Chamberlin & Freudenreich, of Chicago, Ill., and Francis T. Chambers, of Philadelphia, Pa., for complainant.

Peirce, Fisher & Clapp, of Chicago, Ill., for defendant.

SANBORN, District Judge. Infringement suit on the first claim of the King patent, No. 914,426, to complainant, dated March 9, 1909. The claim reads:

"A rod packing ring of soft metal divided into two segments, each of which may be moved laterally over the rod to be packed and each having tapered ends, one with a convex end surface adapted to lie under, and the other with a concave end surface adapted to lie over, the corresponding tapered ends of the other segment, said concave and convex surfaces being parallel to the axis of the ring and so disposed that, when assembled on the rod, the segments interlock with each other and the rod to prevent either segment from being moved laterally away from the rod while the segments may be readily moved together or separated by moving one segment relative to the other in a direction parallel to the axis of the rod."

The device is thus described in the patent:

"The present invention relates to packing for rods, such as the piston rods of steam engines or the like, used to prevent the flow of steam or other fluid along a rod which is movable through a wall opening when the pressure at one side of the wall is higher than the pressure at the other side. The object of the present invention is to provide a packing which will be effective in preventing the flow of fluid along the rod and will be simple in construction and composed of a relatively small number of parts and which can be readily assembled and disassembled. A particularly important feature of the invention is the formation of a soft metal packing ring in two parts, so shaped that the ring can contract readily to compensate for the wear of the rod or packing ring and thereby maintain a tight joint, while at the

For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

same time the parts interlock with each other and the rod, when assembled on the rod, in such manner as to prevent a lateral movement of either segment away from the rod, while at the same time each segment of the ring may be laterally moved onto or off the rod when disengaged from the other segment, and the two segments, when on the rod, can be assembled together in the interlocking or normal position or disassembled by moving one segment relative to the other in a direction parallel to the axis of the rod. This I accomplish by the peculiar configuration which I give to the ring segments."

The packing ring art is a crowded one, highly specialized in every particular of construction. For many years preceding King soft metal packing rings of various forms had been patented and in general use, and various concerns, including plaintiff, were largely engaged in their manufacture. One extensively used type of soft metal packing consisted of one or of a series of solid rings grouped together upon the piston rod. These rings were forced into close bearing with the rod by the pressure of live steam or by springs, such pressure crowding the rings into a concaved cup encircling the rod; and the inclined wall of this cup caused the soft metal to "flow" (putty-like) about the rod. In another well-known type, the soft metal packing was formed of a ring or rings severed upon lines inclined or tangential to the inner wall of the ring, so that the pressure exterior to the ring would cause it to more readily conform to the surface of the rod.

Recognizing the advantages of dividing soft metal rings to enable them to better close against the rods as the interior of the rings and the surfaces of the rods became worn, numerous forms of segmental rings were devised, and in most of these the segments were made with tapered overlapping ends to insure longer joints and easier movement of the segments as they were forced against the rods.

In some instances these segmental packing rings were made of two sections, and in other instances of three or more sections, and certain of the prior art patents point out that the number of sections to be used is a matter within the choice of the mechanic.

Various shapes were also given to the overlapping ends of the ring segments. In some cases they were tapered straight or wedge-like, and in others they were tapered and respectively convex and concave, so that, when the segments of the ring were fitted together upon the rod, one segment had a tapered convex end adapted to lie under, and a tapered concave end adapted to lie over, the correspondingly shaped ends of the other segment.

In most of the segmental packing rings of the prior art, the meeting surfaces of the segment ends were parallel to the axis of the ring, although in some instances such surfaces were inclined to the axis; in short, both forms of such surfaces alike antedated King.

An early recognized advantage of the old type of segmental packing ring was that its sections could be moved laterally over the piston rod, and, after being assembled, could be slipped into the stuffing box, thus avoiding the necessity of disconnecting the cross head from the piston rod, as was required when solid rings were applied to the rod.

So, also, in the prior art the ring segments had been formed with their tapered ends so convex and concave (or otherwise shaped) as to

interlock with each other and the rod, so that the assembled segments could not drop from the rod as they were being moved into the stuffing box. In this old type of ring the half segments were slipped over the rod laterally and then assembled together by moving one segment relative to the other in a direction parallel to the axis of the rod.

It is quite remarkable, in view of the recent development in packing rings, that a patent should have been issued as early as 1878, which is quite similar to the King disclosure. Most of the argument consisted of a discussion of the Jerome patent of December 16, 1878, No. 211,-299, and the briefs and testimony are mainly devoted to its discussion. It is unnecessary to compare the two, because it is evident that King occupies very narrow ground, and the patent can only be sustained by giving it a very narrow construction. Very large sales of the device have been made, and it should not be held void, except on the clearest showing. I am inclined to think it should be held valid but not infringed.

Defendant's device differs in form, and to some extent in operation, from the King claim, and does not infringe.

Bill dismissed, with costs.

ESTATE OF P. D. BECKWITH, INC., v. RILEY et al.

(District Court, N. D. Ohio, W. D. December 7, 1914.)

No. 27.

PATENTS ~~328~~—VALIDITY AND INFRINGEMENT—HEATING STOVE.

The Beckwith patent, No. 931,374, for improvement in heating stoves, is for a combination of old elements, but which, acting together, accomplish improved results, and discloses invention; also held infringed.

In Equity. Suit by the Estate of P. D. Beckwith, Incorporated, a corporation, against Zura Riley and others, for infringement of letters patent No. 931,374, for improvement in heating stoves, granted August 17, 1909, to Arthur K. Beckwith. On final hearing. Decree for complainant.

Harry C. Howard, of Kalamazoo, Mich., for complainant.

Bradford & Hood and Miller, Shirley & Miller, all of Indianapolis, Ind., for defendants.

KILLITS, District Judge. The court finds the three claims of the Beckwith patent in suit valid. The field undoubtedly is narrow, and the elements old, but they seem to have been brought together, through the application of definite mechanical skill, into such combination that they act substantially as one organization effecting a distinct improvement.

The defendants' structure infringes. Nathan v. Howard, 143 Fed. 889, 75 C. C. A. 97; Vrooman v. Penhollow, 179 Fed. 297, 102 C. C. A. 484.

BOYD et al. v. NEW YORK & H. R. CO. et al.

(District Court, S. D. New York. January 29, 1915.)

1. COURTS ~~347~~—EQUITY RULES—PLEADING—ANSWER.

Under the new equity practice, defendant is required to show all his propositions, whether of law or fact, at once in the answer, and the court on a motion to determine points of law authorized by Equity Rule 29 (198 Fed. xxvi, 115 C. C. A. xxvi) may consider whether, in view of the facts alleged, any of the legal theories propounded can properly be considered before testimony taken, or by merely taking such evidence as has previously been often adduced in support of a plea, so that, when defendant claims that the complaint shows no case for equitable relief, he may not complain if the court considers the admissions or allegations of the answer which explain or enlarge, but do not contradict, the allegations of the bill.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 921; Dec. Dig. ~~347~~.]

2. COURTS ~~347~~—EQUITY PRACTICE—DEMURRER.

One whose answer, under the reformed equity practice, objects generally to the bill, must be considered as having done so not only on what complainant shows, but also after having had his own conscience purged.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 921; Dec. Dig. ~~347~~.]

3. EQUITY ~~184~~—SEVERAL DEFENDANTS—DEMURRERS BY ONE.

Where one of several defendants to a bill, after stating his own actions or position by answer, raises an issue of law, and other defendants deny knowledge regarding the first defendant, any relief to which complainant is entitled on the statement of such defendant would not be stayed by an allegation of his codefendant's lack of knowledge.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 422—425; Dec. Dig. ~~184~~.]

4. EQUITY ~~371~~—PRACTICE—MATTERS OF LAW—DETERMINATION BEFORE TRIAL.

A legal proposition, going to less than the whole case made by a bill in equity, should not be decided in advance of final hearing, unless such decision will add to or eliminate from the case a clearly defined and easily stated mass of testimony, the presence or absence of which will not change or affect the method of presenting other aspects of the litigation.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 782; Dec. Dig. ~~371~~.]

5. COURTS ~~347~~—PRACTICE—RULES—PRAYERS—“ALTERNATIVE”—“CAUSE OF ACTION.”

The term “alternative,” as used in Equity Rule 25 (198 Fed. xxv, 115 C. C. A. xxv), allowing relief to be stated and sought in alternative forms, means mutually exclusive, and the term “cause of action,” being defined as composed of the right of the complainant, and the obligation, duty, or wrong of the defendant, combined, a bill praying the destruction of a railroad lease as obnoxious to the Sherman Act (Act July 2, 1890, c. 647, 26 Stat. 209 [Comp. St. 1913, § 8820]), and also the preservation of the present status of the stock of the lessor company which depended entirely on a lease sought to be annulled, was not fatally defective because the prayers were inconsistent.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 921; Dec. Dig. ~~347~~.]

For other definitions, see Words and Phrases, First and Second Series, Cause of Action.]

6. MONOPOLIES ☞10—RAILROAD CONSOLIDATION—LEASE—SHERMAN ACT.

If a railroad lease created a control or unity of competing interests forbidden by the Sherman Act, the fact that it long antedated the statute did not render the act inapplicable.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 9; Dec. Dig. ☞10.]

7. MONOPOLIES ☞24—RAILROAD LEASE—SHERMAN ACT—INVALIDITY—PRIVATE INTERESTS—RIGHT TO SUE.

Minority stockholders of a railroad company in private litigation have no right to enforce the Sherman Act to set aside a prior lease of the assets of one company to another, but may invoke the law to prevent a subsequent consolidation prejudicial to their rights and involving a breach of contract.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 17; Dec. Dig. ☞24.]

8. RAILROADS ☞142—CONSOLIDATION—EXERCISE OF RIGHT—CONTRACTS.

The right of railroads to consolidate, given by a state statute, is merely permissive, and hence it is no violation of the statute for a railroad to contract against the exercise thereof.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 444-447; Dec. Dig. ☞142.]

9. CORPORATIONS ☞180—LEASE OF ASSETS—CONTROL—MINORITY STOCKHOLDERS.

Where a railroad corporation controlled another corporation by its ownership of a majority of the stock, and also by a lease of its property, it was a trustee of such property for the minority stockholders.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 665-673; Dec. Dig. ☞180.]

10. RAILROADS ☞144—CONSOLIDATION—LEASES—RIGHT TO CONSOLIDATE—MINORITY STOCKHOLDERS.

Where, under existing leases and contracts, the dividends or annual returns on stock of the H. Company, a majority of which was owned by the C. Company, which was operating the H. Company's railroad under a lease, must be paid before the C. Company's stockholders could obtain anything, and, if this was not done, the system by which the C. Company obtained access to its terminal station in New York City would be disastrously affected, and the H. Company's shares were worth, by reason of such guaranty, many times what the shares of the C. Company were worth, the minority shareholders of the H. Company were entitled to enjoin the C. Company from dissolving such rights by a consolidation.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 392, 393, 451-455; Dec. Dig. ☞144.]

Bill by John Scott Boyd, Junior, and others, against the New York & Harlem Railroad Company, and the New York Central & Hudson River Railroad Company, and others, to restrain a consolidation between the New York & Harlem Railroad Company and the New York Central & Hudson River Railroad Company. On motion by complainants under Equity Rule 29 (198 Fed. xxvi, 115 C. C. A. xxvi) for decision of points of law in respect to the cause or causes of action stated in the bill, raised by portions of the answer of defendants or some of them. Motion granted.

John S. Sheppard, Jr., and William N. Cohen, both of New York City, and Jacob M. Dickinson, of Chicago, Ill., for complainants.

Alexander S. Lyman, of New York City, for defendant New York Cent. & H. R. R. Co.

Anderson & Anderson, of New York City, for individual defendants and the New York & H. R. Co.

Charles F. Brown, of New York City, for all defendants.

HOUGH, District Judge. The defendant railway corporations (hereinafter called, respectively, the "Harlem" and the "Central") are too well known to need description. The individual defendants are directors of both railways, and constitute a majority of each corporate board. The complainants are stockholders in the Harlem, and citizens and residents of states or countries other than New York.

The object of the bill is to enjoin a consolidation of the Harlem and Central; "consolidation" meaning that merger of railroad corporations into one company permitted by the Railroad Law of New York (chapter 49, Consol. Laws; chapter 481 of 1910, as amended by chapter 506 of 1911).

The legal propositions advanced by complainants as justifying their demand are: (1) That consolidation would violate the contractual rights of Harlem shareholders—rights secured by the written agreements under which the Central has long operated the Harlem properties as an integral part of the transportation system usually described as the "New York Central Lines." (2) Such consolidation, by producing legal unity of two railways in addition to the present centralized control, would be a violation of the "Sherman Act." And (3) even the existing control of the Harlem by the Central, though based upon contracts made long before the passage of the "Sherman Act," became unlawful when that statute sprang into existence, and is to-day a violation of federal law.

The business reasons impelling complainants to prefer Harlem stock to that of any company formed by the union of Harlem with Central may be summarized from the allegations of the pleadings, thus:

The Harlem owns a railroad from Forty-Second street, New York City, to Chatham, N. Y., with a branch from Melrose to Port Morris, where it meets the Central's track; and such ownership and junction existed in 1873.

In that year the Central leased the Harlem for a term of centuries under a rental scheme which included a payment direct to Harlem shareholders, of so large an annual return that for each share of Harlem stock the Central (with the consent of the New York Public Service Commission) has publicly offered 3½ times its par value.

The terms of the lease of 1873 also relieved the Harlem from the necessity of providing for the fixed charges on its bonded indebtedness, the burden of which has, by advance in values and diminution in interest rate, become trifling.

By a supplementary agreement of 1882, ratified by the stockholders of both Central and Harlem, the two companies disabled themselves from changing the terms of rental during the period of demise, and, in "order to secure the individual interest" of each Harlem shareholder,

every such holder was specifically authorized to "prosecute such suits as may be necessary in the premises, to recover his proportionate part" of the stipulated rental, i. e., the guaranteed dividend on Harlem shares; a dividend increased in 1898 by allotment to the Harlem shareholders of part of a saving in interest effected by a refunding of the company's bonded debt.

The payment of annual returns on Harlem stock is peculiarly well secured, by the fact (so well known as to require no proof) that the transportation service of the New York Central Lines enters Manhattan Island, and enjoys the advantages of the Grand Central Station, by using the Harlem's right of way. The terminal facilities of 1873 have (as stated in the answers) been greatly enlarged by the Central's funds, but it still remains true that the property conveyed by the Harlem lease is of vast, though unascertained, value, and vital to the activities (as at present arranged) of the Central in the city of New York.

The intrinsic value of Harlem's property is alleged to be "not less than two hundred million dollars" over a bonded indebtedness of \$12,000,000 only. This is denied; but an offer of $3\frac{1}{2}$ times par for the stock (of which there is and can be but \$10,000,000 par) proves an opinion of value on the part of the principal defendant consistent only with a security of return as nearly absolute as the possibilities of business, politics, invention, and war will permit.

The foregoing is more than a digest of the bill; some facts (not inconsistent with any statement by complainants) are taken from the answers.

The reasons for demanding relief now are alleged to be that especially of late years the Central has bought Harlem stock, until it owns today 62 per cent. thereof. No more than 66 $\frac{2}{3}$ per cent. is needed to carry through a consolidation under the laws of New York. Such merger would extinguish the lease which in effect pledged the Central's own property and earnings to satisfy the price of hiring, and leaves the Harlem free to take back its vastly appreciated estate if the price be not paid; and for such singularly desirable security would substitute mere participation in a united and more heavily incumbered property, where the much larger Central stock could always outvote the Harlem interest, and subject the present securely segregated Harlem property to the lien of mortgages demanded by the needs and ambitions of the Central.

As to whether consolidation is intended by the Central, the answers of the Harlem and the individual defendants profess ignorance; but the Central itself, while denying any purpose of presently acquiring absolute control of the Harlem's railroad properties, admits and asserts:

"That it has in view and is favorably disposed towards at some future time the uniting and vesting in one corporate entity of all the properties and franchises of the Central Company with those of the Harlem Company, demised by said lease, whether by consolidation or otherwise, and that it intends to exercise such rights as are incidental to the ownership of capital stock in said Harlem Company."

The answer then proceeds to argue that Central has spent so much money on Harlem's properties, and will be obliged to spend so much more, that:

In order "to meet the public needs * * * the acquisition of as large a proportion of (Harlem's) capital stock as is reasonably practicable is in pursuance of a just and prudent policy on the part of this defendant."

The Central might as well have said plainly, "We shall buy all the Harlem stock we can, and merge the companies as soon as we think best."

The pleadings are under the Equity Rules of February 1, 1913, and each answer contains matter tendering issues of law. Complainants have thereupon made this motion.

The matter specified in the notice of motion may in part be described with accuracy, in terms of the old practice. The Central has demurred generally to the whole bill.¹

All the defendants have asserted by answer that private complainants cannot in this form of action avail themselves of the prohibitions of the Sherman Act, and all assert that the consolidation of the Harlem and Central is not within the purview of the statute.² With some hesitation I think these contentions would formerly have been raised by motion to expunge.

These probable equivalents are referred to only as aids in passing from old to new; for, if the modern practice is worthy of acceptance, its excellence will not arise from doing only the old things under new names. The new method must show itself a better, quicker, more far-reaching instrument for ascertaining truth; otherwise it were folly to trouble ourselves with new names.

[1] There is nothing novel in embodying and presenting legal propositions in an answer, and the points thus presented may be of every degree of importance.

What is new is the obligation on defendant to show all his propositions at once, whether of fact or law, and let opponent and court consider whether, in view of the facts alleged, any of the legal theories propounded can profitably be considered before testimony taken; or by taking merely such evidence as has heretofore been often adduced in support of a plea.

Evidently this casts a burden upon judicial discretion hitherto unknown. Many a judge has heard in succession a demurrer, a plea or two, and several motions before getting to an answer, and never seen, nor thought he had a right to see, the whole defense at a glance. Whether the panorama now afforded is real reform depends almost altogether on how sympathetically and skillfully the new procedure is administered. That early efforts will sometimes be mistakes is to be expected.

This case affords opportunity and imposes necessity of considering at least two points, which are of importance to the scheme of procedure, and not merely in this litigation: (1) Where an answer asserts that the bill states no case, can any fact allegations of defendant's pleading be considered? (2) When defendants raise legal propositions go-

¹ This is the effect of sections 1 and 6 of the motion, taken together.

² This is thought to be the result of sections 4 and 5 of the motion. Motion paragraphs 2 and 3 will not be further referred to. I consider the specified parts of the answers as merely irrelevancies, provoked by superfluous allegations in the bill.

ing to less than complainant's whole case, what test can be suggested to guide the court in deciding whether to consider or decline the points in advance of final hearing?

On the first point, it seems to me clear that, when defendant alleges that complainant shows no case at all, he cannot complain if the court considers any admission or allegation of the answer which explains or enlarges (but does not contradict) the bill of complaint.

[2] One who "demurs generally" nowadays must be understood to do so, not only on what complainant shows, but also after having had his own conscience purged. Thus only is avoided the old and bad habit of trying everything else before stating facts.

[3] Similarly, where one defendant demurs after stating his own actions or position, and other defendants deny knowledge regarding the first defendant, any relief to which complainant is entitled on the statement of No. 1 will not be stayed by his fellow's lack of knowledge.

For these reasons I have above recited the Central's admissions as to consolidation, and feel free to act on them, notwithstanding the ignorance of the other answers.³

[4] On the second query, I am of opinion that no legal point (going to less than the whole case) should be decided in advance of final hearing, unless such decision will add to or eliminate from the case a clearly defined and easily stated mass of testimony, the presence or absence of which will not change or affect the method of presenting the other aspects of the litigation.

Applying this to the case at bar, it seems advisable now to pass upon the applicability of the Sherman Act, because the propositions of complainant evidently require much expensive fact evidence for ultimate solution, which (if defendants are right) it will be useless to prepare and present.⁴

[5] There is one criticism of the bill, mentioned in arguments and briefs, to which preliminary consideration may be given. It is urged that the bill contains two inconsistent "causes of action." It does, in my opinion, show inconsistent prayers for relief, because it demands (1) the utter destruction of the lease of 1873, as obnoxious to the Sherman Act, and also (2) the preservation of the present status of Harlem stock, which depends wholly upon the very lease sought to be annulled.

But it is not thought that such inconsistency is either fatal to the bill, or constitutes a serious blemish thereupon; and for two reasons: First, the prayers of a bill are not parts of the cause of action therein set forth; and, second, inconsistent and even contradictory prayers are permitted by Equity Rule 25 (198 Fed. xxv, 115 C. C. A. xxv), which allows relief to "be stated and sought in alternative forms."

"Alternative" means "mutually exclusive" (Cent. Dict.), and no phrase could more happily describe the prayers of this bill. "Cause of

³ It is at least difficult to understand how a majority of the Central's directors can deny knowledge of what the Central itself states at length.

⁴ If this view of the new practice prevails, it furnishes an argument for the suggestion often made that each equity case be assigned in limine to a particular judge—a system which would at least make for speed and consistency.

action" has not been found easy of definition. But Prof. Pomeroy's effort, that it is "composed of the right of the plaintiff and the obligation, duty or wrong of the defendant; and these combined, it is sufficiently accurate to say, constitute a cause of action," has been adopted in *Veeder v. Baker*, 83 N. Y. at page 160; while the shorter statement of *Durham v. Spence*, L. R. Ex. Cas., 46, that it "is that which produces the necessity for bringing an action" has been approvingly quoted in *Shelby, etc., Co. v. Burgess Co.*, 8 App. Div. at page 448, 40 N. Y. Supp. at page 873.

In the light of these definitions, I find, in plaintiffs' "statement of the ultimate facts upon which" they ask relief, only one cause of action; for their right is single, viz., to preserve their property, the duty of the defendants is to co-operate in such preservation; and the wrong alleged is a threatened trespass upon that right.

The prayers are but the opinions of the plaintiffs as to the proper method of redress, and inconsistency there is harmless. The court must select that method which is appropriate and lawful, and such procedure as is illustrated by this motion will produce a selection with the minimum expenditure of time and expense.

A very great interest in the new procedure must excuse the foregoing rather lengthy preface.

I have stated complainants' three propositions, and will consider them inversely to the order of statement.

[6] If the lease of 1873 created a control or unity of competing interests forbidden by the Sherman Act, the fact that such obnoxious arrangements long antedate that statute does not render the act inapplicable. *Louisville & Nashville R. R. v. Mottley*, 219 U. S. 467, 31 Sup. Ct. 265, 55 L. Ed. 297, 34 L. R. A. (N. S.) 671.

[7] Complainants, however, have no standing to demand in this private litigation the abrogation of the lease, the restoration of the status of 1873, nor the sale by the Central of its Harlem stock. (First and second prayers for relief.) Such efforts are a usurpation of the functions of the executive; it does not lie in the power of private citizens to assume at will the duties of an Attorney General. Actions thus privately brought would be even more privately settled. The certain scandal and endless confusion resulting from such freedom of action are the sufficient reasons for cases like *National Fireproofing Co. v. Mason Builders' Ass'n*, 169 Fed. 259, 94 C. C. A. 535, 26 L. R. A. (N. S.) 148.

But if private litigants have and seek to assert a private right which is molested, or in danger of violation; and if such actual or threatened infringement consists not merely in contract breaking or other private delict, but also gives rise to transgressions of public law—then private litigants may invoke that law and urge as an additional and potent reason for protecting their private rights the fact that the threatened assault upon the same will constitute not only a breach of obligation but a public wrong. *De Koven v. L. S. & M. S. Ry. Co.* (D. C.) 216 Fed. 955.

It follows that in this case the Sherman Act is measurably applicable; and if it be shown that the contractual relation of centralized control now existing between the Central and the Harlem, directly and not in-

cidentally affects interstate commerce, that such relation constitutes an actual or attempted monopoly or restraint of interstate trade, that such restraint is unreasonable, and the merger or consolidation permitted by the statutes of New York would be an act extending and strengthening a control already contravening rational law, or creating a new relation or union illegal under federal statutes, then findings of the nature just outlined would be ground, not for uprooting all that has been done, but for maintaining the present status, and complainants' present rights, until such time as the Attorney General chooses to act. But obviously much evidence is necessary to decide whether the facts warrant any decision based on the Sherman Act.

There remains the inquiry whether the consolidation asserted as imminent in the bill, and admittedly desired by the Central, would be a violation of plaintiffs' contractual rights, independently of the Sherman Act.

[8] The right to consolidate is merely permissive; it is no violation of any statute to contract against the exercise of such a right. Noyes' Intercorporate Relations, §§ 18 and 24.

[9] There cannot be any public policy of the state of New York rendering it obligatory upon these corporations to unite; for the Central is a trustee by virtue of its control of Harlem stock, and the plaintiffs and other minority shareholders are its cestuis que trustent. Farmers' L. & T. Co. v. New York & Northern R. R., 150 N. Y. 410, 44 N. E. 1043, 34 L. R. A. 76, 55 Am. St. Rep. 689. Possibly minority shareholders who obstructed a public enterprise might have their property taken for the public good, by some proceeding in the nature of condemnation; but no such statutory remedy exists at present.

[10] The act authorizing consolidation (*supra*) requires that upon any merger the capital stock of the consolidated company shall not—

"exceed the sum of the capital stock of the corporations so consolidated at the par value thereof. Nor shall any bonds or other evidences of debt be issued as a consideration for, or in connection with, such consolidation." Section 141.

It follows that the only method, by which the superior value of Harlem as compared with Central stock can be maintained, is by giving to Central shareholders less than share for share, and by no method can Harlem stock (as represented by consolidated stock) be assured that preferred position which it now occupies.

Under existing leases and contracts, the dividends or annual returns on Harlem shares must be paid before the Central shareholders can obtain anything, and, if this be not done, the system by which the Central obtains access to the Forty-Second Street Station is disastrously dislocated.

Consolidation would therefore mean not only an exchange of shares of one name for shares of another, or of a thing of one kind for another thing of the same kind, but would involve a complete destruction of investment in character and quality. Existing arrangements give to Harlem shares rights preferred over all Central stock in the earnings of the entire system now consolidated in control. After consolidation, Harlem shareholders might have more shares, but "shares" would not

mean the same thing, and the return thereon would necessarily be subject to greater and more numerous hazards than is now the case.

The agreement of May 15, 1882, is a sufficient justification to these plaintiffs for protecting their interests by direct suit, and the same document amounts to a lawful undertaking on the part of the Central always to pay to each and every shareholder in the Harlem that holder's proportion of the "annual rent reserved by and to be paid under" the lease of 1873.

Any possible form of consolidation now authorized by the statutes of New York must involve a breach of this contract on the part of the Central; for, whatever Harlem shareholders may get after merger, they can never get their share of the "annual rent" reserved by the lease of 1873.

It results that in my judgment the complainants' bill does set forth a cause of action, and that such cause of action is established by the answers to the extent of entitling complainants to the relief demanded in the third prayer of the bill, viz., that the Central and the Harlem and the said defendant directors be enjoined during the term of the lease of 1873 from taking any steps toward consolidating said companies, or merging the Harlem with any successor to the Central.

An order may be entered declaring, in substance: (1) That the bill of complaint does contain facts sufficient to constitute a cause of action. (2) That the matter alleged in the eighth and sixteenth paragraphs of the complaint (applicability of Sherman Act) are material and relevant to complainants' alleged cause of action, and may (if hereafter supported by competent evidence) afford ground for relief additional to that arising from complainants' contractual rights.

As the result of this motion, the parties are advised that, if complainants choose to move on the pleadings for an injunction pendente lite embodying (mutatis mutandis) the third prayer for relief, such motion will be granted; and, if they elect to abandon the Sherman Act as a basis for action, a final decree for permanent injunction, as sought in said third prayer, will be forthwith granted.

In the language of rule 29 (198 Fed. xxvi, 115 C. C. A. xxvi), I think, after considering the answers, that there is no "principal case" left for trial, so far as plaintiffs' contractual rights are concerned.

THE NESHAMINY.

(District Court, E. D. Pennsylvania. January 28, 1914.)

Nos. 40, 41.

SALVAGE ~~10~~—EXTINGUISHING FIRE IN DRY DOCK—VESSEL IN COURSE OF REPAIR.

Prompt and efficient services rendered by two tugs in extinguishing a fire which destroyed the engine house on the side of a floating dry dock and within ten feet of the side of a barge, which was on the dry dock being repaired and was in danger, held entitled to a salvage award in admiralty against the barge.

[Ed. Note.—For other cases, see Salvage, Cent. Dig. §§ 18-20; Dec. Dig. ~~10.~~

In Admiralty. Suits by Charles L. Walker, managing owner of tug Lizzie Crawford, and by John P. Murray, master of the steam tug Delaware, against the schooner barge Neshaminy; Philadelphia & Reading Railway Company, claimant. Decrees for libelants.

J. Frank Staley and Lewis, Adler & Laws, all of Philadelphia, Pa., for The Lizzie Crawford.

Henry R. Edmunds, of Philadelphia, Pa., for the Delaware.

Wm. Clarke Mason, of Philadelphia, Pa., for The Neshaminy.

THOMPSON, District Judge. Both libelants claim for salvage services rendered to the schooner barge Neshaminy. On December 26, 1912, the Neshaminy, a large wooden vessel belonging to the claimant, the Philadelphia & Reading Railway Company, was upon a floating dry dock of the Philadelphia Ship Repair Company at the foot of Mifflin street, Delaware river, Philadelphia, where she had been for about two weeks undergoing repairs. All of the water was out of the dry dock, and the Neshaminy was resting upon blocks which elevated her to the level of the decks of the dry dock. Upon the north side of the dry dock, and about amidships of the barge, there was constructed an engine house about 10 feet in width, which on the south side was flush with the inside of the dry dock and on the north projected over the outside of the dry dock 5 feet 2 inches.

Shortly before 5 o'clock in the morning of the day in question, it was discovered that the engine house was on fire and an employé of the Ship Repair Company asked the master of the tug Delaware, which was lying on the north side of the dock, to sound alarm with her whistle. The alarm was sounded, and the Delaware ran her bow under the engine house, attached her hose, and played a stream of water on the fire. Upon the Neshaminy at that time were her master, engineer, and a deck hand. A few minutes after 5 o'clock, her steward, who had been ashore, came aboard the Neshaminy, aroused the master and informed him of the fire. The master of the Neshaminy, upon discovering the fire, ordered the engineer to get up steam in her boilers. Whether this order was carried out or not does not appear from the testimony. The fire burned fiercely, but by 7 o'clock the crew of the Delaware, with her hose and pumps, had apparently succeeded in getting it under control. By that time all of the engine house had been destroyed, except one corner upon the side towards the Neshaminy. After the Delaware had been playing on the fire for nearly two hours, the city firemen came onto the dock, but could not reach the fire with their hose. Shortly before 7 o'clock, the employés of the Ship Repair Company arrived at the yard, and Davidson, the foreman carpenter, discussed with his assistant the advisability of sinking the dock. The dock is provided with four valves upon each side for the purpose of filling it with water. The suggestion was not carried out, as Davidson considered that the Delaware had the fire under control. Meanwhile, however, the fire had worked its way underneath the engine house into the lining of the sides of the dry dock. Shortly before 7 o'clock the Crawford arrived, came up back of the Delaware and ran her hose over the stern of the Neshaminy. Additional hose was supplied by the Ship Repair Com-

pany, and one of the crew of the Crawford, the city firemen, and the employés of the Ship Repair Company worked the hose from the deck of the Neshaminy while the Crawford worked her pumps. After playing on the fire for about 15 minutes, the blaze at the corner of the engine house was extinguished, and the Crawford continued to pump water for an hour and a half into the side of the dock below its deck until the fire was finally extinguished. As the claimant's witness Davidson stated:

"They had to go down underneath the deck of the dry dock and dig away and get all in the seams, where the fire had eaten in a little into the seams, and get it all out, trying to save the boiler from falling over. Q. The boiler really had a list, hadn't it? A. Yes, sir; the boiler had a list out towards the Delaware. Q. Then, the lieutenant is wrong when he says that it was— A. Yes, sir; he is wrong. If the boiler had fallen any way, it would have fallen over on the Delaware's deck."

The drawing offered in evidence by the respondents corroborated the statement of this witness that, if the boiler had fallen, it would have fallen towards the Delaware and not towards the Neshaminy.

It is apparent from the evidence that the fire, which destroyed the engine house and partially burned the dry dock, endangered the Neshaminy. The claimant denies that the Neshaminy was in danger from the fire, because her master and crew were aboard and stood ready to extinguish any flames which might be communicated to her from embers or sparks dropping upon her deck. The deck of the Neshaminy was covered with slush, which would have prevented any danger from sparks. Her master and crew could have opened the valves and sunk the dry dock, and the same thing could have been done as suggested by the shipyard's employés when they arrived. It was stated by Davidson that, after turning on the valves, it required 12 or 15 minutes to sink the dry dock, and that it could have been sunk by any one not an expert "to let her go down helter-skelter any way"; that is, without regard to keeping the dock level as it was sinking. The master of the Neshaminy testified:

"Q. When you saw the fire in the boiler house on the dry dock, what steps did you take to protect your barge? A. Well, I called the two men out, and I intended to try to sink the barge, but the tug Delaware was lying there, and seeing that he started to play the hose on it, and it seems he held it down pretty well. He held the fire down. Q. Did you give any notice to your engineer concerning steam? A. I told him to go down forward and get steam up on the boiler. Q. How long had you been lying in the dry dock? A. We had been there, I guess, two weeks at that time, pretty near. I guess two weeks, or something like that. Q. How many men did it take to open the valves and sink the dry dock? A. Well, I don't know, but, in case of emergency, I suppose four. You could run from one side to the other. I had the two ladders there. Q. How many valves were there? A. There were four. Q. Four on each side? A. Four on each side, I believe. Q. And, as a result of the way in which the fire was being handled you concluded that there was no necessity to sink the dry dock, and you just waited? A. No; since the Delaware was keeping it down pretty well. Q. At any time during the progress of the fire did the barge seem to be in danger? A. Well, not with the tug Delaware there she didn't seem to be in any danger. Q. From the time that the fire was discovered until it was put out you and your crew stood by your barge? A. Yes, sir; we stood by. We assisted all we could."

It is apparent that, in order to save the Neshaminy from fire, it was necessary either that the fire should be extinguished without sinking the dock, or the dock sunk and the barge pulled, or run by her own power, out of the way of the fire. As the situation existed, she was resting upon a wooden structure upon which the fire had started, and the walls of which were burning on the inside. The Neshaminy had no adequate means of her own to extinguish a fire of this sort. She had no fire equipment, except hand pumps and tanks of water, and their usefulness is a matter of conjecture. It is also a matter of conjecture whether the dock could have been sunk by the crew of the Neshaminy, for it is apparent, from the evidence of the master, that he knew little or nothing about the method of operating the valves, and the shipyard foreman relied upon the tugs to control the fire. The Delaware had played upon the fire for over an hour and a half before it appears that any employé of the Ship Repair Company, understanding the operation of the valves, arrived at the yard. The burden of subduing the fire from the start and saving the Neshaminy from damage, if not destruction, fell upon the Delaware. That she rendered prompt and efficient service is apparent; and it is also apparent that she was in some danger from the possible toppling over of the boiler. As to what would have occurred if the Crawford had not arrived is also conjectural. The Delaware was playing from the north side of the dock; and while she had succeeded in getting the fire, which was consuming the engine house, under control, her hose was not able to reach the flames which were eating their way into the side of the dry dock. This was the situation when the Crawford arrived; and it was by means of the water pumped from the Crawford that the fire was finally extinguished under the deck of the dry dock an hour and a half after her arrival. It does not appear that there was any special risk to the Crawford, but her services were rendered promptly and efficiently. The degree of peril to the Neshaminy was not so great at that time as earlier, as the employés of the repair company, who understood the sinking of the dock, had then arrived. It is apparent, however, that the reason the dock was not sunk was because of the services of the Delaware and Crawford; and it is impossible to determine what would have been the results if the services had not been rendered. In the opinion of the court, both vessels are entitled to salvage.

In *The Jefferson*, 215 U. S. 130, 30 Sup. Ct. 54, 54 L. Ed. 125, 17 Ann. Cas. 907, after a review of the cases, the Supreme Court held that salvage rendered to a vessel on a floating dry dock while undergoing repairs is the subject of admiralty jurisdiction, even though not floating in the water.

The ruling of Judge Toulmin in *The San Cristobal* (D. C.) 215 Fed. 615, was not upon a state of facts similar to those in the case at bar. The case was decided upon the ground that no direct service was rendered the steamship, nor the dry dock in which she was lying, nor was either injured by the fire.

In the present case, even if no stream were played by either tug upon the deck of the vessel, the fire but ten feet away scorched the Nesham-

iny's side, and the services rendered were not only designed but effective in relieving her from a danger reasonably to be apprehended, if not actually present.

The services rendered by both vessels were prompt, meritorious, and efficient. The Delaware was subjected to some risk by reason of the overhanging position of the engine house and boiler, and that fact must be taken into consideration in awarding salvage to her.

Neither the Crawford nor her crew were subjected to any apparent risk. It is admitted that the Neshaminy is of the value of \$25,000; the Delaware, \$4,000; and the Crawford, \$8,000. Taking into consideration the early and constant services of the Delaware and her position of risk, it is apparent that she is entitled to a greater proportion of salvage than the Crawford. The principle should be borne in mind that one of the objects of a salvage award is to reward services which are perilous and to induce seamen and others to readily engage in such undertakings and assist in saving property. The peril to the Delaware was not great, as it is probable that she could have backed away and prevented the engine house and boiler falling upon her deck; and, as the services of the Crawford did not involve risk to her or any one of her crew, the services are not of such a character as to require that the award should be assessed upon the same liberal principles as obtain in the ordinary cases of sea salvage rendered by one ship to another in case of distress, where the salving vessel and her crew are subject to serious peril.

Under the circumstances, an award will be made to the Delaware of \$600 and to the Crawford of \$200, with costs to each libelant. It was understood at the hearing that the division of any salvage award to the Delaware would be agreed upon between the owners, the charterers, and the crew. It is assumed that the same arrangement has been made in regard to the Crawford, as no suggestion has been made in the briefs as to division of salvage.

Decrees may be entered accordingly.

In re SHEPARDSON.

(District Court, D. Vermont. January 4, 1915.)

No. 2854.

1. BANKRUPTCY ~~426~~—DISCHARGEABLE DEBTS—“FRAUD.”

The word “fraud,” as used in Bankr. Act July 1, 1898, c. 541, § 17 (2), 30 Stat. 550 (Comp. St. 1913, § 9601), providing that debts created by fraud shall not be dischargeable in bankruptcy, means fraud in fact, involving moral turpitude or intentional wrong, and not implied fraud, or fraud in law, existing without the imputation of bad faith or immorality.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 787, 791–807; Dec. Dig. ~~426~~.

For other definitions, see Words and Phrases, First and Second Series, Fraud.]

2. BANKRUPTCY ~~§~~423—CONCLUSIVENESS—GIST OF ACTION—FRAUD.

A judgment for plaintiff in an action for deceit is conclusive on defendant that the judgment is based on fraud, and therefore not dischargeable in bankruptcy.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 818; Dec. Dig. ~~§~~423.]

3. BANKRUPTCY ~~§~~423—DEBTS DISCHARGED—JUDGMENT FOR DECEIT.

A judgment recovered against a bankrupt for deceit in the sale of a farm is a debt arising out of a bankrupt's active fraud, and is therefore not dischargeable in bankruptcy.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 818; Dec. Dig. ~~§~~423.]

4. BANKRUPTCY ~~§~~50—DISMISSAL—GROUNDS—NONDISCHARGEABLE DEBT.

Where a voluntary bankruptcy proceeding was instituted in order that the bankrupt might obtain a discharge from a nondischargeable debt, the court had jurisdiction to dismiss the proceeding, instead of denying a discharge.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. ~~§~~50.]

In the matter of bankruptcy proceedings of George W. Shepardson. On motion to dismiss. Granted.

C. S. Chase and W. R. Daley, both of Brattleboro, Vt., for creditor. Frank E. Barber, of Brattleboro, Vt., for bankrupt.

MARTIN, District Judge. George W. Shepardson filed a voluntary petition and scheduled but one debt, viz., a judgment to E. E. Rowley and wife for \$1,528.36. Adjudication followed. The creditor moved to dismiss the petition on the ground that the only debt scheduled would not be affected by bankruptcy proceedings, and, pending the hearing on said motion, the bankrupt petitioned for discharge. Both questions were heard by me and evidence submitted.

I find that the Rowley judgment was the bankrupt's sole indebtedness, and his purpose in filing his petition in bankruptcy was to avoid the payment of that judgment. The records of the Rowley Case in the state court were put in evidence on the hearing before me, and they show that E. E. Rowley and wife brought an action against the bankrupt, alleging deceit in the sale of a farm to them by the bankrupt, and that said deceit was the gist and gravamen of the action. That case was tried by a common-law jury and resulted in a verdict for the plaintiff. Judgment was rendered on the verdict and a close jail certificate ordered by the court, on the ground that the cause of action arose from a willful and malicious act of the defendant (this bankrupt) and that he ought to be confined in close jail.

[1] The provisions of the Bankruptcy Act as to debts not affected by discharge, as set forth in section 17 (2), were construed by the United States Supreme Court in *Neal v. Clark*, 95 U. S. 704, 24 L. Ed. 586. Justice Harlan, speaking for the court, used this language:

"'Fraud,' referred to in that section, means positive fraud, or fraud in fact, involving moral turpitude or intentional wrong; * * * not implied fraud, or fraud in law, which may exist without the imputation of bad faith or immorality. Such a construction of the statute is consonant with equity, and consistent with the object and intention of Congress in enacting a general law by which the honest citizen may be relieved from the burden

of hopeless insolvency. A different construction would be inconsistent with the liberal spirit which pervades the entire bankrupt system."

[2] In *Forsyth v. Vehmeyer*, 177 U. S. 177, 20 Sup. Ct. 623, 44 L. Ed. 723, the question arose as to the effect of a discharge in bankruptcy upon a judgment obtained in a state court, in which the declaration charged that the defendant (the bankrupt) obtained money through false representation. Justice Peckham delivered the opinion. He discussed the Neal Case with approval, especially as to the distinction between active and constructive fraud. In further discussion of the law and facts of that case he used this language:

"Where the state court has decided that the action was for fraud and deceit, and has held that, in order to have maintained such action the fraud must have been proved as laid in the declaration, it must be assumed that the verdict and judgment in that action were obtained only upon proof and a finding by the jury of the fact of fraud. Judgment being entered after a trial upon such pleadings and upon a verdict of guilty, the question of fraud was not open for a second litigation upon the trial of this action. The defendant below in this action had full opportunity given him to prove what in fact was the declaration in and the character of the first action, and the findings of the court below in favor of the plaintiff must be regarded as a finding against the defendant upon the issue as to the character of that action. * * * The existence of fraud must therefore be assumed in the further progress of the case. The only matter left for this court to decide is whether a debt created by means of a fraud, such as is set forth in the declaration, is exempt from the effect of a discharge in bankruptcy. The proper construction of the section of the act relating to such a discharge has been frequently before this court, and we regard the law upon the subject as quite well settled."

[3] The decision of the Supreme Court in that case is that deceit is active fraud, and that resulting damages are not affected by proceedings in bankruptcy. Further citations are unnecessary. In the case at bar, I hold that a discharge would not affect the Rowley judgment.

[4] Should a petition in bankruptcy be dismissed, or a discharge denied, because the bankrupt was owing no debt which would be barred by a discharge? It was held in the affirmative in *Re Maples* (D. C.) 5 Am. Bankr. Rep. 426, 105 Fed. 919; *Re Yates* (D. C.) 8 Am. Bankr. Rep. 69, 114 Fed. 365; *Re Colaluka* (D. C.) 13 Am. Bankr. Rep. 292, 133 Fed. 255. Under the facts as above set forth I have no doubt of the discretionary power of the court to either dismiss the bankruptcy proceedings or deny the petition for discharge. True it is that the court may decline to pass upon the nature of the liabilities scheduled, but to my mind, where it affirmatively appears that a discharge can affect but one claim, and that claim has been adjudicated by a state court to be based upon and growing out of deceit and false representation, the court ought to exercise its discretionary power to dismiss such cases or refuse the bankrupt's petition for discharge. To my mind, a dismissal is the more appropriate.

Let the cause be dismissed.

In re CONTINENTAL PAINT CO.

(District Court, N. D. New York. January 26, 1915.)

BANKRUPTCY ☞348—CLAIMS—PREFERENCE—"WORKMEN, CLERKS, OR SERVANTS."

The superintendent of a bankrupt's paint factory, employed at \$40 per week to superintend the making of paint, though in the course of his employment he did a great deal of manual labor assisting those under him, was not a "workman or servant" so as to entitle him to priority for wages due him as superintendent under his contract, under Bankr. Act July 1, 1898, c. 541, § 64b, 30 Stat. 563, as amended by Act June 15, 1906, c. 3333, 34 Stat. 267 (Comp. St. 1913, § 9648), providing that wages due workmen, clerks, traveling or city salesmen, or servants, earned within three months before the commencement of bankruptcy proceedings, and not exceeding \$300, shall be entitled to priority.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 536; Dec. Dig. ☞348.]

In the matter of bankruptcy proceedings of the Continental Paint Company. On petition to review a referee's determination that claimant, William E. Wilson, was entitled to allowance of his claim, but not to priority. Affirmed.

M. A. Phelps, of Syracuse, N. Y., for claimant.
James Tracy, of Syracuse, N. Y., for the trustee.

RAY, District Judge. The Continental Paint Company is a corporation. William E. Wilson was employed by it as superintendent of its factory. A written memorandum was drawn, but on account of some differences was never signed. William B. McOwen, an officer of the corporation from its incorporation in 1913, was general manager, and testified that Wilson was employed by it and had charge of the paint factory and superintended the making of the paints and the getting out of the orders and in fact did whatever was necessary around the factory. He also testified that Wilson performed manual labor in mixing the paint, helping to make the paint, and that he worked with the man who made the paint right along there. He also said that Wilson was engaged as superintendent of the factory, and, if he had had ten men under him, would have been the superintendent of the ten men, and that he was an expert paintman, etc., and was going to teach the men the formulas for making paint. Wilson was to be paid \$40 a week. The man or men under him were paid \$12 to \$14 a week.

It would seem that this corporation was not a success, and that the work of superintendent was not very extensive, and hence Wilson took hold and did a great deal of manual labor. This fact does not change the fact that he was hired or engaged to act as superintendent at \$40 per week, and that so far as there was any duty as superintendent to perform he acted as such. At the same time he did more or less manual labor. However, he was superintendent of the factory at a salary of \$40 per week, and Mr. Phelps asked this question, "How

☞For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

much of the salary did you draw?" The answer was, "\$40 a week." Question, "You were paid that salary up until what time?" Answer:

"I think it was paid up until February 23, 1914, and they owed me from that date until March, 1914, which would make \$140. Q. For that last three weeks and a half you have not been paid? A. No, sir."

He then described the work he performed.

This, with other evidence, convinces me that the referee was right in holding that Wilson was there acting for this corporation in the capacity of superintendent, although he did a great deal of manual labor. This he had the right to do. The fact that there was but little work to do as superintendent does not change the fact that he was superintendent and employed as such.

Section 64b of the Bankruptcy Law provides that:

"Wages due to workmen, clerks, traveling or city salesmen, or servants which have been earned within three months before the date of the commencement of proceedings, not to exceed three hundred dollars to each claimant; * * * is entitled to priority."

The balance of the wages due to Wilson under his agreement of \$40 per week was not wages due to a workman or servant, but to Wilson as superintendent under his agreement.

He does not base his claim on a quantum meruit for work done as a workman or servant, but on his agreement that he should be paid \$40 per week. This agreement was based on the fact that he was to perform the duties of superintendent whatever they were, more or less. Waiting for business and the employment of more men, he took hold and did more or less manual labor. However, he was superintendent all the time and earned his salary as such, and was entitled to it, but is not entitled to priority of payment.

I do not see how the referee could have held otherwise than as he did, and hence the order of the referee must be affirmed.

EAMES v. H. B. CLAFLIN CO.

(District Court, S. D. New York. January 9, 1915.)

RECEIVERS ☞67—POSSESSION OF PROPERTY—DELIVERY AFTER APPOINTMENT OF RECEIVERS.

Where, on a creditors' bill to sequester the assets of an insolvent corporation, receivers were appointed, and thereafter, but before the receivers had filed their bond or taken possession of the property, a seller, who had contracted to sell merchandise to the corporation, and who had no knowledge of the insolvency or receivership, delivered the merchandise to the corporation, the receivers could not retain possession thereof without paying the purchase price, whether their possession related back to their appointment or not, since the corporation could not accept possession after the decree appointing the receivers had been made, unless the receivers rejected the contract of purchase and, if the receivers elected to accept the contracts as assets of the corporation, they must also accept the burdens of those contracts. The retention of the goods delivered in these circumstances must be deemed an election to accept the contracts.

[Ed. Note.—For other cases, see Receivers, Cent. Dig. §§ 117-122; Dec. Dig. ☞67.]

In Equity. Creditors' bill by John C. Eames against the H. B. Claflin Company. On petition by the receivers for instructions regarding the claims of Joshua L. Bailey & Co. Order entered, giving instructions.

This is a motion made in a creditors' bill to sequester the assets of a corporation in financial embarrassment, for distribution among its creditors. Receivers were appointed by an order signed on June 24, 1914, between 5 and 5:30 p. m. after the clerk's office had closed; the order being filed at the opening of the office on the 25th at 9 a. m. The receivers' possession was made conditional on filing a bond, and the bond was approved and filed at about 1 p. m. on the 25th; the receivers taking possession shortly thereafter. During the morning of the 25th certain sellers, in ignorance of the receivership, delivered merchandise to the corporation, which had been ordered under contracts long antedating the filing of the bill or any knowledge of insolvency. These sellers claim the right to treat the deliveries as made to the receivers, and as establishing a receivership debt. The receivers petition for instructions, suggesting that their obligations date from the filing of the bond.

Henry Root Stern, of New York City, for receivers.

Arthur C. Rounds, of New York City, for sellers.

LEARNED HAND, District Judge (after stating the facts as above). I do not find it necessary in this case to decide whether the possession of the receivers relates back to the time of the filing of the order for the following reasons. The receivers are entitled, regardless of the form of the papers, to possession only of such assets as were owned by the corporation at the time of filing either of the bill or of the decree appointing them. If the corporation acquires any assets thereafter, it is not relevant to the sequestration suit. Now the contract of sale was an existing asset of the corporation, which the receivers had the option to accept or reject. If they rejected it, it remained an asset of the corporation; if they accepted it, they took it cum onere. At the time when they became entitled to it, however, no delivery had been made, the seller still had his lien, even assuming title had passed. A delivery thereafter to the corporation would not be a delivery under the contract, unless the receivers eventually elected to reject, because the court had forbidden the corporation thus to assume any of its existing assets, among others, such contracts of sale. When the receivers assumed such a delivery by taking the goods into their own possession, they could do so only by exercising their option to assume the contract. I need not consider the effect of a delivery to the corporation if the receivers had rejected the contract; it would be a matter outside this suit. It is enough that the rights of the receivers date at the latest from the entry of the order, and that their right to possession can arise only by reason of either the corporation's actual possession at that time, or of its right to possession by virtue of a contract then existing.

Assuming, therefore, even that the receivers' possession does not relate back, I find that their assumption and retention of the corporation's possession arising after the bill and decree were filed can only be treated as an exercise of their option. The receivers are therefore instructed that they must either pay for the goods the contract price, or

abandon all claims to them, in which case the sellers will be allowed to pursue such remedies against the corporation for their recovery as they may be advised.

Such an order will pass upon the petition.

THE GWYNEDD.

(District Court, E. D. Pennsylvania. February 1, 1915.)

No. 56.

ADMIRALTY ~~28~~—**GROUND OF PROCEEDING IN REM—NEGLIGENCE OF OWNER OF TUG.**

A suit in rem cannot be maintained against a tug for injury to a deck hand on a barge while in tow of the tug, through the alleged negligence of the owner of the tug, who was also owner of a pier at which they were making a landing, in allowing the pier to become out of repair.

[Ed. Note.—For other cases, see Admiralty, Cent. Dig. §§ 278-288; Dec. Dig. ~~28~~.]

In Admiralty. Suit by Joseph Sessich against the tugboat Gwynedd. On exception to libel. Sustained.

Willard M. Harris, of Philadelphia, Pa., for libelant.

Wm. Clarke Mason, of Philadelphia, Pa., for respondent.

DICKINSON, District Judge. The exception to this libel is based upon the principle of law disclosed by the following statement of facts:

The third or charging paragraph of the libel sets forth a charge of negligence upon the part of the respondent, through which negligence personal injuries were sustained by the libelant. The libelant was a deck hand on a scow which was in tow of the tugboat. The scow was to be brought to a pier. The libelant stood at the forward cleat on the starboard side. When the scow reached the pier, another deck hand jumped ashore with the eye of a mooring line, which he intended to place around a cleat on the pier, and notified the master of the tug that the line was fast. It turned out that the cleat to which the deck hand expected to make fast the line had been torn out of place, or so broken as to be useless. Because of this he was unable to make the line fast as he expected, and he went to the river end of the pier looking for a mooring post. The tug was then under way, and this obliged the libelant to haul the slack of the line to the next cleat on the scow. The night was cold, the line coated with ice, and so heavy as to be handled with difficulty. The deck hand on the wharf made fast his end of the line, and libelant attempted to make fast his end at the cleat. He had made one turn on the cleat, but the strain on the line was such as that the line would not hold, and in attempting to make another turn his finger was caught between the line and the cleat. The proximate cause of the injury is alleged to be the neglect of the Reading Railway Company, the owner of the pier, to replace the broken cleat, or provide suitable means for fastening the float.

The exception is based upon the proposition that the libel is in rem against the vessel, and the negligence charged is that of the owner of the pier. It is true that the owner of the pier happens to be also the owner and manager of the tug. The point made, however, is that this mere coincidence of ownership no more makes the tug liable for the negligence of the owner of the pier than if they had been different persons. The libelant does not controvert the soundness of the above principle, but lays alongside of it the other principle, for which the case of *The Osceola*, 189 U. S. 175, 23 Sup. Ct. 483, 47 L. Ed. 760, is cited as authority, that the vessel, as well as her owners, is liable for the maintenance and cure and the wages to which a seaman who falls sick or is wounded in the service of the ship is entitled. It will be noted that the case is not authority for the proposition that the liability of the ship extends beyond the continuance of the voyage. Did the libel in this case set forth as a cause of action that the libelant had been injured in the service of the ship and lay as his damages the expense of his maintenance and cure and his wages during the time for which he was entitled to receive wages, a libel under the authority of this case could doubtless be maintained. This libel, however, cannot be said to set forth any such cause of action nor to lay any such damages. The cause of action is generally speaking negligence, and the particular negligence alleged is that of the owner of the pier. The only connection of either the vessel or the owner with the proximate cause as alleged of the libelant's injury is that he was injured while on the vessel and that the vessel and pier happened to have the same owner.

We do not see that the libel sets forth any cause of action, and the exception filed to it is sustained.

The libel is therefore dismissed.

In re RIDER et al.

(District Court, D. Montana. January 30, 1915.)

No. 887.

1. BANKRUPTCY ~~368~~—PARTNERSHIP—FEES AND COMMISSIONS OF TRUSTEE.

Where a partnership and its members are adjudged bankrupt, on a single petition, as they should be, there is but one case for the purpose of computing the fees and commissions of the trustee, and commissions are to be computed only on the moneys disbursed as a whole.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 571; Dec. Dig. ~~368~~.]

2. BANKRUPTCY ~~368~~—CONSTRUCTION OF ACT—“CASE.”

The word “case,” as used in Bankr. Act July 1, 1898, c. 541, 30 Stat. 544 (Comp. St. 1913, § 9585 et seq.), is used in its ordinary meaning as a comprehensive term, embracing the aggregate in respect to that which is brought and prosecuted in the form of a single proceeding.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 571; Dec. Dig. ~~368~~.]

For other definitions, see Words and Phrases, First and Second Series. Case.]

~~368~~ For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes.
220 F.—13

In the matter of Mary E. Rider and Mose D. Rider, individually and as partners doing business as the Capital Plumbing Company, bankrupts. On review of order of referee. Modified and affirmed.

Wight & Pew, of Helena, Mont., for petitioning creditors.
A. P. Heywood, of Helena, Mont., for bankrupts.

BOURQUIN, District Judge. A partnership and the two individuals composing it, joined in a single involuntary petition, were adjudged bankrupt. The appointed trustee petitioned for fees and commissions upon the partnership property or estate, and also upon the individual property or estate, separately computed. The referee allowed but one fee, but apparently granted the petition in respect to commissions. The trustee seeks review.

[1] The office of trustee and its duties are the creature of statute. Like public offices, the emoluments are those fixed by statute. Section 48 of the Bankruptcy Act provides that:

"Trustees shall receive for their services * * * a fee of five dollars deposited with the clerk at the time the petition is filed in each case," and "commissions on all moneys disbursed or turned over to any person," computed at a prescribed and diminishing rate. Comp. St. 1913, § 9632.

Section 72 of said act, added in 1903, is that:

"Neither the referee, receiver, marshal, nor trustee shall in any form or guise receive, nor shall the court allow him, any other or further compensation for his services than that expressly authorized and prescribed in this act." Comp. St. 1913, § 9656.

Bankruptcy proceedings are in equity. When they involve a partnership, and throughout are based upon a single petition, as they should be, and as herein, however numerous the parties and controversies, and the necessity of conforming procedure and relief thereto, they constitute, as in any like proceeding in equity, a single suit or case. It is the manner in which brought and prosecuted that determines whether proceedings are one case or more. A single case may be severed to form two or more, or two or more cases may be consolidated to form but one.

[2] There is little in the Bankruptcy Act to imply that the word "case" therein is intended to be of other than the ordinary signification, viz., a comprehensive term, embracing the aggregate in respect to that which is brought and prosecuted in the form of a single proceeding. However plausible the reasoning that in bankruptcy a partnership and its members are separate entities, with separate estates, at least since section 72, supra, and *Francis v. McNeal*, 228 U. S. 700, 33 Sup. Ct. 701, 57 L. Ed. 1029, there is no justification for the claim that though joined and prosecuted in a single petition they present separate cases for the purpose of fees, commissions, or aught else.

Although for procedural purposes in marshaling of assets the estates are separate, for the purpose of computing a trustee's fee and commissions there is but one case. Commissions are to be computed on the moneys disbursed as a whole, and not as separate estates, and avoid the possibility of double commissions upon moneys twice disbursed by necessary transfer from or payment by estate to estate.

There is no express authorization otherwise in the act, and none can be implied. Upon this subject see *In re Farley* (D. C.) 115 Fed. 359, and cases therein cited.

The referee's allowances and order will be modified to conform hereto, and, as modified, are confirmed.

MAUREL V. SMITH et al.

(District Court, S. D. New York. February 2, 1915.)

1. LITERARY PROPERTY ☞7—**OWNERSHIP—JOINT AUTHORSHIP.**

Where it was agreed between plaintiff and defendant that defendant would write a comic opera, for which plaintiff wrote the scenario, and, though defendant made many changes in the plot, he used the scenario, and adopted the whole framework and scheme thereof, they were joint authors, with the rights and obligations implied by law from such relation.

[Ed. Note.—For other cases, see *Literary Property*, Cent. Dig. § 6; Dec. Dig. ☞7.]

2. LITERARY PROPERTY ☞7—**OWNERSHIP—JOINT AUTHORSHIP.**

Where plaintiff and defendant H. agreed that such defendant should write a comic opera, for which plaintiff wrote the scenario, and H. engaged defendant R. to write the lyrics, the lyrics, when united with dialogue, plot, and music into one composition, became such a part thereof that plaintiff had an interest therein, though they had slight or no relation to the plot, and though R. in several instances simply took old songs, which he had already written, and placed them in the libretto, and the subsequent publication of such songs separate from the opera did not break the original unity or defeat plaintiff's rights.

[Ed. Note.—For other cases, see *Literary Property*, Cent. Dig. § 6; Dec. Dig. ☞7.]

3. COPYRIGHTS ☞41—**OWNERSHIP—CONSTRUCTIVE TRUSTEES.**

Where two of three joint authors of a comic opera took out copyrights thereon, they became constructive trustees for the third author, and were accountable to her for her interest in the literary property destroyed by the publication and copyright.

[Ed. Note.—For other cases, see *Copyrights*, Cent. Dig. §§ 40, 48; Dec. Dig. ☞41.]

4. LITERARY PROPERTY ☞7—**CONTRACTS—NOTICE.**

Plaintiff contracted with W. and L. to write a scenario for a comic opera, the dialogue and lyrics to be written by B., who failed to take up the work. W. and L. asked one of the defendants to undertake the completion of the opera, telling him that plaintiff was to write the scenario and that her assent was necessary, and he procured the scenario from her, and in conjunction with the other defendant completed the libretto. A contract was made between defendants and W. and L., reciting that W. and L. had the exclusive dramatic rights in plaintiff's scenario, that defendants were to write the opera, and W. and L. to produce it, and pay certain royalties, and hold defendants harmless against any suits arising over the scenario. Held, that defendants were charged with notice of plaintiff's rights, and with complete knowledge of the contents of the contract between her and W. and L., and any inference by them as to the extent of her conveyance to W. and L. was at their own peril.

[Ed. Note.—For other cases, see *Literary Property*, Cent. Dig. § 6; Dec. Dig. ☞7.]

5. TRUSTS **359—ESTABLISHMENT—EQUITY JURISDICTION.**

Equity had jurisdiction of a suit by one of the joint authors of a comic opera against the others, who had taken out copyrights thereon, to have them adjudged constructive trustees for plaintiff, and for an accounting, even though there were no complicated accounts requiring equitable relief, as plaintiff's rights arose from a constructive trust, created and cognizable only by a court of equity.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 554, 565, 566; Dec. Dig. **359**.]

6. COPYRIGHTS **41—OWNERSHIP—RIGHTS OF JOINT AUTHORS.**

Where two of the joint authors of a comic opera had it published and copyrighted, even though the third author did not consent thereto, and though the absence of her consent avoided publication, she might accept the wrongful publication and insist upon her proprietary rights, as though she had consented at the outset.

[Ed. Note.—For other cases, see Copyrights, Cent. Dig. §§ 40, 48; Dec. Dig. **41**.]

7. EQUITY **39—RETENTION OF JURISDICTION TO GRANT COMPLETE RELIEF.**

In a suit by one of the joint authors of a comic opera to have the other authors, who took out a copyright on the opera as a dramatic composition, adjudged constructive trustees for plaintiff, equity, having taken jurisdiction for this purpose, would also determine plaintiff's rights in any other literary or dramatic property not copyrighted, including the moving picture rights and dramatic rights for stock companies, though it was doubtful whether a bill in equity would lie for a determination thereof alone.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 104-114; Dec. Dig. **39**.]

8. COURTS **329—UNITED STATES COURTS—JURISDICTION—AMOUNT IN CONTROVERSY.**

The allegations of plaintiff's bill as to the value of the subject-matter in controversy will serve to give jurisdiction to the United States District Court, unless it clearly appears that the effort to give jurisdiction was only colorable and that the amount is less than \$3,000.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 897; Dec. Dig. **329**.]

9. LITERARY PROPERTY **7—ROYALTIES—DIVISION BETWEEN JOINT AUTHORS.**

Plaintiff agreed with defendant H. that defendant should write the libretto for a comic opera, for which plaintiff wrote the scenario. H. engaged R. to write the lyrics, and defendants completed the libretto, gave an exclusive license to print the vocal scores and lyrics, and took out a copyright on the libretto as a dramatic composition. The composer of the music was, by agreement with defendants, to have one-half of the royalties, and plaintiff did not complain of this arrangement. Held, that a division of the remaining one-half of the royalties equally between plaintiff and the two defendants would not prejudice defendants, and could not be complained of by them.

[Ed. Note.—For other cases, see Literary Property, Cent. Dig. § 6; Dec. Dig. **7**.]

In Equity. Suit by Fred De Gresac Maurel against Harry B. Smith and others. Decree in favor of plaintiff.

This is a bill in equity, brought by the author of the scenario of a comic opera produced in New York under the title of "Sweethearts." It alleges that the plaintiff and the defendant Harry B. Smith entered into an agreement by which the plaintiff was to give a scenario and Smith was to write upon it a libretto for the comic opera; that Smith should copyright the same with the plaintiff as co-owner; that as to the songs, or "lyrics," Smith should have two-thirds of the royalties of English versions and one-third of translations;

that later Harry B. Smith procured another defendant, Robert B. Smith, to write the lyrics, to which change the plaintiff subsequently consented; that Robert B. Smith in his undertaking had full knowledge of the plaintiff's rights and wrote the lyrics for the piece; that later, without plaintiff's knowledge, Robert B. Smith made an agreement with the other defendant, G. Schirmer, Incorporated, to give it the right to publish the play and to copyright it, and took from the corporation an agreement to pay royalties to the two Smiths, which agreement they procured by falsely representing themselves to be the sole owners; that in pursuance thereof G. Schirmer, Incorporated, published the opera as a whole and certain vocal numbers separately, and took out statutory copyrights upon each; that the defendant Harry B. Smith also took out a statutory copyright in his own name upon the complete libretto. The relief prayed is that the plaintiff be adjudged the joint owner with the defendant Harry B. Smith in the opera and statutory copyrights in both it and the lyrics, and entitled to a share in the future royalties arising from the publication, that the corporation be adjudged trustee of such copyright in the comic opera, that Robert B. Smith be adjudged to have no right in the same, and that the plaintiff have an account of past profits. There is other matter in the bill, which for the purposes of this suit may be disregarded.

Upon the hearing the following facts developed: In September, 1912, the plaintiff made a contract with a firm of theatrical managers in New York, Werba & Luescher, by which she undertook before October 2d of that year to write a full and complete scenario for a proposed comic opera, and in which she accepted one Henry Blossom as collaborator to write the dialogue and "lyrics." She granted to the managers the exclusive right to produce the opera publicly in the United States and Canada for the ensuing season and the season of 1914-15, in return for which the managers agreed to pay her certain royalties on all the gross receipts, which are not here material. The managers likewise agreed to advertise the plaintiff as the author, and not to make any changes in the opera without her consent. The publishing rights the plaintiff expressly reserved, and the managers also agreed not to sublet the right to produce the opera. The plaintiff did not complete the scenario at the time agreed, and during November Blossom declined to take up the work, thus leaving the managers with the first act of a belated scenario on their hands and no one to complete the play. Being in a serious predicament because of their other engagements looking toward its production, early in December they asked the defendant Harry B. Smith, a well-known writer of librettos for such productions, to undertake the completion of the play within such time as would permit its presentation. In their interview with Smith the managers told him that the plaintiff was to write the scenario under agreement with them and that her assent was necessary. Smith spoke to her on the telephone, and she agreed that he should write the play in the place of Blossom, upon which the managers delivered to him the first act of the scenario, which alone at that time had been completed. On that day or the next Harry B. Smith had an interview with the plaintiff, the exact character of which is in dispute. It is agreed, however, that the plaintiff promised to complete the second act of the scenario and send it to him, and he agreed to undertake to write a play upon it, if he should be satisfied. The music was to be composed later. The plaintiff says that at that time Smith agreed that they should collaborate in producing the libretto upon the same terms as had theretofore existed between them, they having collaborated in several instances in the past, but Harry B. Smith says that no such agreement was made. He began at once to work upon the play, having in his possession the first act of the scenario, and within the week the plaintiff sent to him the second act, which he retained. Harry B. Smith soon discovered that he could not write the whole play, and he therefore engaged his brother, Robert B. Smith, to write the "lyrics"; the latter having full knowledge that the plaintiff was the composer of the scenario. Together they completed the libretto.

On the 10th of December, 1912, the managers entered into a contract with the Smiths, reciting that they had the exclusive dramatic rights in the plaintiff's scenario, and that they wished the Smiths to make the libretto, in consideration of which the Smiths agreed to write the play by the 15th of Jan-

uary, and the managers agreed to produce it by the 15th of February. The names of the plaintiff and both Smiths were to appear on all programmes along with the composer, and the Smiths were to have the right of publication, along with certain royalties based upon the managers' gross receipts. The managers also agreed to hold the Smiths harmless against any suits arising over the scenario furnished by the plaintiff, to which the managers at that time claimed exclusive rights. On the 23d of December Robert B. Smith made a contract with G. Schirmer, Incorporated, by which he gave it the exclusive license to print the "lyrics" and vocal score of the opera, or any part thereof, and the corporation agreed to publish and copyright it, and to pay certain royalties to Smith, in pursuance of which G. Schirmer, Incorporated, took out a copyright upon the whole opera, libretto and music, and upon several songs, lifted from the opera, the words of all of which were necessarily the work of only Robert B. Smith. On April 18th Harry B. Smith obtained a copyright in his own name for the complete libretto of the opera as a dramatic composition.

In writing the libretto, neither of the Smiths had any assistance from the plaintiff, other than the scenario. She had no interview with Robert B. Smith, nor any with Harry B. Smith after that of December 2d. She gave no help in composing the dialogue, nor did she attend any rehearsals till just before the production. They testify that they made small use of her scenario, especially that of the second act, and Robert B. Smith particularly asserts that in the composition of the lyrics he made no use whatever of the scenario, and that, indeed, in several instances he simply took old songs, which he had already written, and placed them in the libretto. In all cases Harry B. Smith so arranged the dialogue as to make a more or less easy transition into the song. The opera proved a success, and Robert B. Smith has received from G. Schirmer, Incorporated, royalties amounting to more than \$5,500 under his contract of December 23, 1912. On October 3, 1913, the composer, the plaintiff, and the two Smiths entered into a contract with an Australian manager, by which they agreed to give him the dramatic rights in Australia, New Zealand, and South Africa for a certain percentage of the royalties, of which the composer was to get one-half, the plaintiff one-fourth, and the Smiths jointly the remaining one-fourth. At that time \$1,500 was paid down and divided between the several authors.

Nathan Burkan, of New York City, for plaintiff.

Maxwell C. Katz, of New York City, for defendants.

LEARNED HAND, District Judge (after stating the facts as above). [1] I do not propose to decide whether in the interview of December 2, 1912, Harry B. Smith and the plaintiff agreed that his work should be upon the terms of their previous contracts. There had been a number of these, all drafted in detail, and the bill is undoubtedly drawn upon the theory that that interview constituted a contract between the parties; but it is not necessary that the plaintiff should recover the express division of royalties there alleged, if enough facts are shown independently to give her the relief which she now asks. However, I do find that they agreed at that time that Harry B. Smith was to take the scenario and work upon it, if he approved it, that they agreed to a joint authorship in the piece, and that they accepted whatever the law implied as to the rights and obligations which arise from such an undertaking. I further find that Robert B. Smith had knowledge of the plaintiff's scenario and contributed his work upon the understanding that all three were contributing to a single joint operatic performance and assented to the work on those terms. The effect of the Smiths' misunderstanding of the plaintiff's rights, arising from Werba & Luescher, I shall consider later.

The case may therefore be considered upon the basis of what rights the law will imply from an agreement of the kind mentioned. I have been able to find strangely little law regarding the rights of joint authors of books or dramatic compositions. The only case in the books in which the matter seems to have been discussed is Levy v. Rutly, L. R. 6 C. P. 523. That was a case in which Levy had employed Wilks to write a play for him, which Wilks did, and the plaintiff, finding some of the incidents were objected to by members of the playing company, made various alterations and additions; one scene being entirely new. The drama thus altered the plaintiff produced, and took from Wilks a receipt for a certain sum down "for my share, title, and interest as co-author with him in the drama." Wilks died, the defendant pirated the drama, and Levy sued. It was held that he could not recover, as his work did not constitute him a joint author, and the judges discussed the question of joint authorship, and each concluded that it would arise only when several parties contributed their labor to the production by common and preconcerted design. Keating, J., at page 529, used the following language, which has often been quoted:

"If two persons undertake jointly to write a play, agreeing on the general outline and design and sharing the labor of working it out, each would be contributing to the whole production, and they might be said to be joint authors of it; but to constitute joint authorship there must be a common design."

Montague Smith, J., at page 530, says:

"But I take it that, if two persons agree to write a piece, there being an original joint design and the co-operation of the two in carrying out that joint design, there can be no difficulty in saying they are joint authors of the work, though one may do a larger share than the other."

I cannot doubt that the production of this opera was the result of such a joint design. It is quite clear that the plaintiff in the first place intended to collaborate with Blossom, and Harry B. Smith certainly understood that he was to use the scenario of the plaintiff in substitution for Blossom. This appears abundantly by the provisions in the Smiths' contract with the managers, in the copyright notices, and in the contract of October 3, 1912. That Harry B. Smith used the scenario in preparing the libretto is in my judgment proved beyond doubt by a comparison between the completed libretto and the scenario itself. He made many changes in the plot, but no one can read the two without seeing that the whole framework and scheme had been adopted from the scenario itself. The defendants have with much elaboration insisted upon these changes, but they in no sense modify the fundamental fact that the idea of the plot originated with the plaintiff. I do not think it necessary to go into the details of this comparison, for the records remain for any one to read. It is enough to say that by changes, omissions, additions, and alterations a subsequent author cannot avoid the debt which he owes to the maker of the plot, or treat him merely as the suggester of the piece, under Shepherd v. Conquest, 17 C. B. 427. A scenario followed as much as this goes into the bone and flesh of the production.

[2] As to Robert B. Smith the case is different, in that it cannot be

said that he used the scenario to anything like the same extent. The titles of the "lyrics" suggested by the plaintiff apparently he did not use, unless it be the Angelus and the opening chorus. That, however, makes no difference in my judgment, for the "lyrics," whether composed, or even, in one or two instances, actually lifted from other context, nevertheless became a part of the whole opera when completed. It is true enough that the appositeness of the "lyrics" to the context is slight, as is common enough in such productions. They form no part of the dramatic action, and are merely pleasing diversions from whatever fragment of plot runs through the whole. Yet no one can hope to measure the degree of contribution which the plaintiff made to their production or selection, and no one ought to try. Moreover, it is not necessary to hold that the "lyrics" have any relation whatever to the plot, or owe any suggestion to it in the mind of their composer, because they became united with dialogue and plot and music into one composition, and whatever their origin, in their presentation the whole was single. Their subsequent separate publication did not break this original unity, because it is impossible to say how much of their vogue was due to them alone, and how much to their presentation along with the opera as a whole. A moment's reflection will, I think, make this clear. Some one goes to such an opera, and brings away a general pleased impression, which he seeks to repeat. Some of the individual numbers may have struck him as tuneful, or comic, or touching; and so he buys a song or more to play or sing. When he does so, no one can tell how much the song alone contributes, or how much it may be blended with the general impression of the piece. It is enough that the song originally appeared in the context of plot, dialogue, and music, and got its currency along with the whole production. We should have no difficulty whatever in reaching such a conclusion, were the production higher in the dramatic art—e. g., any of the more ambitious operas; but there are standard operas in which the unity is scarcely more than in an opera of this class. Take, for instance, *Lucia di Lammermoor*. Many of the arias are, at least musically, separate numbers, and recognized as such. Or take classic examples of the same kind of production as this—e. g., Gilbert and Sullivan's operas, where many of the songs hold but the slightest unity with the plot of the piece. Sir Joseph Porter's rise to fame in *Pinafore*, or the Yum Yum's song to the moon in the *Mikado* can hardly be said to advance the plot, yet it would be quite unreal to say that their author, had he been other than Sir William S. Gilbert, could have claimed that they were literary productions independent of the whole opera in which he chose to imbed them, and as parts of which they first appeared and got their popularity. I do not think that it is in the least possible to undertake a satisfactory analysis of the extent of the mutual influences between the parts of such a piece. Even if they are not highly organized, at least they are like mosaics from which, though you may lift a stone, it loses the significance of its setting. When several collaborators knowingly engage in the production of a piece which is to be presented originally as a whole only, they adopt that common design, mentioned in *Levy v. Rutley*, supra, and unless they undertake expressly to apportion their contributions, they must share alike.

The law is scanty upon this point, so far as I have found. In *Hatton v. Keen*, 7 C. B. N. S. 268, the plaintiff, having composed some music for presentation of two of Shakespeare's plays under agreement with the defendant, tried later to collect penalties for infringement. The case did not turn upon any license given by the plaintiff, but upon whether his music had not gone into the fabric of the presentation in such sense that he lost independent ownership. This the court held. The case was much stronger for the separability of the part from the whole than the case at bar, because the music was merely incidental to the plays, which were themselves, of course, not musical. The Queen's Bench followed the Common Pleas in *Wallenstein v. Herbert*, 16 L. T. N. S. 453, on almost the same case, though Lord Cockburn referred to the fact that the defendant was the plaintiff's licensee. These cases must be taken as declaring, even if it was not essential to the decision, that one who contributes to such a joint production does not retain any several ownership in his contribution, but that it merges into the whole.

[3] With this premised, it follows that when the Smiths took out these statutory copyrights the literary property, which by publication they used and destroyed, was owned jointly by themselves and the plaintiff, and the resulting statutory rights they held in equity upon the same division as existed before. They are accountable to the plaintiff share and share alike, unless she has waived her rights. This she did not do. Her contract with Werba & Luescher gave them only rights of dramatic production under their own management, and left her general property intact. The plaintiff, in my judgment, is right in asserting that they became constructive trustees for her in whatever rights they got, legal or equitable.

[4] Their answer is in part that they relied upon their contract of December 10th with Werba & Luescher. Yet they had the clearest notice of her rights, not only from her, but from Werba & Luescher themselves. It is true they knew she had made a contract, but obviously such knowledge charged them with complete knowledge of its contents. She gave them no false information about her rights; her conduct did not mislead them. Any inference as to the extent of her conveyance was at their own peril under all analogies.

[5, 6] The defendants deny equitable jurisdiction of the court, on the theory that there are no complicated accounts requiring equitable relief. *Carter v. Bailey*, 64 Me. 458, 18 Am. Rep. 273. If the bill depended upon the account alone, there might be some difficulty under that case; but it does not. As I have said, the plaintiff's rights arise from a constructive trust, created and cognizable only by a court of equity. The statutory copyrights have been acquired through the publication, and so the loss, of certain common-law literary property; i. e., a libretto to which all three parties had contributed. The copyright is the resulting res, and by every equitable rule the defendants hold any legal rights they have upon trust in the same proportion. If it be urged that the publication of the libretto was not with the plaintiff's consent, and that therefore she still holds her interest in the literary property, the answer is that the bill alleges that she gave consent to publication,

but not to the Smiths' acquisition of a copyright to her exclusion, or that, even if she did not consent, and if the absence of her consent avoided publication (a doubtful position), nevertheless the wrongful publication she may now accept and insist upon her proprietary rights in equity, as much as though she had consented at the outset. Her suit, so far as concerns the statutory copyrights, is clearly on the equity side of the court, because at law she could get no declaration of those rights, nor, indeed, could a court of law look at any but legal interests in the copyrights. The case in this aspect is not unlike *King v. Barnes*, 109 N. Y. 267, 16 N. E. 332, though the subject-matter is different. The bill lies as against a trustee who repudiates the trust and refuses to pay any share of the profits. An accounting is only an incident to such a bill, though it is a proper incident. At most, this objection would only result in transferring the cause under rule 22 to the law side, which the defendants have not asked, and perhaps do not want.

[7] The plaintiff also asks for a declaration of her interest in the remaining literary property held in common, especially the moving picture rights and the dramatic rights for stock companies, which she has not assigned, since to give them Werba & Luescher would have to sublet the dramatic rights. In this literary property the plaintiff is still a co-owner at law with the Smiths, and it is certainly doubtful whether any bill in equity would lie upon it alone, unless for some especial reason. However, equity, having taken jurisdiction for any good reason, will never leave the parties to another litigation finally to determine their controversy, and the decree may properly follow the prayer in a declaration of the plaintiff's interest in the remaining literary property.

The defendants' next objection is that the recovery does not follow the bill. It is true that much of the bill is surplusage—e. g., the charges of fraud, conspiracy, the express division of the royalties into thirds by the contract; but enough is stated to be a foundation for all that is necessary to the equity of the bill. The rest may be disregarded, especially in equity, where there have never been such things as "causes of action," properly speaking.

[8] Another objection is to the jurisdiction of this court, based upon the value of the subject-matter in controversy. The defendants misconceive the rule; the allegation of the bill will serve, unless it clearly appears to the court that the effort was only colorable, and that the value is not \$3,000. *Barry v. Edmunds*, 116 U. S. 550, 6 Sup. Ct. 501, 29 L. Ed. 729; *Wetmore v. Rymer*, 169 U. S. 115, 18 Sup. Ct. 293, 42 L. Ed. 682; *Put-in-Bay Co. v. Ryan*, 181 U. S. 431, 21 Sup. Ct. 709, 45 L. Ed. 927; *Street, Eq. Proc.* §§ 361, 365. The value of the statutory copyrights does not appear. I cannot say that they are clearly worth less than any given sum, but we may count the incidental relief upon this question. Robert B. Smith has already received \$5,540, of which one-third is \$1,840, and the value of the motion picture rights is certainly \$1,000. The stock rights are substantial, and the plaintiff has already received upon the Australian dramatic rights nearly \$400 down. Obviously it would be absurd to say that it was clearly proved that the subject-matter in controversy did not equal \$3,000.

[9] Finally, the defendants appear to object that the composer of the music is not joined; but this is not made in the answer as an ob-

jection to lack of parties defendant, and it may be taken only as going to the form of the decree. The parties in the agreement of October 3, 1913, long after the play had been written and proved a success, divided the royalties, one-half to the composer, one-quarter to the plaintiff, one-quarter to the two Smiths. The plaintiff does not question the propriety of this division so far as concerns the composer, nor have the Smiths suggested that the librettists were to get more than one-half. However, if the contributors were to share alike, it could not injure the Smiths to give the plaintiff one-third of their recovery. That could hurt them only in case they had agreed with the composer that he should have, as against them, less than one-fourth of the gross receipts, while we know he got one-half. As between the plaintiff and the Smiths they cannot be prejudiced by a decree dividing the whole share of the librettists into thirds. It is true that this is less than the Smiths accorded voluntarily to the plaintiff in the Australian contract, but she does not press that admission.

The decree will be as follows:

1. Declaring G. Schirmer, Incorporated, and Harry B. Smith trustees for the plaintiff in the statutory copyrights already taken out, to the extent of a one-third interest in whatever rights the Smiths have in such copyrights under any agreements with G. Schirmer, Incorporated, or Victor Herbert, the composer.
2. Declaring the plaintiff a co-owner to the extent of a one-third interest with the Smiths in any interest which all three of them may have in the moving picture rights of the opera in question, and in any other literary or dramatic property not copyrighted which has not passed to Werba & Luescher under the plaintiff's contract with them.
3. Decreeing an account against Robert B. Smith of any profits which he may have received from the statutory copyrights; in the account any proper cross-equities may be considered.
4. Appointing William Parkin, Esq., to take and state the account.
5. Awarding costs, except as against G. Schirmer, Incorporated.

In re NEW ENGLAND TRANSP. CO.

(District Court, D. Connecticut. December 5, 1914.)

No. 3185.

1. BANKRUPTCY ~~205~~—MARITIME LIENS—EXPENSE OF OPERATION OF VESSELS BY TRUSTEE.

Where a bankrupt corporation was the owner of vessels which were subject to maritime liens, to establish and enforce which proceedings in admiralty were prosecuted with the consent of the bankruptcy court, and in such proceedings the vessels were sold, expenses incurred by the receiver and trustee in operating the vessels after adjudication are not allowable from the proceeds as against lien claimants, where the general estate is sufficient to pay the same, since the earnings made became a part of such general estate.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 234, 303; Dec. Dig. ~~205~~.]

2. BANKRUPTCY ~~210~~—MARITIME LIENS—ENFORCEMENT IN BANKRUPTCY PROCEEDINGS.

Where a maritime lien exists, a court of bankruptcy will enforce such lien with the same effect as would a court of admiralty, and the lien claimants will not be required to contribute toward the general expenses of the proceedings, beyond the cost of establishing and enforcing their liens, where there are other funds of the estate.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 321-323; Dec. Dig. ~~210~~.]

3. MARITIME LIENS ~~37~~—DISTRIBUTION OF PROCEEDS OF VESSEL—RULES OF PRIORITY.

Where tugs and barges of a shipowner were not employed in harbor service, but in interstate commerce, in distributing their proceeds among lien claimants, the "forty-day" rule does not apply, but the liens may more equitably be given precedence in accordance with the yearly rule.

[Ed. Note.—For other cases, see Maritime Liens, Cent. Dig. §§ 58-70; Dec. Dig. ~~37~~.]

In Admiralty and in Bankruptcy. In the matter of the New England Transportation Company, bankrupt. On distribution of proceeds of vessels owned by bankrupt, in admiralty proceedings to enforce maritime liens.

Hyland & Zabriskie, of New York City, for libelants Burt & Mitchell Co. and Johann Swenson.

Alexander & Ash, of New York City, for libellant Burns Bros.

De Lagnel Berier, of New York City, for libellant Hudson Oil & Supply Co.

Frederick H. Wiggin, of New Haven, Conn., for trustee.

THOMAS, District Judge. The New England Transportation Company, a domestic corporation having its principal place of business at New Haven, was for a long time the owner of the tugs Resolute and Fred E. Ives together with a fleet of coal barges. The tugs were employed in the towing of these barges and other vessels between the port of New York and various cities and towns on the Long Island Sound in Connecticut, Rhode Island, and as far east as Massachusetts.

The company became involved financially, and in July, 1913, proceedings in bankruptcy were instituted against it in this court. During the time the vessels were operated by the company, numerous claims accrued against them for repairs, supplies, and other necessaries.

Suits in admiralty were commenced against the Ives in this court before bankruptcy proceedings were instituted, and in due course she was attached and sold by the marshal, and her proceeds have since been distributed among the various lienors; the trustee in bankruptcy having filed a disclaimer of any interest in the sale fund.

After the proceedings in bankruptcy were commenced, the lienors holding liens upon other vessels of the fleet obtained from the acting judge of this court an order allowing them to file libels and enforce their liens in admiralty. This was done, and under appropriate proceedings, in which the trustee joined with the libelants, the vessels were sold at public auction by the United States marshal.

Thereafter Henry G. Newton was appointed special master to hear

and report upon all libels and claims against the proceeds of the respective vessels. He died in March, 1914, before completing his work, and on April 4th in the same year Harrison Hewitt was appointed special master in his place. He made and filed his report on or about June 27, 1914, to which exceptions were duly taken.

The matter is now before the court on exceptions to the report of the special master, to whom was assigned the duty of ascertaining and reporting the amount and order of precedence of payments to libelants and maritime lienors and claimants out of the proceeds of the sale of the vessels which belonged to the bankrupt at the time of its adjudication in bankruptcy.

The vessels were sold by the marshal and trustee jointly, by order of the then acting judge of this district. The exceptions taken to the master's report concern: (a) Certain recommended payments out of the sale proceeds covering an allowance for fees and expenses to the trustee's attorney; (b) an allowance of the usual commission to the referee on cash to be disbursed to libelants and maritime lien claimants; (c) certain expenses incurred by the receiver and trustee for wages and supplies while they were conducting the bankrupt's business with the referee's sanction, subsequent to the date of bankrupt's adjudication; and (d) failure of the trustee to collect and credit the tug Resolute with the amount of a certain outstanding account representing part of the earnings of that tug while being operated by the trustee.

Exceptions are also taken to the rule invoked by the special master as to the amount and order of payments to be made where the proceeds of sale of certain of the vessels are insufficient to pay libelants and maritime lien claimants in full.

Instead of the proceeds obtained from the sale of the vessels being placed in the treasury of the court, as required by admiralty rules, the acting judge, upon the petition of the trustee in bankruptcy, directed that when a sale of the vessels was made, the proceeds thereof, less the amount required for clerk's fees and the marshal's fees and expenses, should be paid over to the trustee in bankruptcy to hold and pay out under order of court. The acting judge further directed that the same expenses and costs as are taxed in admiralty be allowed as preferred claims to libelants and to those entitled to maritime lien claims.

The vessels which were sold and the amounts obtained for each were as follows:

Resolute	\$6,375 00
Columbia	1,850 00
Carlos French.....	2,100 00
M. H. Fuller.....	2,025 00
G. B. Martin.....	800 00
Shamrock	2,200 00
E. G. Stoddard.....	660 00
Victoria	2,000 00
<hr/>	
Making the total sale receipts.....	\$18,010 00
From this amount there was paid to the clerk and marshal for fees and expenses the sum of.....	868 61
<hr/>	
And the balance, amounting to.....	\$17,141 39

was then turned over to the trustee in bankruptcy.

The special master recommends that there be paid out of this fund, as expenses of administration, the following items:

(a) An allowance to himself for services, amounting to.....	\$ 100 00
(b) An allowance for the services and disbursements of the former special master, now deceased, amounting to.....	428 65
(c) An allowance to the trustee for his services and disbursements, amounting to.....	285 00
(d) An allowance to the trustee's attorney for his services and disbursements, amounting to.....	526 05
 A total of.....	 \$1,339 70

He also recommends that the proceeds of sale of each vessel contribute to this total, apportioning it according to the respective amounts for which each vessel sold. Thus apportioned, each vessel's share is as follows:

Resolute	\$475 26
Columbia	137 49
Carlos French.....	156 02
H. M. Fuller.....	150 44
G. B. Martin.....	59 43
Shamrock	163 45
E. G. Stoddard.....	49 03
Victoria	148 58

He further recommended that from the proceeds of sale of the tug Resolute there be paid a special fee of \$75 to the trustee's attorney for special services rendered in relation to a claim against that vessel, as also expenditures amounting to \$1,426.56 made by the trustee for that vessel while operating her, although he has furnished no itemized statement of the expenditures.

The referee having asserted the right to receive a commission on all disbursements made to libelants and maritime lienors of all the vessels, the special master has recommended that the proportionate part of the referee's commission of 1 per cent. be paid from the proceeds of sale of the respective vessels.

The special master has further recommended that, where the proceeds of sale of any of the vessels are insufficient to pay in full those entitled to maritime liens thereon, such of the maritime lien claims as accrued within 40 days next prior to the date of the filing of the petition in bankruptcy be first paid, and that claims accruing within the 12 months next prior to the beginning of said 40 days be then paid, and so on in successive 12-month periods, until the fund of the particular vessel shall have become exhausted.

In view of the fact that there is a large fund belonging to the estate in the hands of the trustee other than that obtained from the sale of the vessels, I am of the opinion that there should first be paid from the proceeds of sale the following amounts:

Special master's services.....	\$100 00
Former special master's services and expenses.....	428 65
Expenses incurred by trustee's attorney.....	76 05
Allowance recommended as compensation to the trustee for his services and expenses.....	285 00
 Total	 \$889 70

This total amount shall be contributed from the proceeds of each vessel in such proportion as the amount which the trustee receives as the net proceeds of sale of the particular vessel is found to bear to the whole amount received by him as trustee from the sale of all the vessels. Therefore the special master's report will be confirmed to this extent, and the order of distribution will be found in a later part of this opinion.

It will also be confirmed, in so far as he has recommended the payment of a fee for special services to the trustee's attorney out of the proceeds of sale of the tug Resolute, and the taxable costs recommended for payment to the proctors of the several libelants.

[1] The special master's report must be overruled, in so far as he has recommended payment, out of the proceeds of sale, to the trustee's attorney of the amount claimed for general services rendered by him, the commissions claimed by the referee, and the expenses incurred by the receiver and trustee in operating the bankrupt's business subsequent to the commencement of bankruptcy proceedings.

The trustee, however, must also be allowed his expenditures in so far as he paid the crews and employés of the several vessels for wages earned by them prior to July 25, 1913. The respective amounts of these wages chargeable to each vessel will be found in a later part of this opinion.

All moneys earned by the vessels while being operated by the receiver and trustee properly belong to the general fund of the estate, and that fund should be credited with such earnings, instead of the particular vessel engaged in the earning. This being so, it would be unfair to charge any portion of the proceeds of sale with the cost of such operation, as it seems hardly probable that, had the results of the operation of the business by the receiver and trustee resulted in a profit, instead of showing a loss, the general creditors would then be satisfied to permit the profit so made to inure to the benefit of the maritime lien claimants of such of the vessels as were engaged in producing such profit. Were there no general fund sufficient to pay all the expenses of administration, the court might be justified in obliging the maritime lien claimants to contribute thereto, from the proceeds of sale of the vessels, a greater amount than they are required hereby, in which event the judgment herein would naturally follow the rule stated in the following cases: *In re Cramond* (D. C.) 145 Fed. 966; *In re Sanford Furniture Mfg. Co.* (D. C.) 126 Fed. 888; *In re Baughman* (D. C.) 163 Fed. 669—although none of those cases involved any question of maritime liens.

[2] The general rule to be followed in cases of this kind is as follows:

"Where a maritime lien exists, either a court of bankruptcy or of equity will enforce such a lien with the same effect as would a court of admiralty." *The Ironsides*, Fed. Cas. No. 7069; *In re Scott*, Fed. Cas. No. 12,517; *In re Kirkland*, Fed. Cas. No. 7842.

Applying this rule in so far as it may be applied, I am of the opinion that the holders of maritime liens should not now be asked to contribute more, inasmuch as they have already been obliged to contribute such a large amount from the proceeds of sale of the vessels to meet clerk's

fees and the fees and expenses of the marshal, together with the allowances asked as compensation for the special masters and their disbursements and the allowance suggested for the services of the trustee. For this reason the general fund in the hands of the trustee must be resort ed to for the payment of the other recommended expense items.

[3] The special master's report contains this statement:

"I shall assume that all liens accruing *within forty days prior* to the 23d day of July, 1913, the commencement of bankruptcy proceedings, have preference over the others, and are to be paid in full if the proceeds of the *sale of the vessel are sufficient*. This seems to be in accordance with the opinions of Judge Townsend and Judge Platt and the New York decisions."

After discussing the cases he concludes with this statement:

"Applying these principles, liens accruing between June 13 and July 22, 1913, inclusive, will take precedence of all others. Liens accruing after July 22, 1912, will take precedence of all prior liens, and liens accruing between July 23, 1911, and July 22, 1912, inclusive, will take precedence of all liens prior to them, and so as regards liens accruing between July 23, 1910, and July 22, 1911, inclusive."

From these statements it will be noticed that the special master has first followed in part the "40-day" period rule, and then adopted a "12-month" period rule, while the "40-day" rule sanctioned by Judge Brown in *The Proceeds of The Gratitude* (D. C.) 42 Fed. 299, and followed by Judge Hough in *The Glen Island* (D. C.) 194 Fed. 744, intended *successive* "40-day" periods, and the "yearly rule" where applied as in *The Philomena* (D. C.) 200 Fed. 873, and in *The Bethulia* (D. C.) 200 Fed. 876, referred to calendar years, so that the special master has not followed either of these rules as they are ordinarily understood and applied.

The Fred E. Ives, whose home port was New Haven, was also owned by the bankrupt, and was a companion tug to the Resolute. The Ives, for several years previous to her seizure, had, like the Resolute, been engaged in towing barges and other craft in the waters of Long Island Sound, making trips from as far east as Providence, R. I., to as far west as the New Jersey coast.

Libels having been filed against the Ives, she was arrested by the marshal of this district at the port of New London, just one week before the day the bankrupt filed its petition in bankruptcy. A decree was obtained against her, as the result of which she was sold and the avails of sale paid into the registry of this court. The bankrupt's trustee then filed a disclaimer of any interest in the sale fund on account of the large number of maritime liens against her.

The commissioner, who was appointed to ascertain and report the amount of the maritime liens against the Ives, their right to priority, and their consequent order of payment out of the fund obtained by her sale, filed his report in this court, and the same was afterwards confirmed, and the fund disbursed in accordance with the commissioner's recommendations.

Referring to the matter of priority of the several maritime liens and the order of their payment, the commissioner expressed himself in the following language:

"The theory upon which all these rules are predicated, whether it be the so-called 'voyage rule,' the 'season rule,' the '40-day rule,' the '30-day rule,' or

the 'yearly rule,' is that the vessel should be allowed sufficient time wherein to earn her freight and pay her bills before being seized and held for the debt; and this, of course, carries with it the further idea that, the larger the bill, the more time should be allowed the vessel. * * * The Ives was not a harbor tug, within the meaning of that term as applied in the Cases of The Gratitude and The Glen Island, both of which tugs were engaged in and about the harbor of New York, while the Ives was engaged in interstate commerce. Consequently, no principle of law enunciated in those decisions will be violated if the '40-day rule' be not followed here. * * * By applying the 'yearly rule,' which in this case is practically the 'season rule,' most justice will be done to all parties, as thereunder all who furnished supplies and did repairs to the Ives from January 1, 1913, up to the time the marshal arrested her (all these claims being of equal rank), will be permitted to share pro rata in the fund in proportion to their several claims accruing during this period, as the fund is insufficient to pay in full items of debt contracted during that time. * * * If, however, there were sufficient funds to pay in full all claims accruing during the year 1913, and more, the excess thereof should be first shared in by those whose claims accrued during the year 1912, and any overplus remaining thereafter should be first shared in by those whose claims accrued during the previous year, and so on until the whole fund would be used in settlement of the claims allowed; claims of equal rank to be treated alike, and claims founded on a tort, as of damages arising out of collision by or through the negligence of the tug, to have preference over earlier contractual claims for supplies furnished in accordance with the rule laid down in the case of The John G. Stevens, 170 U. S. 113 [18 Sup. Ct. 544, 42 L. Ed. 969]. * * *

If the court should adopt the "40-day period" rule recommended by the special master in this case, it would mean that two very large claims against the Resolute, viz., Tietjen & Lang Dry Dock Company and James Shewan & Sons for repairs and materials furnished her during February, 1913 (and without which it would have been impossible for that vessel to have continued in her work), would be paid in part only, instead of in full, whereas supplies of much less import furnished her during the 40-day period recommended by the special master would be paid in full. The same would be the case with reference to the G. B. Martin and the E. G. Stoddard, against which vessels R. S. Bushey has a large bill for repairs made during January, 1913.

In view of the fact that the maritime lien claims against the vessels of the bankrupt's fleet herein concerned are like those which were filed against the Ives, both in their nature and point of time when they accrued, it will tend to uniformity if the rule adopted by the commissioner in the Ives Case be followed in this. Therefore the report of the special master must be overruled on this point, and the fund shall be distributed in the following manner:

First. There shall be paid from the avails of sale of all the vessels the items of administration expense hereinbefore allowed, amounting to \$889.70, each vessel to share in the payment in the proportion indicated, to wit:

Resolute	\$314 93
Columbia	91 39
H. M. Fuller.....	100 04
Shamrock	108 68
Victoria	98 80
G. B. Martin.....	39 52
Carlos French.....	103 74
E. G. Stoddard.....	32 60

Second. The trustee shall reimburse himself out of the avails of sale of each vessel for the amount which he paid to its crew and employés as wages earned prior to July 25, 1913, as follows:

Resolute	\$378 53
Columbia	12 00
Shamrock	12 00
Victoria	12 00
Carlos French.....	56 00
H. M. Fuller.....	56 00
G. B. Martin.....	56 00
E. G. Stoddard.....	52 00

Third. The trustee's attorney shall receive from the avails of sale of the tug Resolute a fee of \$75 for special services rendered that vessel.

Fourth. After the above-mentioned deductions are made, the remaining avails of sale of the several vessels shall be disbursed as follows:

1. In payment of the costs allowed by the special master to the several proctors.

2. In payment of all maritime lien claims in full, where the avails of the particular vessel will permit this to be done.

3. In cases where the avails of sale of the particular vessel prove insufficient to pay all maritime lien claims in full then, in so far as is possible, those which accrued during the year 1913 shall be paid in full, and the excess of the avails of sale thereafter remaining, if any, shall be then shared in by those whose liens accrued during the year 1912, and when these are paid in full then to lienholders of the next previous year, and so on until the whole fund of the particular vessel is exhausted in the payment of such claims.

4. In cases where the fund shall be found insufficient to pay in full all lien claims of equal degree accruing during the particular year, then the fund is to be prorated between said lien claimants. Lien claims founded on a tort are, however, to rank liens for supplies or materials of a prior date, and therefore are to be first paid in full where possible.

5. Whatever balance remains after making the above payments must be turned over to the trustee as representative of the owner and shall become a part of the general fund of the estate.

UNITED STATES v. RUROEDE et al.

(District Court, S. D. New York.)

1. CONSPIRACY ~~§~~ 43—ARREST—COMPLAINT—EXAMINATION.

Rev. St. § 1014 (Comp. St. 1913, § 1674), provides that an offender may be arrested and imprisoned or bailed by a commissioner, agreeable to the usual mode of process against offenders in the state where accused has been found, and Code Cr. Proc. N. Y. § 149, concerning proceedings before a committing magistrate, provides that depositions on which a warrant is issued must set forth the facts tending to establish the commission of the crime, and defendant's guilt. Held, that where a complaint on which

accused was arrested on information and belief charged that he did unlawfully, etc., conspire to defraud the United States, and to effect the object of the conspiracy defendants had an interview in the city of New York on December 31, 1914, and that the source of deponent's information and the grounds of his belief as to the facts were an official investigation, the disclosure of which would be contrary to public policy and injurious to the government's case, but would be presented in full at the hearing of the complaint, was fatally defective for failure to show in what respect the overt act constituted a violation of law.

[Ed. Note.—For other cases, see Conspiracy, Cent. Dig. §§ 79, 80, 84-99; Dec. Dig. ☞43.]

2. CRIMINAL LAW ☞213—INSUFFICIENT COMPLAINT—PRELIMINARY EXAMINATION—WAIVER.

Accused by waiving preliminary examination did not waive his right to object that the complaint on which he was arrested failed to state an offense.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 431-433; Dec. Dig. ☞213.]

Application by Carl Ruroede, impleaded, etc., for discharge on habeas corpus. Writ sustained, and prisoner discharged.

H. Snowden Marshall, U. S. Atty., of New York City.

Charles A. Oberwager, of New York City, for defendants.

AUGUSTUS N. HAND, District Judge. [1] The prisoner was arrested upon a complaint by the Acting Division Superintendent of the Department of Justice, which stated:

"On information and belief that on or about the 15th day of November, 1914, the above-named defendants * * * unlawfully, willfully, knowingly and feloniously did conspire to defraud the United States and to effect the object of the said conspiracy the defendant Carl Ruroede did on the 31st day of December, 1913, at the city of New York * * * have an interview with the defendant John Aucher against the peace of the United States and their dignity and contrary to the form of the statute of the United States in such case made and provided.

"The source of deponent's information and the grounds for his belief as to the facts herein are based upon an official investigation thereof to disclose the nature of which would be contrary to public policy and would be injurious to the government's case and the same will be presented in full at the hearing upon this complaint."

The warrant issued by the commissioner for the arrest of Ruroede follows the exact language of the complaint in the description of the crime and the overt act.

The accused appeared before the commissioner and waived examination. He now comes before me on a writ of habeas corpus and seeks a discharge upon the ground that the complaint alleges no facts constituting a crime.

It is true that numerous cases hold that less precision is necessary upon an affidavit for commitment than in the case of an indictment; but nevertheless I think the rule is fundamental to the common law that a prisoner is entitled at all times to be apprised of the crime of which he is accused, and also of the acts charged constituting that crime.

It is to be observed that section 1014 of the Revised Statutes, under which the proceeding for the arrest of Ruroede was taken, provides that the offender may "by any commissioner * * * and agreeably to the usual mode of process against offenders in such state (referring to the state where the accused has been found), and at the expense of the United States, be arrested and imprisoned, or bailed, as the case may be, for trial before such court of the United States as by law has cognizance of the offense."

The late Judge Addison Brown, in the case of *United States v. Greene* (D. C.) 100 Fed. 941, following the opinion of Mr. Justice Curtis of the Supreme Court of the United States in the old case of *United States v. Rundlett*, 2 Curt. 41, Fed. Cas. No. 16,208, held that it was the effect of section 1014 to assimilate all proceedings for holding accused prisoners to answer before a court of the United States to proceedings had for similar purposes by laws of the state where the proceedings might take place.

Section 149 of the Code of Criminal Procedure of the state of New York, referring to proceedings before a committing magistrate, provides that the depositions upon which the warrant is issued "must set forth the facts * * * tending to establish the commission of the crime and the guilt of the defendant."

In the case of *United States v. Greene*, *supra*, Judge Brown held that where there had been an indictment in another district, and the United States had applied for a removal to that district under section 1014 of the Revised Statutes, there must be an independent proceeding before the commissioner in the jurisdiction from which the prisoner was sought to be removed for the purpose of ascertaining whether there was sufficient ground to commit and remove him. Judge Brown further held that an allegation, in the indictment in the foreign state (which paper was offered in evidence, as the sole basis for commitment), that the prisoner conspired to defraud the United States and as an overt act presented to a disbursing officer of the government fraudulent claims without any statement showing in what respect such claims were fraudulent, or any evidential facts or circumstances from which fraud could be found, was a defective allegation, and the court must discharge the accused. That case, where the indictment was treated as having the force of an affidavit before a committing magistrate, is a direct authority in this court for the position I have indicated, namely, that the overt act alleged must be connected with the crime in such a way as to indicate that a criminal act was performed.

As was said by Judge Andrews of the New York Court of Appeals in the extradition case of *People ex rel. Lawrence v. Brady*, 56 N. Y. 182, cited by the counsel for the accused:

"It is a reasonable rule, supported by obvious considerations of justice and policy, that when a surrender is sought upon proof, by affidavit, of a crime, the offense should be distinctly and plainly charged."

As was said in the case of *United States v. Cruikshank*, 92 U. S. at page 557, 23 L. Ed. 588:

"In criminal cases, prosecuted under the laws of the United States, the accused has the constitutional right to be informed of the nature and cause

of the accusation.' Amend. 6. In United States v. Mills, 7 Pet. 142 [8 L. Ed. 636], this was construed to mean that the indictment must set forth the offense 'with clearness and all necessary certainty, to apprise the accused of the crime with which he stands charged.' * * * The object of the indictment is: First, to furnish the accused with such a description of the charge against him as will enable him to make his defense, and avail himself of his conviction or acquittal for protection against a further prosecution for the same cause; and, second, to inform the court of the facts alleged, so that it may decide whether they are sufficient in law to support a conviction, if one should be had. For this, facts are to be stated, not conclusions of law alone. A crime is made up of acts and intent, and these must be set forth in the indictment, with reasonable particularity of time, place, and circumstances.

"It is a crime to steal goods and chattels; but an indictment would be bad that did not specify with some degree of certainty the articles stolen. This, because the accused must be advised of the essential particulars of the charge against him, and the court must be able to decide whether the property taken was such as was the subject of larceny."

See, also, U. S. v. Hess, 124 U. S. 483, 8 Sup. Ct. 571, 31 L. Ed. 516.

The affidavit in this case, while it does state the crime of conspiring to defraud the United States and does state an act which may have been an overt act in the commission of that crime, nowhere states any facts indicating in what respect the overt act constituted a violation of the law. This seems to me a fatal error on the face of the complaint, and, unless cured in some way, I am required to sustain the writ of habeas corpus.

[2] It is urged, however, by the United States attorney, that, inasmuch as the prisoner at the hearing before the commissioner waived examination, he is debarred now from complaining of his confinement pending an investigation by the grand jury. There is no doubt that a waiver of examination does debar a prisoner from thereafter questioning informalities or technical objections to the regularity of the proceeding; but I do not think that any cases cited by the United States attorney have gone so far as to hold that a waiver of examination cured a complaint which upon its face discloses no facts indicating the commission of a crime. While the government in any case is justified as far as possible in keeping secret its evidence until a matter has been submitted to the grand jury, it cannot, I think, sustain a warrant of arrest for any reason or under any circumstances, where neither the warrant nor the complaint state facts constituting the crime that is charged, even though the prisoner has at the hearing waived examination. His waiver will prevent him, as I have heretofore said, from objecting to informalities or irregularities in the warrant or in the complaint; but it does not, I think, debar him from attacking a process which does not upon its face state the facts which constitute the crime charged. The meaning of the waiver is, I think, simply this: The prisoner has a right to have evidence produced in support of the complaint and to produce evidence on his part in answer thereto; in other words, to have the benefit of a preliminary examination. If he does not desire to have it and waives it, he cannot thereafter claim that he should have had it. In other words, the waiver is as broad as the privilege and nothing more. He has never by any con-

duct of his waived the right to object to the fact of being held upon a complaint which states no cause of action and upon a process which is, therefore, void.

In the case of *In re Mallison*, 36 Kan. 725, 14 Pac. 144, cited by the United States attorney, it was held that the waiver of a preliminary examination amounted to a waiver of the right to bail and also of the right to have the facts of the alleged offense examined into on a writ of habeas corpus.

The case of *Benjamin v. State of Florida*, 25 Fla. 675, 6 South. 433, also cited by the prosecution, correctly holds that, where a preliminary examination is waived by the prisoner and the waiver accepted by the magistrate, the prisoner is precluded thereafter from "asserting in any subsequent proceeding anything he could not have asserted if the examination had taken place, or, in other words, he is at least in the same situation as he would be had an examination taken place; he cannot for his own advantage say that the examination did not take place, and on that ground attack the commitment which the magistrate may have adjudged. * * *"

In that case, however, it was distinctly held by the Supreme Court of Florida that the prisoner did not by waiving examination bar his right to apply for bail or to have a full inquiry upon a writ of habeas corpus into the facts of the case. The Florida case is therefore not an authority in any respect for the position urged by the United States attorney and seems to me quite contrary to the views he urges. Indeed, I think it goes too far in apparently holding that after a waiver of examination the accused may on a writ of habeas corpus controvert facts which are stated in a complaint that is good upon its face.

The case of *People ex rel. Perkins v. Moss*, 187 N. Y. 410, 80 N. E. 383, 11 L. R. A. (N. S.) 528, 10 Ann. Cas. 309, correctly states the law. The court there said:

"If the information, which was laid before the magistrate, furnished no legal evidence of the commission of a crime by the relator, then he was illegally restrained of his liberty. If the facts shown did not warrant an inference by the magistrate of the existence of probable cause to believe that the crime charged had been committed, he was without jurisdiction to cause the arrest of the relator, and the latter was entitled to resort at once for his protection to the writ of habeas corpus. * * * He was not obliged to await an examination before the magistrate. The provision of the statute, in that respect, was for his benefit; in order that he might be informed of the charge and that he might have the opportunity to examine the witnesses and to make any statement in relation to the charge. * * * He could waive these proceedings, however, and immediately sue out the writs, that the legality of his detention under arrest might be inquired into. * * *"

The writ must be sustained, and the prisoner discharged.

UNITED STATES v. ATCHISON, T. & S. F. RY. CO.

(District Court, S. D. California, S. D. January 14, 1915.)

RAILROADS ☞254—OPERATION—SAFETY APPLIANCE ACT—HAULING FOR REPAIR—“NECESSARY.”

An interstate carrier, which moved from a transfer track to its repair track, in the same city, a car whose automatic coupling was out of repair, so that a man had to go between the ends of the cars to uncouple it, is not relieved from the penalty under the Railroad Safety Appliance Act (Act March 2, 1893, c. 196, 27 Stat. 531), by the amendment thereto by Act April 14, 1910, c. 160, 36 Stat. 299, § 4 (Comp. St. 1913, § 8621), providing that, if the safety appliance equipment becomes defective while in use, the car may be hauled to the nearest available point where repairs can be made, if such movement is “necessary” to make such repairs, and they cannot be made except at such repair point, where it appears that the repairman could have gone to the transfer track to make the necessary repairs, or they could have been made by switchmen if they had had the proper appliances, since the requirement of the statute that the movement must be “necessary” will not be held to mean only that it be convenient or expedient.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 764–772; Dec. Dig. ☞254.

For other definitions, see Words and Phrases, First and Second Series, Necessary.]

Action by the United States of America against the Atchison, Topeka & Santa Fé Railway Company to enforce a penalty for violation of the Safety Appliance Act. On trial to the court upon an agreed statement of facts. Judgment entered for plaintiff.

Albert Schoonover, U. S. Atty., and H. R. Archbald, Asst. U. S. Atty., both of Los Angeles, Cal.

E. W. Camp, U. T. Clotfelter, and Paul Burks, all of Los Angeles, Cal., for defendant.

BLEDSOE, District Judge. This is an action tried before and submitted to the court upon an agreed statement of facts. The plaintiff asks for a judgment of \$100, as against the defendant, because of an alleged violation of the Safety Appliance Act of Congress, in that the said defendant hauled on its line of railroad, over a part of a through highway of interstate commerce, a certain freight car, which said freight car was out of repair, in that the uncoupling chain on one end of said car was disconnected from the coupler, thus necessitating a man going between the ends of the cars to couple or uncouple them.

In the agreed statement of facts, among other things not material to a determination of the cause, it is stipulated that the railway of the defendant is, and was, efficiently managed and operated in accord with the best-known custom and usage prevailing among well-operated railroads; that in the city of San Diego, wherein the alleged violation of the Safety Appliance Act occurred, a certain transfer track, upon which was situate the car in question, was a little over one mile distant from a certain track known as the “D street repair track,” which latter track was set apart and used for the accommodation of, and upon which it

☞ For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

was the practice to place, all cars which were in need of repairs of a character which could be made at San Diego; that defendant maintained a regular force of car inspectors and repairmen in its yard at its said repair track, but did not regularly maintain any such car inspectors or repairmen at any point upon the aforesaid transfer track, it being the practice to send a car inspector from the said repair track to inspect cars upon the said transfer track before moving them, and it being the practice to make all repairs which could be made at San Diego on said repair track; that it was defendant's practice to inspect all cars placed upon said transfer track before accepting delivery of the same, and that the car in question, before delivery of the same was accepted, was so inspected and found to be in all respects, as required by the acts of Congress, in proper condition of repair; that after said car had been so inspected and found to be in proper condition of repair, but before it had been removed therefrom, some person unknown to the defendant, and not in its employ, and without its knowledge, aid, or consent, removed from the coupler upon one end of the said car a clevis pin and clevis (being a familiar device and used for the purpose of connecting the uncoupling lever and chain, connected with and constituting a part of the automatic coupler, with which said car was equipped); that thereafter, and after a switching engine of the defendant had reached said transfer track, and after some employé of the defendant had discovered the removal of the said clevis pin and clevis, whereby the uncoupling chain on one end of said car was disconnected from the coupler thereof, said car was moved by the said switching engine of the defendant to a distance of $1\frac{1}{10}$ miles, above referred to, from said transfer track to defendant's said repair track, "for the sole purpose of making such repair there."

It is then stipulated that it would have been possible to send a repairman from said repair track to said transfer track with tools and materials of a character necessary to make such repairs, which said repairs could also have been made by the switching crew which had been sent to move said car from said transfer track, if the members thereof had had in their possession, or upon their engine (as they did not have at said time or place), any clevis and clevis pin of the size, type, and kind necessary to make such repairs.

It is provided in the Safety Appliance Act, as amended, that a common carrier hauling on its line any car "not equipped with couplers, coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars," shall be liable for the penalty sued for herein, and it is conceded that the defendant herein is liable as for an infraction of that statutory provision, but the claim is made that it is exempt from punishment therefor, because of the remedial amendment ingrafted upon the Safety Appliance Act in 1910 (36 Stat. 299), whereby it was provided that:

"Where any car shall have been properly equipped, as provided in this act and the other acts mentioned herein, and such equipment shall have become defective or insecure while such car was being used by such carrier upon its line of railroad, such car may be hauled from the place where such equipment was first discovered to be defective * * * or insecure to the nearest available point where such car can be repaired, without liability for the penal-

ties imposed, * * * if such movement is necessary to make such repairs and such repairs cannot be made except at such repair point."

The sole question in the case, which is of importance because of the principle rather than of the amount involved, is whether or not, upon the discovery of an inhibited defect in the equipment of a car, the common carrier may haul the car in the usual and ordinary way from the place where the defect is first discovered to the nearest place where such repairs as are necessary, because of the existence of such defect, are usually and ordinarily made, in spite of the fact that with but little, if any, inconvenience or interference with the practicable operation of the carrier's business, such repair could have been made upon the ground, and without any necessity of moving the car or subjecting employés of the carrier to risk of injury. Mr. Justice Moody, of the United States Supreme Court, in construing the Safety Appliance Act, said:

"There is no escape from the meaning of these words. Explanation cannot clarify them, and ought not to be employed to confuse them or lessen their significance. The obvious purpose of the Legislature was to supplant the qualified duty of the common law with an absolute duty deemed by it more just." St. Louis, Iron Mountain & S. Railway Co. v. Taylor, 210 U. S. 281, 28 Sup. Ct. 616, 52 L. Ed. 1061.

It is apparent to me from a careful reading of the Safety Appliance Act, together with its amendments, that Congress intended that an "absolute" duty was to be cast upon common carriers operating the usual instrumentalities of interstate commerce; that such absolute duty required of such common carriers the doing of the certain precise definite things specified in the statute; that the considerations impelling the requirement of these things were those looking to human safety and the protection of the lives of the thousands of employés engaged in and about the work incident to the carrying on of interstate commerce. Under such circumstances this court feels that considerations of "convenience," "practicability," or "expediency" should not be permitted to fritter away or lessen the most commendable purpose of the act in question, and that a defendant should not be permitted to claim the benefit of the remedial amendment above referred to, unless such defendant clearly and indisputably brings itself within the purview thereof. If such be the correct and rational interpretation of the entire act, then in order that the movement of a car, such as is involved herein, can be justified, it must be shown by the carrier that such movement was *necessary*, in order that the required repairs might be made, and that such repairs *could not be made* except at the repair point to which the car was moved. It will not suffice, in my judgment, to hold that the word "necessary" is the substantial equivalent of "convenient," or that it should be qualified by the phrases "practicably" or "economically"; so to hold would be to place convenience, practicability, and economy above human life, and that this court will not do.

It is clearly apparent, from the agreed statement of facts, that it would have been very easy for the defendant to have sent an appropriate repairman from its repair track to the transfer track, where the car in question was standing. It would have been equally easy, or pos-

sibly less so, if the engine had been made use of, for the switching crew to have sent to the repair track for the materials necessary to effectuate an adequate repair. It is suggested in the agreed statement of facts that the crew did not have in their possession, or upon their engine, a clevis and clevis pin of the size, type, and kind necessary to make the required repairs. It does not appear, however, that they did not have in some other place, to wit, upon the other end of the car in question, such clevis, or that they did not have at hand a different sized clevis or other instrumentality which could have been used for the precise repair then necessary. In any event, it does not appeal to the court that the movement of the car complained of by the government was necessary, in order that the repair could be made, nor that the repair could not, consistently with a proper operation of defendant's railway even, have been made, at the point where the defect was originally discovered.

Findings being unnecessary, judgment will be entered as prayed for by plaintiff.

In re JOHNSTON et al.

(District Court, S. D. California, S. D. February 1, 1915.)

1. CHATTEL MORTGAGES ~~63~~ — EXECUTION — AFFIDAVIT ACCOMPANYING INSTRUMENT.

Under Civ. Code Cal. § 2957, providing that a mortgage of personal property is void as against creditors, unless accompanied by the affidavit of all the parties thereto that it is made in good faith, and without any design to hinder, delay, or defraud creditors, if the oath of the parties is taken by a competent official, who certifies thereto, their signatures to the affidavit are unnecessary.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. §§ 125-135; Dec. Dig. ~~63~~.]

2. CHATTEL MORTGAGES ~~63~~ — EXECUTION — AFFIDAVIT ACCOMPANYING INSTRUMENT — "AFFIDAVIT."

Under Civ. Code Cal. § 2957, where chattel mortgagors neither signed an affidavit that the mortgage was not made to hinder and defraud creditors, nor were sworn to that effect, it did not render the instrument valid that they went before a notary public for the purpose and with the intent of performing every act required by law to make the instrument a valid mortgage, especially in view of Code Civ. Proc. Cal. § 2003, defining an "affidavit" as a written declaration under oath.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. §§ 125-135; Dec. Dig. ~~63~~.]

For other definitions, see Words and Phrases, First and Second Series, Affidavit.]

3. CHATTEL MORTGAGES ~~63~~ — EXECUTION — AFFIDAVIT ACCOMPANYING INSTRUMENT.

Where chattel mortgagors did not sign the affidavit required by Civ. Code Cal. § 2957, that the mortgage was not given to hinder or defraud creditors, the notary public's certificate that they were duly sworn and deposed that it was not so given was not conclusive that they made the necessary oath, especially in view of Code Civ. Proc. Cal. § 1978, providing that no evidence is by law made conclusive or unanswerable, unless so declared by that Code, and section 1920, providing that entries of pub-

lic officials in books or records are merely *prima facie* evidence of the facts therein stated.

[Ed. Note.—For other cases, see *Chattel Mortgages*, Cent. Dig. §§ 125-135; Dec. Dig. ☞63.]

In Bankruptcy. In the matter of Carrie Johnston and another, bankrupts. Proceeding to review an order of the referee. Order annulled, and matter again referred to the referee, with instructions.

Wm. M. Morse, Jr., of Los Angeles, Cal., for bankrupt.

W. T. Craig, of Los Angeles, Cal., for certain creditors.

BLEDSOE, District Judge. This is a review of an order made by the referee in bankruptcy in the above-entitled proceeding, allowing as valid a certain chattel mortgage given by the said bankrupts upon personal property belonging to them, and decreeing that the owner and holder of said mortgage had a right to foreclose the same, as against the trustee in bankruptcy.

The sole question in the case arises out of a requirement of the Civil Code of the state of California. By section 2957 of said Code it is provided that a mortgage of personal property is void as against creditors of the mortgagors and subsequent purchasers and incumbrancers of the property in good faith and for value, unless: (1) It is accompanied by the affidavit of all the parties thereto that it is made in good faith and without any design to hinder, delay, or defraud creditors; and (2) it is acknowledged or proved, certified, and recorded in like manner as grants of real property. The mortgage in question was given to secure the payment of a subsisting indebtedness owed by the mortgagors to the mortgagee, and was duly and regularly signed and acknowledged as required by section 2957. With respect to the affidavit mentioned in said section, however, the mortgage contained merely the following statement or certificate:

"State of California, City of Los Angeles—ss.:

"Carrie L. Johnston and Hattie B. Davies, mortgagors in foregoing mortgage named, and Sarah Rabin, the mortgagee in said mortgage named, each being duly sworn, each for himself, doth depose and say: That the aforesaid mortgage is made in good faith, and without any design to hinder, delay, or defraud any creditor or creditors. Sarah Rabin.

"Subscribed and sworn to before me this 3d day of February, 1914.

"[Seal.]

Elizabeth F. Hillman,

"Notary Public in and for said County, State of California."

[1] It thus appears that, though there is a certificate appended to the mortgage certifying that the two mortgagors and the mortgagee, after each had been duly sworn, did make the oath required by the statute, only the mortgagee named therein actually signed said oath or affidavit. It has been held, however, conformably to the general current of authority, that the signatures of the parties to the affidavit are unnecessary, it being sufficient if the oath be taken by a competent official certifying to the same (*Ede v. Johnson*, 15 Cal. 53); and counsel for the trustee herein, who asked for a review of the ruling of the referee, do not contend such is not the law.

[2] The claim is made, however, and evidence was introduced before

the referee in support thereof, that the mortgagors actually failed to take the oath required by the section of the Code above referred to, and that the certificate of the notary to the effect that they had taken such oath is in truth and in fact a false statement. The referee apparently declined to make a finding with respect to the question as to whether or not the said mortgagors did take the oath as required, but did make a finding, upon which he held the mortgage to be valid, substantially as follows:

That, on the day in question, the said mortgagors and the said mortgagee went to the office of the notary public above mentioned, and that "each of said persons appeared personally before said notary public at her office, for the purpose of, and with the intent to do and perform each and every act required by law to be done and performed by them, and each of them, to make said instrument a valid chattel mortgage, and also to have said notary public do and perform each and every act required by law to be done by her as such notary public to make said instrument a valid mortgage upon the personal property therein described, and thereupon the said notary public subscribed her name as such notary, and affixed her notarial seal," etc.

The trustee had asserted that the instrument was not a valid chattel mortgage, and upon the hearing of the matter evidence seems to have been admitted on both sides with respect to the question of whether or not the mortgagors did, as a matter of fact, make the oath required of them, and which was certified by the notary public as having been made by them. Under these circumstances, in my judgment, the referee should have made a finding in answer to such question, and upon such finding determined the validity or invalidity of the mortgage, as the case might be.

Section 2957, supra, requires that the affidavit of all the parties to the mortgage, with respect to the facts mentioned, shall accompany the mortgage. Section 2003 of the Code of Civil Procedure defines an "affidavit" as a "written declaration under oath." Such, indeed, is the general definition of the term. 2 Cyc. 4. So it has been held that, in order for an affidavit to be valid for any purpose, it must be sworn to. 2 Cyc. 16.

[3] The referee's finding is not that the mortgagors *made* the necessary oath, but that, merely intending to do everything necessary to make a valid chattel mortgage (without, however, in any way so indicating to the notary), they are conclusively presumed to have made oath to the statement required by the statute, solely because the notary has certified that they did. So to hold would be to sacrifice substance for form. The Legislature evidently intended that a chattel mortgage should not be valid, as against creditors at least (and it will be remembered that the trustee in virtue of the provisions of section 47 of the Bankruptcy Act [Act July 1, 1898, c. 541, 30 Stat. 557 (Comp. St. 1913, § 9631)] occupies the position of a judgment creditor), unless certain facts specified in the statute in question were given verity by the solemnity of an oath; it was not intended that the parties to such instrument might create a valid mortgage without submitting themselves to the pains and penalties of perjury in the event the facts were falsely stated by them. It is apparent that no prosecution for perjury could possibly be predicated upon the transaction as delineated in the referee's

findings, even if everything supposedly sworn to had been known to be false by the parties. In spite of their general purpose in appearing before the notary, and in spite of her formal certificate that they were in fact sworn, their failure in some way to make oath to the facts required by the statute would have been a complete defense to them in a prosecution for perjury as for making a false oath.

The conclusion of the referee, if I understand it, seems to be based upon the theory that the certificate of the notary, as to what was done by the parties after they came to her office, is conclusive. Section 1978 of the Code of Civil Procedure, however, provides that:

"No evidence is by law made conclusive or unanswerable, unless so declared by this Code."

Not only is there no section in the Code, to which my attention has been called, which declares the certificate of the notary, given under such circumstances, to be conclusive evidence of the truth and correctness of the facts therein stated, but, on the contrary, section 1920 of the same Code provides that entries of public officials in books or records (of which the entry in question would be one) are merely *prima facie* evidence of the facts stated therein. It is true, without doubt, that it would require considerable, yea almost conclusive, evidence to overcome the certificate of the notary (*Pickens v. Knisely*, 29 W. Va. 1, 11 S. E. 932, 6 Am. St. Rep. 622), but that, as a matter of law, it may be overcome, and the truth shown, seems to me to be beyond question (1 Cyc. 618; *Pickens v. Knisely*, *supra*).

There is a line of cases, of which *Le Mesnager v. Hamilton*, 101 Cal. 532, 35 Pac. 1054, 40 Am. St. Rep. 81, is one, holding that, where a person actually appears before a notary and *makes "some kind of an acknowledgment"*, the certificate of the officer would be conclusive, in favor of a purchaser in good faith, that such person actually made the acknowledgment certified to; however, this rule seems to be limited to cases of acknowledgment made by married women under statutes where the acknowledgment is regarded as a "part of the execution of the instrument itself." In ordinary cases, of course, the acknowledgment and certificate thereof are necessary only as a means of securing *recordation* of the instrument and do not affect its validity. In the case of an ordinary certificate of acknowledgment (and a certificate of the administration of an oath would stand upon the same footing), it has been held by the Supreme Court of California, citing the sections of the Code referred to hereinabove, and differentiating the *Le Mesnager* Case, *supra*, that the certificate is only *prima facie* evidence of the facts recited therein. *Moore v. Hopkins*, 83 Cal. 270, 23 Pac. 318, 17 Am. St. Rep. 248.

If we assume, as seems proper, that the affidavit required to accompany chattel mortgage in California is also a "part of the execution" of such chattel mortgage, and necessary to give it validity as against creditors, still the rule as announced by the preponderance of authority should be followed, *viz.*, that the certificate will be held conclusive only where "some kind of an acknowledgment" (affidavit) has been made by the party appearing before the notary. Herein, confessedly, under the findings, no affidavit of any sort or character was made, mentioned, or

discussed by the mortgagors in the presence of the notary, or at all. Under such a state of facts I do not consider that the holding in the Le Mesnager Case even, and others similar to it, would apply.

The testimony as taken before the referee is of a very contradictory nature with respect to the question at issue in the case—that is, whether the mortgagors did or did not make the affidavit certified to—and because of this it seems improper for the court, at this time, itself to make a finding on such issue, and it seems to be necessary, therefore, that the matter should again be referred to the referee, with instructions to make a finding thereon.

The order of the referee herein is hereby annulled, and the matter is again referred to the referee, with instructions to permit the parties to offer additional evidence, if they shall be so advised, upon the question as to whether or not the affidavit accompanying the mortgage was actually made, and to report his findings and conclusions thereon.

In re PENN DEVELOPMENT CO.

(District Court, S. D. California, S. D. February 1, 1915.)

BANKRUPTCY ☞105—PROCEEDINGS—JUDGMENT IN STATE COURT—INJUNCTION.

Under Bankr. Act July 1, 1898, c. 541, § 11a, 30 Stat. 549 (Comp. St. 1913, § 9395), providing that a suit on a dischargeable debt which is pending against a person at the time of filing a bankruptcy petition against him shall be stayed until an adjudication or dismissal of the petition, an injunction will not be granted as of course by a bankruptcy court, on the filing of an involuntary petition, restraining a creditor, having a judgment in the state court against a bankrupt on a dischargeable debt, from taking any steps to enforce the same, without any allegation of proof of the threatened invasion of the rights of any creditor, and because of a mere possibility of action being taken which would be injurious to the creditors as a whole, in the absence of any application to the state court for proper relief there.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 156–158, 162; Dec. Dig. ☞105.]

In Bankruptcy. In the matter of bankruptcy proceedings of the Penn Development Company. On petition by Theodore Martin, a creditor, for an injunction restraining the enforcement of a judgment recovered against the bankrupt in the state court. Denied.

Theodore Martin and Hunsaker & Harris, all of Los Angeles, Cal., for petitioning creditors.

J. R. Whittemore, of New York City, for alleged bankrupt.

BLEDSOE, District Judge. In the above-mentioned bankruptcy proceeding, initiated by the filing of an involuntary petition, Theodore Martin, one of the creditors of the bankrupt, has filed his verified petition with the court, asking for the issuance of "a writ of injunction" forbidding the said bankrupt, his servants and attorneys, "and all officers, sheriffs, and constables, from selling, disposing of, or in any manner interfering with, any of the property belonging to the bank-

rupt herein, from the issuance of any writs or writ of execution" upon the certain judgment hereinafter referred to, or "from entering judgment in the action" hereinafter referred to, or "proceeding any further with respect thereto," until the further order of the court, etc.

The petition alleges that, within four months previous to the filing of the involuntary petition in bankruptcy herein, one Stephen W. Dorsey obtained in a certain action a default judgment in the superior court of the state of California, in and for the county of Los Angeles, against the said bankrupt, in a sum in excess of \$10,000; that at the same time in another certain action in the said court between the same parties, the said Dorsey caused the default of the defendant to be entered in a suit brought by him for the recovery of "an alleged indebtedness" in excess of \$95,000; that previously thereto, but within the said four-months period, in each of said actions, the plaintiff, Dorsey, had caused certain property of the said bankrupt to be placed under attachment, and, although it is not so stated, it is presumed that such property is still under such attachment. It is also alleged in the said petition that the bankrupt, at some time previously hereto, made motions in each of said actions for the vacating of the said judgments and the setting aside of the said defaults, which motions were denied by the said court. It is also alleged that appeals were taken by the said bankrupt from the orders denying said motions, but that no stay bonds of any sort were given or filed, and that no attempt has been made by the bankrupt in any manner to stay or interfere with any proceedings which might be taken subsequent to the making and entry of said judgment and of said defaults. The petition then alleges:

"That, due to the condition as herein set forth, it is possible at any moment to issue or cause to be issued upon said judgment writs of execution, and cause them to be levied upon the property of the bankrupt herein: that under the laws of the state of California in such event it is entirely unnecessary to give any notice of issue of execution, levy, or sale thereunder, to any of the creditors of said bankrupt, and it is possible for levy to be made at any time, and sale had thereunder, without any creditors learning thereof in time to prevent a sale and transfer of property of the said bankrupt to any innocent purchaser for value. If said judgment creditor is permitted to proceed any further with said judgment by way of issue of execution, levy, and sale thereunder, same would result in a sacrifice of the assets of the bankrupt, and in addition result in giving to said creditor a preference over other creditors of the same class."

It is then alleged that the said debts of the bankrupt are provable and dischargeable in bankruptcy, and that unless the injunction asked for, and herein above referred to, is granted, the creditors of the bankrupt will suffer irreparable loss and injury.

It appears that there has been no adjudication in bankruptcy herein as yet, and that the judgments and defaults herein above referred to were had and taken prior to the filing of the involuntary petition herein. It is also apparent that the injunction herein petitioned for is asked under and pursuant to the provisions of section 11a of the Bankruptcy Act, which provides that a suit founded upon a dischargeable debt, and which is pending against a person at the time of the filing of a petition against him, "shall be stayed until after an adjudication or the dismissal of the petition."

It will be observed that there is no allegation in the petition that a motion has been made in the superior court of Los Angeles county to stay proceedings in the said actions herein pending, either by staying the issuance of a writ of execution or the entry of judgment, and neither is it alleged that the judgment creditor, or any one acting for him or in his behalf, is about to, or has in any wise indicated that he will, proceed to an enforcement of his judgment, either by the issuance of a writ of execution and sale thereunder, or otherwise. There is, then, nothing alleged to indicate that anything is about to be done which will cause irreparable, or any, loss or injury to the creditors of the said bankrupt or otherwise.

The question thus presents itself: Should this court, upon the filing of an involuntary petition in bankruptcy, *as of course*, and without any allegation or proof of a threatened invasion of the rights of any creditor, issue its injunction enjoining the further prosecution of a suit in a state court for a provable debt against the bankrupt, because of the *mere possibility* of action being taken which will be injurious to the rights of creditors, and in the absence of an application to such state court for the proper relief therein? I cannot believe that such question should be answered in the affirmative.

Though it is true that the writ of injunction is proper to be used in order to effect and secure the stay provided for in said section 11a, supra, nevertheless I can find nothing in the Bankruptcy Act, or otherwise, which seems to justify the issuance of a writ of injunction by the court under any circumstances less strong than would be required in any other instance wherein this prerogative writ of the court was sought to be made use of. In other words, there is nothing in the Bankruptcy Act, *per se*, which either requires or justifies the issuance of a writ of injunction under any circumstances less formidable than would be required to justify its issuance in any other equitable proceeding. It will be issued, and its use is intended, to prevent the infliction of threatened or imminent, and not mere *possible*, injury.

The principle of law, as I understand it, and as it is usually announced by courts of equity having a due regard to the limitations placed upon their jurisdiction, is well stated in 22 Cyc. 758, as follows:

"It is not sufficient ground for an injunction that the injurious acts may possibly be committed, or that injury may possibly result from the acts sought to be prevented. There must be at least a reasonable probability that the injury will be done if no injunction is granted, and not a mere fear or apprehension."

In Coffeyville Mining & Gas Company v. Citizens' Gas Co., 55 Kan. 173, 40 Pac. 326, the Supreme Court of Kansas said:

"Injunctions cannot be obtained on the visionary basis of fears or beliefs. It is only actual unlawful purposes, made evident by acts or declarations, that furnish a valid foundation for the interposition of the strong arm of the law by injunction. * * * (Citing several cases.) No act or declaration of the defendant is shown indicating a purpose to injure plaintiff's property."

It was therefore held, in consequence, that the disallowance of an injunction in that case was proper. In like vein the Supreme Court

of California (*Lorenz v. Waldron*, 96 Cal. 243, page 249, 31 Pac. 54, page 56) said:

"A mere possibility, or anything short of a reasonable probability, of injury, is insufficient to warrant an injunction against any proposed use of property by its owner. 'Injury, material and actual, not fanciful or theoretical, or merely possible, must be shown as the necessary or probable result of the action sought to be restrained.' * * * 'The court cannot grant an injunction to allay the fears and apprehensions of individuals; they must show the court that the acts against which they ask protection are not only threatened, but will, in probability, be committed, to their injury.'

The court then quotes, with approval, from a Nevada case (*Sherman v. Clark*, 4 Nev. 142, 97 Am. Dec. 516) where the Supreme Court of that state said:

"It must also * * * appear that there is at least a reasonable probability that a real injury will occur if the injunction be not granted."

The disposition of the courts, as well as of the legislative branch of the government, in recent years, has been to limit, rather than to extend, the use of the injunctive arm of the courts—to limit the use to those cases where such use is necessary in order that real and substantial injury to rights or property of an imminent and probable character, may be prevented. There is no reason, in my judgment, why this commendable tendency should not be given due regard in the courts of bankruptcy.

In a proper case, where a court, or a party litigant therein, is about to take some unlawful or unwarranted step with respect to property which is properly subject to the jurisdiction of this court of bankruptcy, both propriety and duty would demand that this court issue its injunction staying or preventing such unlawful or unwarranted act. It is my judgment, however, that in a case like the present, where the proceeding is pending in a state court, because of considerations of comity and with a view of avoiding needless friction between state and federal sovereignties, it were better, in the first instance, for a petitioning creditor to make a motion in the state court for the withholding of a writ of execution, or for such other remedy as may be appropriate. Thereafter, upon a denial of such motion, or, in any event, upon a threatened or probable step by the judgment creditor, or some officer of the court, looking to a sequestration of the property involved, or a use of it unwarranted under the bankruptcy law, application should be made to this court for the issuance of its injunctive relief, and the same would be granted at once, as of right.

The presumption is that every man knows the law and will obey the law. Upon the state court and its various functionaries and the aforesaid judgment creditor being apprised of the fact that the property in question is now subject to administration by this court of bankruptcy, it is to be presumed that they will, one and all, "govern themselves accordingly." In the absence of an allegation or proof of a contrary tendency, it cannot be assumed by this court, at this time, that there is anything more than a mere "possibility" of an interference by any one with the just rights of creditors in the property of the bankrupt. If this court were to concern itself with enjoining mere "possible" inva-

sions of private rights, it could easily, and probably would, happen that the court would have no time for anything else. In addition, it may be suggested that the issuance of an injunction against a man or a public official is suggestive, to say the least, of some slight odium attaching to him, because of an intention by him unlawfully to invade the rights of others. Such a step this court declines to take, except in the presence of such a showing as seems to exhibit indubitable necessity for that action.

Though this proceeding is wholly of an ex parte nature, owing to the fact that a similar request of the same petitioner has heretofore been denied by the court, the present application has been pressed with some insistence, and in support thereof the following authorities have been cited: Loveland on Bankruptcy, pp. 155, 156; *In re William E. De Lany & Co.* (D. C.) 124 Fed. 280; *In re Fortunato* (D. C.) 123 Fed. 622; *In re Kletchka* (D. C.) 92 Fed. 901; section 11a, Bankruptcy Act. It is sufficient to say that none of these authorities sustain the position of petitioner.

The petition for the writ of injunction is denied, without prejudice to its renewal.

In re BREAKWATER CO.

(District Court, E. D. Pennsylvania. February 2, 1915.)

No. 5029.

1. BANKRUPTCY ~~223~~, 368—**FEES OF REFEREE AND TRUSTEE—COMPUTATION.**

Where the assets of a bankrupt contracting corporation were practically all covered by secured claims, but a plan was devised, in order to carry out the bankrupt's contracts and preserve its property, whereby its assets were to be transferred to a new corporation, the secured creditors to receive preferred stock and the others common stock for their claims, and in pursuance of that plan the assets were sold subject to the liens to the bondholders for a small sum, the commissions of the referee and the trustee should be figured, not on the amount of cash actually received at the sale, but upon the total value of the assets, which under the plan adopted were constructively handled by them in the settlement of the estate.

[Ed. Note.—For other cases, see *Bankruptcy*, Cent. Dig. §§ 571, 888-894; Dec. Dig. ~~223~~, 368.]

2. BANKRUPTCY ~~223~~—**FEES OF REFEREE—PRIOR AGREEMENT.**

An agreement by a referee in bankruptcy to accept a less fee than he was entitled to receive under the law, made for the purpose of allowing the adoption of a reorganization plan whereby the assets might be preserved for the benefit of creditors, and which was approved by practically all of the creditors, is not illegal.

[Ed. Note.—For other cases, see *Bankruptcy*, Cent. Dig. §§ 888-894; Dec. Dig. ~~223~~.]

Bankruptcy proceedings against the Breakwater Company. On petition of the American Surety Company to revise an order of the referee fixing the fees of the referee and the trustee. Petition dismissed, and order affirmed.

Henry C. Willcox, of New York City, for petitioner American Surety Co., of New York.

Owen J. Roberts, of Philadelphia, Pa., for trustee.

THOMPSON, District Judge. The question for decision in the present case is whether fees of \$6,500 each ordered paid to the referee and trustee are greater than allowed by the Bankruptcy Act (Act July 1, 1898, c. 541, 30 Stat. 544 [U. S. Comp. St. 1913, §§ 9585, 9656]).

When the trustee was elected, the property of the bankrupt, which was engaged in building breakwaters for the United States government, was distributed throughout various states of the Union, the Hawaiian Islands, and the Province of Ontario, Canada. It consisted, *inter alia*, of stone quarries with their various equipment, floating equipment, bills receivable, and cash.

The trustee's account shows the amount of the inventory and appraisements, together with uninventoried assets, to be \$1,066,467.91. Against this property was a mortgage of \$1,000,000, under which bonds to that amount were outstanding and coupons amounting to \$50,000 were due. Upon an order of the referee authorized by the vote of the creditors, the assets were sold by the trustee to Alexander B. Siegel, acting for the bondholders, subject to the lien of the mortgage and all other valid liens for \$75,000.

It appears by the record that various efforts had been made by the trustee to make some disposition of the assets of the company which would to the greatest possible extent benefit the unsecured creditors. In addition to the liens of the mortgage, admiralty liens existed against the floating equipment of the company approximating \$75,000. A claim had been filed by the Assets Realization Company, the mortgagee, in the amount of \$1,028,384.17, and the aggregate indebtedness shown by the schedules was \$2,888,173.49.

After various attempts to save the property as a going business for the benefit of the creditors, through the efforts of the trustee, a corporation was formed known as Coast & Lakes Contracting Corporation, and a plan was submitted to the creditors for the purchase by that company directly, or through an intermediary, of all the real estate, plant, and equipment of the Breakwater Company for the purpose of completing the existing contracts of the bankrupt and continuing its business. The stock capitalization of the company as authorized provided for 15,000 shares of preferred stock of the par value of \$100 each, \$1,500,000; and 10,000 shares of common stock of the par value of \$100 each, \$1,000,000.

It was proposed, in consideration of the sale of the assets of the bankrupt to the company by the trustee for the sum of \$75,000 in cash subject to the liens, that the holders of the mortgage bonds receive 10 shares of preferred stock for each \$1,000 bond, taking up \$1,000,000 of preferred stock, and the holders of coupons amounting to \$50,000 receive preferred stock at par to that amount, the balance of the preferred stock to be reserved for future issue; that unsecured creditors consisting of holders of unsecured notes of and claims against the Breakwater Company receive for their claims 50 per cent. of the face amount thereof, or approximately \$700,000, in common stock; the balance of common stock, as far as material to the question arising in this case, to be reserved for future issue. The holders of the first mortgage bonds were required to deposit their bonds with the coupons with a nominee of the company. The unsecured creditors were required to

file and prove their claims before the referee and assign their notes and claims to a nominee of the company. The sale, in pursuance of the foregoing plan, was authorized at a meeting of the creditors and the property sold by the trustee, and the sale was confirmed by the referee and subsequently by the court.

The position of the referee is that the fees payable to himself and the trustee are to be based upon the total amount of stock in the corporation issued to the secured and unsecured creditors of the bankrupt. The position of counsel for the trustee at the hearing (who also presented an argument for the referee's contentions) is that the commissions should be based upon the actual property administered in relieving the estate of lien indebtedness amounting to over \$1,100,000. For reasons hereinafter stated, the creditors at a meeting duly called authorized payment to the referee of \$6,500 and a like amount to the trustee, and the referee thereupon ordered the fees in these amounts to be paid. The American Surety Company, which was surety upon contracts of the bankrupt and having at the time a duly proved and allowed claim of \$3,241.96, was the only creditor to vote against the allowance of the fees; creditors approximating 1,000,000 voting in the affirmative. It appears that the surety company has since proved additional claims amounting to approximately \$82,000, and has other contingent claims yet to be liquidated. The contention of the American Surety Company is that, inasmuch as the sale was made subject to the lien of the first mortgage for the sum of \$75,000, the fees of the referee must be based upon the actual cash disbursed to creditors by the trustee under section 40 of the Bankruptcy Act, and those of the trustee upon the cash disbursed or turned over to any person including lien holders under section 48.

The position of the petitioner, briefly stated, is that, inasmuch as the assets of the company were not converted by the sale, but were sold subject to the lien, the only funds disbursed by the trustee in bankruptcy consist of the balance of \$75,000 in excess of the liens, together with such other money as has come into his hands from other sources, and that the sale did not discharge the lien, so that neither actually nor constructively has the amount of the liens passed through the hands of the trustee. The petitioner's position, in the opinion of the court, is not sound because it depends exclusively upon the terms of the order of sale and not upon the entire transaction in which the order of sale had a part in carrying out the proposition of the Coast & Lakes Contracting Corporation, and overlooks the position of the trustee with relation to the administration of the assets of the bankrupt and the distribution of their value to mortgage bondholders and unsecured creditors. Under the organization plan in pursuance of which the sale was made, it is true that the sale was made subject to liens, but the mortgage bondholders were to surrender their bonds and to receive therefor preferred stock and the unsecured creditors to surrender their notes and claims and receive therefor common stock. Thus the stock of the corporation was transferred to the bondholders and to the unsecured creditors in consideration of the transfer of their claims; the corporation in payment of their claims receiving the entire property of the bankrupt

from the trustee as payment of the mortgage indebtedness and the claims of the unsecured creditors, and the lien and unsecured creditors receiving, as representing the value of those assets, in distribution, stock of the corporation. While the lien of the mortgage remained at the time of the sale for the purpose of carrying out the terms of the agreement in pursuance of which the sale was made, the debt of \$1,000,000 upon the mortgage and the amount due upon the coupons, and the claims of the unsecured creditors were paid in stock. Looking at the transaction as a whole, therefore, it is apparent that the entire amount of the lien indebtedness was constructively disbursed by the trustee to the corporation for the bondholders and the unsecured creditors. *Varney v. Harlow*, 210 Fed. 824, 127 C. C. A. 374, 31 Am. Bankr. Rep. 339; *In re Cramond* (D. C.) 145 Fed. 966, 17 Am. Bankr. Rep. 22; *In re Sanford Co.* (D. C.) 126 Fed. 888.

[1] The referee and trustee, therefore, are entitled to have their commissions fixed upon the amount disbursed through the intermediary, the Coast & Lakes Contracting Corporation, by means of shares in its stock in precisely the same manner as though the sale had been made for cash sufficient to pay off the liens, the cash received by the trustee, and distributed to the creditors and used by them for purchase of the stock received by them. So ascertained, the fees would amount to over \$11,000 each to the referee and trustee, which is largely in excess of the fees fixed at the creditors' meeting.

[2] A large part of the brief and argument of the petitioner was devoted to criticism of an arrangement made prior to the sale by which the referee and trustee agreed to accept \$6,500 each as their fees in order to have the sale consummated in pursuance of the organization plan. It is urged that the referee, being a judicial officer, should not be allowed fees fixed by agreement in advance of sale. It appears, however, that the agreement was to accept less fees than he might have claimed, and that the plan would probably have failed and the value of the property would have been wiped out by foreclosure then pending if the referee or trustee had insisted upon claiming full statutory fees. Congress has seen fit to fix the compensation of referees upon a percentage basis which, in every case, results in the referee primarily fixing his own fee. The referee is no doubt frequently embarrassed by being called upon to fix his own compensation. It goes without saying that he cannot use his position for the purpose of obtaining larger fees than the law allows, neither should a litigant take advantage of the position in which the referee is placed, by impugning, without justification, the motives of a judicial officer of this court with unquestioned reputation for high standards of honor and ethics. That counsel for the American Surety Company had no confidence in his imputations against the referee is indicated by the fact that, although he at one time covertly attempted to attack his qualifications to act as referee in the proceeding upon the same grounds which he now urges against the allowance of fees, he never proceeded with his protest against the qualifications of the referee to act. Both the referee and trustee, in order that the plan of sale, which was afterwards ratified by practically all of the creditors, might be carried through for the benefit of the credi-

tors, relinquished their claims to part of their fees. It appears that the plan under which the sale was had was not made in pursuance of any purpose to increase the fees of either officer. That its purpose was to benefit the creditors is apparent, for it was approved by all present or represented at the creditors' meeting except the petitioner. In allowing a trustee compensation on a commission basis, Congress apparently intended to stimulate that officer to all possible activity in the interest of creditors. Owing to the industry and business acumen of the trustee and his counsel in this case, the general creditors share in the benefit derived from the assets of the company. The bondholders through the trustee in the bankruptcy proceedings carried out their plan to acquire the property without foreclosure. No lien creditor is objecting to the fees ordered to be paid, although the payment will reduce funds which would otherwise go to the corporation as assignee of the claims of general creditors. The petition is dismissed, and the order affirmed.

UNITED STATES v. PRINCE LINE, Limited, et al.

SAME v. AMERICAN-ASIATIC S. S. CO. et al.

(District Court, S. D. New York. February 3, 1915.)

1. MONOPOLIES ~~16~~—RESTRAINT OF TRADE—AGREEMENT BETWEEN SHIP-OWNERS—REASONABLENESS.

An agreement between all the shipowners engaged in the same trade as to the number of vessels each should operate, the dates of sailings, exchange of freight between lines, and rates of freight, made for the purpose of assuring shippers regular sailings and affording them a fair rate so that they might meet the competition of trade from other countries, is not in itself an unreasonable restraint of trade contrary to the Sherman Anti-Trust Act July 2, 1890, c. 647, 26 Stat. 209.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 12; Dec. Dig. ~~16~~.]

2. MONOPOLIES ~~16~~—STATUTES—CONSTRUCTION.

The construction that the Sherman Anti-Trust Act prohibits only unreasonable restraint of trade is the same when applied to acts of common carriers as when applied to others.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 12; Dec. Dig. ~~16~~.]

3. SHIPPING ~~147~~—FREIGHT RATES—REASONABLENESS—OCEAN CARRIERS.

Regular rates for the ocean carrier trade are not unreasonable because at particular times or places tramp steamers are willing to cut them greatly in order to secure a cargo.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 500, 506, 507; Dec. Dig. ~~147~~.]

4. MONOPOLIES ~~16~~—RESTRAINT OF TRADE—REBATE—EXCLUSIVE CONTRACTS.

The practice of a combination of ocean carriers to give rebates to all shippers who ship exclusively by their lines, which tended to secure more regular cargoes and to enable the carriers to anticipate the needs of the trade, is not an unlawful restraint of trade.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 12; Dec. Dig. ~~16~~.]

5. MONOPOLIES ~~24~~—INJUNCTION—REFUSAL OF ACCOMMODATIONS.

Where there was evidence, in proceedings by the United States to dissolve a combination of ocean carriers under the Sherman Anti-Trust Act, that one of the members of the combination had refused to carry a cargo for a certain shipper when there was unengaged space on its vessels, an injunction will be issued against the combination and its members to prohibit such practice in the future.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 17; Dec. Dig. ~~24~~.]

6. MONOPOLIES ☞24—RESTRAINT OF TRADE—REASONABLENESS.

A violation of the Sherman Anti-Trust Act is not established unless there is some proof of actual unreasonable interference with the natural course of trade, and, where neither carrier nor shipper complain, it may be inferred that there is no unreasonable restraint of trade.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 17; Dec. Dig. ☞24.]

7. MONOPOLIES ☞24—INJUNCTION—FIGHTING SHIPS.

Where a conference agreement between ocean carriers contained a provision for "fighting ships," but there was no evidence that one had ever been used, no injunction will be granted against that practice.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 17; Dec. Dig. ☞24.]

Separate suits under the Sherman Anti-Trust Act by the United States of America against the Prince Line, Limited, and others, and against the American-Asiatic Steamship Company and others, to dissolve certain alleged unlawful combinations and to enjoin certain practices of the respective companies. Bill against the Prince Line, Limited, and others dismissed, except as to the injunction against a certain practice; and that against the American-Asiatic Steamship Company and others dismissed.

The records are separate, but both causes were heard on the same day and may conveniently be discussed in a single opinion. In each cause the petition alleges that for some years defendants have been engaged in an unlawful conspiracy to restrain trade and destroy competition in ocean carriage between ports in the United States and specified foreign ports, and to monopolize such trade. The relief prayed is that each of these alleged unlawful combinations be declared illegal, and that certain of their practices in conducting the business of their respective combinations be enjoined.

In *United States v. Prince Line, Limited, et al.*:

Ernest E. Baldwin and Stanley D. Montgomery, Sp. Asst. Attys. Gen., and H. Snowden Marshall, U. S. Atty., of New York City, for the United States.

Convers & Kirlin, of New York City (J. Parker Kirlin and Mark W. Maclay, Jr., both of New York City, of counsel), for defendants Prince Line, Limited, and others.

Burlingham, Montgomery & Beecher, of New York City (Charles C. Burlingham, Charles Burlingham, and Roscoe H. Hupper, all of New York City, of counsel), for defendants Lamport & Holt, Limited, and others.

Spooner & Cotton, of New York City (John C. Spooner, of New York City, of counsel), for defendants Hamburg-American Line and others.

In *United States v. American-Asiatic S. S. Co. et al.*:

Ernest E. Baldwin and Stanley D. Montgomery, Sp. Asst. Attys. Gen., and H. Snowden Marshall, U. S. Atty., of New York City, for the United States.

Burlingham, Montgomery & Beecher, of New York City (Charles C. Burlingham, Charles Burlingham, and Roscoe H. Hupper, all of New York City, of counsel), for defendants American-Asiatic S. S. Co. and others.

John C. Spooner, of New York City, for defendant Hamburg-American Line.

Convers & Kirlin, of New York City (J. Parker Kirlin and Mark W. Maclay, Jr., both of New York City, of counsel), for defendants Dodwell & Co., Limited, and others.

Before LACOMBE, COXE, WARD, and ROGERS, Circuit Judges.

Petition Against Prince Line and Others.

LACOMBE, Circuit Judge. The combination against which this proceeding is directed, composed of two British and two German steamship companies, has been practically dissolved as a result of the European War. In consequence the questions here presented have become largely academic, and it seems unnecessary to undertake any ex-

haustive discussion of the facts. A brief statement of the propositions contended for and of our disposition of them will be sufficient.

[1] The combination, while it existed, was the well-known sort not infrequently found among ocean carriers, where two or more ship-owners agree together as to the number of vessels they will operate in a particular trade, as to number of voyages to be made between specified ports, as to dates of sailings, as to exchange of freight to be carried when the vessel of one or another line has her space engaged or it is more convenient to use one vessel instead of another, as to rates of freight, etc. The fundamental question is whether what has been done by the parties to the combination has operated an unreasonable restraint of trade, or has resulted in a monopolization of trade between the ports specified within the terms of the Sherman Anti-Trust Act.

[2] Preliminary to that question, however, there is submitted a proposition advanced by the government to the effect that the later decisions of the Supreme Court, in cases like the Standard Oil Co. v. United States, 221 U. S. 1, 31 Sup. Ct. 502, 55 L. Ed. 619, 34 L. R. A. (N. S.) 834, Ann. Cas. 1912D, 734, and United States v. American Tobacco Co., 221 U. S. 106, 31 Sup. Ct. 632, 55 L. Ed. 663, have no application in this litigation because the defendants are common carriers. We find no authority in the reports, nothing in the text of the act, nor in the congressional proceedings which accompanied its passage, to support the proposition that the act is to have one construction when defendants are manufacturers, merchants, or traders, and another and different one when they are common carriers. The acts of these defendants are to be considered in the light of the construction which has been given to the act by the Supreme Court irrespective of their particular vocation.

The commerce affected is that between New York and New Orleans and certain ports in Brazil; coffee mainly this way, products of the United States out. These exports from the United States are in competition with similar exports from Europe to Brazil, an older trade and a larger one. At the time it was formed the parties were in the trade and handled all the trade there was. No one was frozen out by their combination and there was no greater monopoly than existed before. Indeed, there is less of a monopoly now than there was then, since a new independent carrier, the Lloyd Brasiliano, has come in as a competitor. Some of these defendants operated, or were in combination with, some of the foreign lines which handled the competing commerce from Europe to Brazil. Their story of the genesis of their combination, here complained of, is this: The object was to give regular and sufficient service at stated intervals, so that there would not be an overplus of vessels one month and a scant supply the next month; to have regular sailing dates known far in advance so that shippers could make firm contracts for future deliveries; to give merchants an opportunity of changing their engagements from one line to another as convenience required; to develop outports and to give an opportunity to low classes of cargo to get regular transportation; to establish uniform rates of freight, uniform so far as the several

lines were concerned, although naturally liable to change from time to time; and to establish rates so as to meet the European rates, fixed by combinations whose business is not regulated by statute. Counsel for the government questions these statements on the ground that they assume "purely altruistic motives." We do not agree. Of course, the object was not altruistic; the defendants wished primarily to make money for themselves; there is no sentiment in business; but they reasoned, no doubt, that if they kept their rates so regulated in co-ordination with European rates as to give a United States shipper reasonable assurance as to what he had to meet in competition and a fair parity as to rates, and also gave him proper and sufficient sailings with opportunity of changing engagements, the trade would be stimulated, would grow more readily than under the old uncertain conditions, and with its growth the combination would gather in its share of the financial results. The event seems to have justified their expectations. In the mere initiation and carrying out of the enterprise outlined above we see no unreasonable or abnormal restraint of trade.

[3] It is contended that the rates charged by the combination have been unreasonable. Examination of the testimony does not persuade us to this conclusion. Conditions of carriage on the ocean are peculiar. Its waterways are open to all. Tramps and chartered vessels may pass from port to port without acquiring franchises or condemning rights of way. In one sense, as a witness graphically expressed it, "ocean freights are as unstable as the water itself." Regular rates, normally reasonable, are not to be held unreasonable because at some time and place one or more tramp steamers are willing to cut them deeply rather than sail to their next port in ballast. A test sometimes used when inquiring into reasonableness of rates is the cost of service. Thus tested, the evidence indicates that the rates charged by the combination, regulated as they were in co-ordination with European rates, as a rule covered merely cost of service and a reasonable profit; indeed, a small profit, for the competing line, which shaded down defendant's rates very little, ran frequently at a loss. Testing the rates by comparison with general ocean freights leads to a similar conclusion; such increase of rates as there has been from time to time seems to have been entirely normal following the upward movement of general ocean freight rates.

[4] It is contended that the system of rebates adopted by the combination was a restraint of trade. Rebates at a stated percentage were given to exclusive shippers. Their payment was deferred so that it could be determined at the close of a rebate period whether the shipments of the concern asking for it had really been exclusive. It is, of course, desirable for a shipper to know in advance what rates he is to be charged; in like manner, it is desirable for a carrier to know as definitely as it can what amounts of cargo it may expect it will have to handle in a given period. These rebates were not secret, nor were they confined to a favored few; they were uniform, were open to all, and all were invited to avail of them. The arrangement is probably as old as trade itself. One natural result of it would seem to be stability in sailings and service—both desirable for trade—which might not otherwise be maintained.

If the price of a unit of cargo space be assumed to be 50 cents, the 10 per cent. rebate brings it down to 45 cents. Since the line has been doing business with the 10 per cent. rebate, it must be assumed that (in the case taken as an illustration) 45 cents per unit is remunerative; that it covers cost and a reasonable profit. It does not seem to us, however, necessarily to follow that the 45 cents would be remunerative if it were not coupled with the agreement for exclusive shipments. A line providing regular sailings and undertaking to furnish sufficient space will presumably learn by experience enough of conditions at the several ports at different seasons to enable it to calculate with reasonable accuracy what amount of cargo it may expect from its shippers for any particular sailing. Making provision accordingly, the vessel sailing will take her departure with substantially a full cargo. But if, when she reaches port, it is discovered that the calculations as to expected cargo were correct, but that some of her largest regular shippers had sent their merchandise off the week before by some tramp steamer, the regular vessel will have to sail with much unfilled cargo space. A few experiences of this sort might well involve a loss equal to, if not in excess of, the 10 per cent. We think the two things, rebate and exclusive shipments, are so closely and normally coupled together that in substance the situation is the same as it is when a lower price per unit is quoted for large shipments than for small ones. Such differentiation of price charged between large and small shipments is not unreasonable. *Int. C. C. v. B. & O. R. R.*, 145 U. S. 263, 12 Sup. Ct. 844, 36 L. Ed. 699.

[5] It is charged that defendants have refused to carry cargo at their own berth rates, when there was unengaged space in their vessels. There is no attempt to prove this against all the defendants. Between one of them and the single shipper who makes the charge there was generated from prior transactions, occurring before the combination, a degree of heat, which has probably warped the testimony on both sides as to this refusal. The one side, admitting refusal in a few instances, asserts that there was not unengaged space at the time of refusal, an assertion not necessarily proved false by the vessel's subsequently sailing with some free space; prior engagements may have been canceled. Witnesses for the shipper admit that their tenders of cargo were in the hope of "making out a case," either for action for treble damages or the initiation of this suit by the United States. The evidence is generally unsatisfactory, and it is hard to say where the truth lies; but, on the whole, we are inclined to condemn such practices by granting an injunction against the combination of defendants and its component members prohibiting refusal to receive cargo offered at their regular rates, unless for good cause shown.

In view of the fact that the logic of events has turned this investigation into an autopsy, instead of a determination of live issues, it seems unnecessary to discuss the persuasiveness of the proofs offered to show that the percentage of outward cargo from the United States carried by defendants grew from 51 per cent. in 1908 to 54.7 per cent. in 1912.

There may be a decree for injunction as indicated *supra*, without costs; in all other respects the bill is dismissed.

Petition Against American-Asiatic Company.

[6] This is a suit, similar to the one above considered, brought under the Sherman Anti-Trust Act against a combination of the ocean steamship lines running from New York and Boston to ports in the Far East and return. There are 11 corporations defendant, 8 British, 2 United States and 1 German. The acts complained of are the usual ones, conferences, agreements, pooling arrangements, regulation of number of vessels employed, of ports visited, and of sailing dates, regulation of rates, provisions for rebates, not secret but open to all and uniform, etc. All of these, or some of them, it is contended, constitute a restraint of trade and an attempt to monopolize under the act. From a study of the multitudinous decisions, not always harmonious, construing this act, the conclusion is reached that a violation of the act is not made out by theories of what will be the result upon trade and commerce of agreements entered into by defendants, or upon presumptions as to what may have been done under such agreements. Some actual unreasonable interference with the natural course of trade must be shown by proof.

In most, if not in all, cases of this character, many of the witnesses called by the government necessarily come from the offices of the defendants. From them only can it be best established what agreements were made and what action under such agreements was taken by the parties thereto. In all cases to which attention has been called, however, this testimony is supplemented by other evidence given by witnesses who complain of some injury; some one asserts that the rates charged him are excessive, or that his business has been in some way interfered with or harassed or hampered by defendant's conduct.

No such witness has appeared in this case; no shipowner, no shipper or consignee, no manufacturer, merchant, or trader, large or small, in the United States or in the Far East, is here with any complaint. Persons engaged in the trade which, it is alleged, is restrained, sit mute; every one seems to be reasonably well satisfied with existing conditions except the government, which contends that the agreements themselves carried out according to their terms, constitute a violation of the act, i. e. (as it is now construed), that they evidence an "unreasonable restraint of trade." It further suggests as a reason for dissolving the combination that, when the Panama Canal is in full operation, "there is no reason to suppose that traffic through (it) would escape the domination of defendants, if they were able to control it."

When from carriers and former carriers and prospective carriers of merchandise between the specified ports, and from persons interested in the manufacture, transportation, sale, and purchase of such merchandise, there comes no complaint, it seems a fair inference that whatever restraints may have resulted from defendant's combination and conduct are merely the usual, normal, and reasonable restraints against which it has been held the Sherman Act is not directed.

[7] Defendant's conference agreement contains a provision for "fighting ships." If there were evidence that any steps had ever been taken towards putting one on, we should be inclined to grant an injunc-

tion similar to the one we granted in *United States v. Hamburg American Co. et al.* (D. C.) 216 Fed. 971; but, since there is no such evidence in this case, we see no reason for granting that relief.

The bill is dismissed as to all the defendants. All concur.

CITY OF KNOXVILLE v. SOUTHERN PAVING CONST. CO. et al.

(District Court, E. D. Tennessee, at Knoxville. July 14, 1914.)

No. 8.

1. REMOVAL OF CAUSES ~~116~~—JURISDICTION—NATURE OF ACTION.

A federal District Court sitting in equity has no jurisdiction on its equity side of a common-law action removed from a state chancery court, given concurrent jurisdiction with common-law courts of law actions by Acts Tenn. 1877, c. 97.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. § 246; Dec. Dig. ~~116~~.]

2. REMOVAL OF CAUSES ~~116~~—FEDERAL COURTS—JURISDICTION.

A federal court on its common-law side has jurisdiction of a common-law action removed from the chancery courts of the state, provided the necessary requirements to establish federal jurisdiction generally are present.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. § 246; Dec. Dig. ~~116~~.]

3. REMOVAL OF CAUSES ~~108~~—RELIEF—FEDERAL JURISDICTION—REMAND OR DISMISSAL.

Where the relief sought in a suit is grantable in a state court under a statute enlarging its equitable jurisdiction, but is nevertheless beyond the equitable jurisdiction of the federal court, the case, after removal, should be remanded, instead of being dismissed.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. § 217; Dec. Dig. ~~108~~.]

4. REMOVAL OF CAUSES ~~116~~—ACTION AT LAW—REMOVAL TO EQUITY SIDE—REMAND—TRANSFER.

Such rule does not apply where the suit is purely a common-law action, and the federal court has complete jurisdiction to give full relief sought on its law side, in which case it should be transferred to the law side of the court, and not dismissed or remanded.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. § 246; Dec. Dig. ~~116~~.]

5. REMOVAL OF CAUSES ~~116~~—LEGAL AND EQUITABLE ACTIONS—UNION—SEPARATION AFTER REMOVAL.

Where, in accordance with state practice, a suit unites both legal and equitable causes of action, of each of which the federal court has jurisdiction on its law and equity sides respectively, it should, after removal, be recast into two suits, one on the law and one on the equity side of the court, and there proceeded with, and a motion to remand should be denied.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. § 246; Dec. Dig. ~~116~~.]

Suit by the City of Knoxville against the Southern Paving Construction Company and others. The suit was removed from the State Chancery Court to the United States District Court in equity, and

plaintiff moved to remand to the state court, and defendants moved to transfer to the law side of the District Court. Plaintiff's motion denied, and defendant's motion to transfer granted.

W. T. Kennerly, City Atty., of Knoxville, Tenn., and Maynard & Lee, of Knoxville, Tenn., for plaintiff.

Coleman & Frierson, of Chattanooga, Tenn., for defendants.

SANFORD, District Judge. Clearly, if this suit, which was removed from a Chancery Court of the State, does not involve a dispute or controversy properly within the jurisdiction of this court, it must either be remanded to the State court or dismissed, "as justice may require," pursuant to section 37 of the Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1098), superseding section 5 of the Act of March 8, 1875, c. 137, 18 Stat. 472 (Comp. St. 1913, § 1019).

[1] Being a suit to recover damages for breach of contract, it is, concededly, a purely common law action, jurisdiction of which was conferred upon the Chancery Courts of the State, concurrently with the common law courts, by the Tennessee Acts of 1877, c. 97, p. 119.

[2] Clearly this court has no jurisdiction of such a controversy upon its equity side. *Cates v. Allen*, 149 U. S. 451, 13 Sup. Ct. 977, 37 L. Ed. 804; *Mississippi Mills v. Cohn*, 150 U. S. 202, 204, 14 Sup. Ct. 75, 37 L. Ed. 1052. It is equally clear, however, that it has jurisdiction of such a controversy upon its common law side, the requisite diversity of citizenship existing and the necessary jurisdictional amount being involved.

Under these circumstances the plaintiff relies upon the statement in Simkins' Fed. Eq. Suit (2d Ed.) 885, 886, that "it seems that when a case is pending in a State equity, which if removed would, by the nature of the case, go on the law side, the court should remand and not require the pleadings to be recast." The cases of *Cates v. Allen* (U. S.) *supra*, and *Gombert v. Lyon* (C. C.) 80 Fed. 305, which are cited in support of this suggestion, do not, however, in my opinion, sustain the view suggested in the text, since in neither of them was the nature of the case such that it could have been transferred to the law side of the court, and the only alternative presented to the Federal Court was that of either remanding the suit or dismissing it entirely.

[3] The true rule deducible from *Cates v. Allen* (U. S.) *supra*, and other Federal cases by which it has been followed, is, I think, this: That if the relief sought in the suit is grantable in the State court under a statute enlarging its equitable jurisdiction but is nevertheless beyond the equitable jurisdiction of the Federal Court, the case should, after removal, be remanded to the State court, instead of being dismissed. *Cates v. Allen* (U. S.) *supra*; *Gombert v. Lyon* (C. C.) *supra*; *Mathews Co. v. Mathews* (C. C.) 148 Fed. 490; *Peters v. Equitable Society* (C. C.) 149 Fed. 290. By reason of the equitable nature of the relief sought such controversy would likewise be entirely beyond the common law jurisdiction of the Federal Court, and the result of removing the same to the Federal Court would otherwise be that if not remanded it must be dismissed and the plaintiff thereby entirely deprived of the relief grantable in the State court; and hence, as the

Federal Court is unable to grant such relief upon either its equity or law side, justice clearly requires that the suit, instead of being dismissed, should be remanded to the State court.

[4] Obviously, however, this rule does not apply where the suit is purely a common law action and the Federal Court has complete jurisdiction to give the full relief sought upon its law side. In such case, instead of either dismissing the suit or remanding to the State court, it should clearly be transferred to the law side of the court. *Peters v. Equitable Society* (C. C.) *supra*, at page 294. To hold otherwise would permit resident plaintiffs in States such as Tennessee, in which the Chancery Courts have been given concurrent jurisdiction of all civil causes of action triable by the common law courts, except those for injuries to person, property or character involving unliquidated damages, to practically defeat the right of non-resident defendants to remove such suits to the Federal Court by suing such non-resident defendants in such common law actions in the Chancery Court instead of in the common law courts of the State. The true rule upon this subject is well stated by Circuit Judge Lowell, obiter, in *Peters v. Equitable Society* (C. C.) *supra*, at page 294, as follows:

"That the Legislature of the State, by extending the equitable jurisdiction of the state courts to matters in which an adequate remedy at law is given to the suitor by the federal courts, cannot thereby deprive the citizen of another state of his right of removal to this court is plain. But, on the other hand, if a state statute gives any suitor a remedy in equity in the state courts better and more complete than that which this court can give him at law, and if, furthermore, the remedy thus given is one which this court cannot enforce in equity, the suitor has the right to carry on his litigation in the state court of equity, undisturbed by removal here."

[5] And so, for like reasons, where, in accordance with the State practice, the suit unites both legal and equitable causes of action, of each of which the Federal Court has jurisdiction, on its law and equity sides, respectively, it should, after its removal into the Federal Court, be recast into two suits, one upon the law and the other upon the equity side of the court and there proceeded with. *Hatcher v. Hendrie Co.* (8th Circ.) 133 Fed. 267, 68 C. C. A. 19; *La Mothe Mfg. Co. v. National Co.*, 15 Blatchf. 432, 14 Fed. Cas. 1053; *Lacroix v. Lyons* (C. C.) 27 Fed. 403; 2 Foster's Fed. Pract. (4th Ed.) § 392, p. 1599; Black's Dill. on Remov. § 207, p. 342; Simkins' Fed. Eq. Suit (2d Ed.) 884. And in such case a motion to remand to the State court should be denied. *La Mothe Co. v. National Co.*, *supra*; *Lacroix v. Lyons* (C. C.) *supra*.

I may add that I find nothing in conflict with the conclusion above reached in *Thompson v. Railroad Companies*, 6 Wall. 134. In that case no question of remanding to the State court was involved or decided by the court, the only question being as to the validity of a decree in a common law action which had been removed from the State court and improperly transferred to the equity side of the court, thereby depriving the defendants of their constitutional right of trial by jury.

An order will accordingly be entered overruling the plaintiff's motion to remand and granting the defendants' motion to transfer this cause to the law side of the court.

In re COCKSHAW.

(District Court, S. D. New York. January 23, 1915.)

1. BANKRUPTCY ~~374~~—COMPOSITION—GOOD FAITH OF OFFER.

A bankrupt must exercise the utmost good faith with his creditors in offering a composition, and will not be permitted to trade with them by increasing his offer after he finds that the first offer was rejected as insufficient.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 575; Dec. Dig. ~~374~~.]

2. BANKRUPTCY ~~374~~—COMPOSITION—AMENDMENT OF OFFER.

Where a bankrupt was deprived of a full opportunity to examine and appraise the property for the benefit of those who were to assist him financially, and made in good faith an offer of composition which was rejected as insufficient, he may thereafter be permitted to amend his offer, though there is no express statutory authority for permitting such amendment.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 575; Dec. Dig. ~~374~~.]

Bankruptcy proceedings against Herbert Cockshaw. Motion by the bankrupt to amend his original offer of composition granted.

Roberts & Hepburn, of New York City (Irving L. Ernst, of New York City, of counsel), for trustee and objecting creditors.

Frank E. Bradley, of New York City (Robert B. Honeyman, of New York City, of counsel), for bankrupt.

AUGUSTUS N. HAND, District Judge. The master reports that an offer of 25 per cent. in composition is insufficient. The bankrupt, after the composition was offered, and during the proceeding before the master, enlarged his offer to 30 per cent. and asks that his original offer be thus amended, and that the court send back to the master for determination the single question as to whether the amended offer is proper and advantageous to the creditors. The bankrupt urges, as an excuse for asking leave to amend, that prior to his offer of 25 per cent. he was not given such access to the property in the hands of the trustee that he could have it examined and appraised for the persons who were to assist him in raising money to carry out the composition. He says he complained prior to filing his offer of 25 per cent. to the referee and to the trustee. It is denied that he made such complaints, and they could not have been very effective, for when, after the composition was offered, he made request of the referee to allow him access to the property, the request was at once granted.

[1] It goes without saying that there must be the utmost good faith on the part of the bankrupt in offering a composition; and any attempt on his part to "trade" with the creditors or the court by offering a larger sum after the bankrupt finds his first offer is unsatisfactory is quite contrary to the spirit of the statute.

[2] On the other hand, the creditors and their representative, the trustee, must exercise a corresponding good faith toward the bankrupt. If he really was, in any substantial sense, deprived of a chance to have the property in the hands of the trustee examined by apprais-

ers in order to inform himself or his financial assistants as to its value, prior to the offering of the composition, I think his original offer should be so amended as to have the same effect as though the composition had been offered at the increased amount. If he has merely changed his proposal after the offer of composition was filed, not because he was theretofore mistaken as to the value of his property or prevented from ascertaining it, but merely because he had to raise his offer to meet the views of the creditors, I should feel that the enlarged offer ought to be rejected, if objected to, irrespective of its general merits, because the composition was not made in the good faith required by the Bankruptcy Act. While it is a difficult matter to determine, from the conflicting affidavits, whether or not the bankrupt was prevented from examining the property in the hands of the trustee prior to the offer of the original composition, so as to enable him or the people, who were to advance him money, to examine and appraise the property, I am inclined to believe the bankrupt was not, prior to his offer of composition, given as full an opportunity as he needed to have the stock of jewelry examined, and that the adequacy of his offer may have been impaired by this fact. I will therefore allow the offer of composition to be amended, so as to increase the amount offered from 25 per cent. to 30 per cent., and refer to the special master the question as to whether the offer and its acceptance are in good faith and have not been made or procured, except as provided by the Bankruptcy Act (Act July 1, 1898, c. 541, 30 Stat. 544 [Comp. St. 1913, § 9585]), or by any means, promises, or acts therein forbidden, and also whether the offer in itself, as increased, is advantageous to the creditors. I think, before an application for confirmation of the composition thus amended is made, the bankrupt should obtain the consent of a majority of his creditors in number and amount to the amended offer. If the master reports that the amended offer and acceptance of the bankrupt have been in good faith, and the offer is advantageous and should be approved, I can see nothing in the act or in the opinion of Judge Sater in the Matter of Kinnane Co., 217 Fed. 488, cited by the objecting creditors, and decided by the United States District Court for the Western District of Ohio, which would militate against a confirmation of the composition.

While the statute does not provide for the amendment of a composition, and while I think an amendment should be allowed only in the rarest cases, I should not hesitate to allow it when I believe that the only change in the offer of composition was an increase in the cash offered, and that the bankrupt had not trifled with the court, but had at all times acted in good faith.

HORSLEY v. MODZELEWSKI.

(Circuit Court of Appeals, Third Circuit. February 9, 1915.)

No. 1870.

**SHIPPING C-84—LIABILITY FOR DEATH OF STEVEDORE—DEFECTIVE APPLI-
ANCE.**

Conflicting evidence considered, and *held* insufficient to establish the liability of a shipowner for the death of a stevedore's employé, who was killed by the falling of a tub of ore being hoisted from the hold by means of a wire rope, which broke, on the ground of negligence in supplying a rope which was defective and insufficient in strength, but to show by a decided preponderance that the rope was made by an English manufacturer of high standing, was tested in course of manufacture, and afterward according to Lloyd's regulations, and found of sufficient strength to sustain a much greater weight than that placed upon it, that it was new, and had been used but once, a few days before, when it was subjected to but a slight strain, that it was inspected by several officers before use on this occasion and found in perfect condition, and to show without contradiction that no defect was noticed in it by the winchman, hatch tender, or foreman of stevedores before it broke.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 342, 349-351; Dec. Dig. C-84.]

Appeal from the District Court of the United States for the Eastern District of Pennsylvania; Joseph Buffington, Judge.

Suit in admiralty by Francisca Modzelewski against M. H. Horsley, as owner of the British steamship Eastwood. Decree for libelant, and respondent appeals. Reversed.

Convers & Kirlin and Charles R. Hickox, both of New York City, and Edward F. Pugh, of Philadelphia, Pa., for appellant.

Howard M. Long, of Philadelphia, Pa., for appellee.

Before HUNT, McPHERSON and WOOLLEY, Circuit Judges.

J. B. McPHERSON, Circuit Judge. This is an action in personam by Francisca Modzelewski against M. H. Horsley, who was averred to be the owner of the British steamship Eastwood. It was begun by foreign attachment, and the respondent afterwards appeared and made defense.

On Tuesday, December 14, 1909, the libelant's husband, a laborer engaged in discharging the cargo of the steamship at Philadelphia, was killed by the fall of a tub or bucket loaded with iron ore, weighing altogether about a ton. He had been at work in the hold, and the tub fell upon him while the winch was hoisting it out of No. 1 hatch. We shall assume that he died on the ship. The libelant sued under the Pennsylvania statute, and recovered damages on the ground that the wire rope to which the tub was attached "was not in proper condition, that the ship had notice of that fact, and that its failure to provide a suitable rope caused the accident." This quotation from the opinion below states briefly the essence of the libel, which charges the respondent with furnishing a rope that was "defective, unsafe, improper, and not sufficiently strong," and avers that, although the condition of the rope

could have been discovered "by ordinary care and diligence and by reasonable inspection," nevertheless "the respondent and his agents wholly neglected their duty," etc.

The libel was filed and the attachment issued in the following July; but the actual seizure of the ship was waived, and bond was entered by the master on behalf of the respondent. It was clearly proved that the Horsley Line, Limited, a British association, and not Horsley as an individual, was the owner of the steamship; but the trial judge held the respondent estopped to deny that he himself was the owner. This is one of the errors assigned, but we need not consider it, as we think the case should be decided on another ground. The witnesses were all examined by deposition, so that the case is presented to us just as it was presented to the court below. The Santa Rita, 176 Fed. 893, 100 C. C. A. 360, 30 L. R. A. (N. S.) 1210.

The ship had nothing to do with the work of discharging, except to furnish the winch and the wire rope and some other appliances at each hatch. The rope in question—which was nearly new, and of the usual type and size—broke at a point about 63 feet from the tub, between the winch and the gin block, the upper block of the derrick. It had been made by an English firm of the highest standing in the trade, and had been thoroughly tested in the course of manufacture. It was composed of 6 strands around a main hemp core, and each of these strands had its own hemp core, surrounded by a double layer of galvanized crucible steel wires, 14 outer over 8 inner wires. The rope therefore was made up of 132 wires and 7 hemp cores. It had been tested according to Lloyds' regulations, both for torsion and for tensile strength. Each of the wires had been subjected to a torsion test of 43 twists in 8 inches, and to a tensile strain of 360 pounds. The completed rope, therefore, would sustain a breaking strain of more than 19 tons, and since the safe load of such a rope is estimated to be from one-seventh to one-tenth of the breaking strain, a large factor of safety was left, so that the rope was abundantly capable of sustaining and raising a load of from 1½ to 2 tons. It had been supplied to the ship in June, 1909, and after being oiled had been stored in the forepeak for several months. Toward the end of November it was used for the first time at Santiago, Cuba, not for cargo, but merely to lift some of the beams from the hatches. It was then oiled again and stored in the peak during the voyage of eight or nine days from Santiago to Philadelphia. It had been inspected in Cuba, and was inspected a second time on December 10, the day before the vessel reached Philadelphia, at which time it was rove into place in order to be in readiness for unloading. It was also inspected by the foreman of the stevedores early on Monday, December 13, before the actual work began, and on each of these three occasions it was found to be in excellent condition. And, although it had been used for about a day and a half in Philadelphia before the accident, nothing wrong was observed at any time either by the winchman or by the hatch tender.

It does not satisfactorily appear why the rope broke. Two or three theories are advanced, but we need not enter the field of conjecture. Unless sufficient evidence is present to establish the negligence of the

respondent or his agents, we must accept this deplorable occurrence as an unexplained accident, for which no recovery can be had in this action. And no evidence of negligence exists, except in the testimony of two witnesses, upon which (for reasons to be given as briefly as possible) we do not feel able to rely with confidence.

As already stated, the libel was not filed until July 18, 1910. On the next day, July 19, the master and the second officer were examined by deposition and testified *inter alia* to the following effect: The second officer deposed that he had been on duty at Santiago and had seen the rope taken out of the forepeak; it was new, and was only used on that occasion to lift the beams and hatches; his business was to handle such ropes, and he saw this particular rope several times in Santiago; it was not broken in any way, even slightly; he had handled it there, and had observed it while in the discharge of his duty; he had also examined the self-lubricating blocks through which the rope ran, and found them in excellent condition; the rope had then been taken down, and had been put up again the day before the ship's arrival in Philadelphia; he had also greased the rope down by the winch while it was being used here, and had found nothing the matter with it. The master testified: That the rope had been supplied on June 2, 1909, and had never been used before the ship reached Santiago; there it had merely lifted the beams out of the hatches, and had then been oiled and stored in the peak; on the day preceding the ship's arrival in Philadelphia it had been taken out of the peak and rove to the winch at No. 1 hatch; the standing orders on board the ship were that every rope must be examined before it was used for cargo, and the officers must report any defects or anything wrong with the ropes at any time; the examination was usually made by the first officer and the boatswain, and the custom was to lay the rope along the deck so that it could be thoroughly examined; he had had this rope in his own hands, and had looked it over fathom by fathom; no one made any complaint about it, and he himself had found it in good condition; such rope is subject to government inspection in England, and cannot be used unless it is certified by official inspectors.

The boatswain and first officer had left the ship in the preceding January, and the whereabouts of the boatswain was not discovered. But the first officer was found, and on April 10, 1911, he testified as follows: The rope came on board in June, 1909, and was then absolutely new; it was immediately placed in the forepeak, and was used for the first time at Santiago, simply for the purpose of lifting the hatch beams during fine weather; it was then put away again in the peak, where it remained until it was roved to the winch just before arrival in Philadelphia; he himself inspected it in Santiago, and afterwards when it was rigged here, and it gave no evidence of rust, or chafe, or of any other defect; several persons handled it, but he spoke of its condition from his own knowledge; no one reported the rope to him as being unsafe or not in proper condition, and no other inspection of the rope could have been made than was actually made; the condition of the blocks also was good, and he had been close to the rope when it was uncoiled and put through the blocks, so that he could see, and had seen, for himself.

Up to this time no testimony had been offered by the libelant bearing upon the condition of the rope, but on June 29, 1911, she called the hatch tender. His duty, of course, required him to be within a few feet of the rope, which had thus been under his observation for more than a day before the accident happened. He testified that the rope was up when he went to work, and that he had never looked at it; he did not see that anything was the matter with it, and it looked all right to him; it was no part of his duty to examine the rope, as the ship supplied it, but if he had seen anything the matter with it he would have stopped the work and made complaint. He repeated that he had not examined the rope himself, and evidently he had seen nothing to suggest that the rope was defective or unsafe. On the same day the winchman, who was also required to be within a few feet of the rope, testified upon the libelant's call that so far as he noticed nothing was the matter with the rope; if he had seen anything wrong, he would have given notice of the defect; as far as he could see, it was working all right; the rope looked as if it had been used before; it was not as bright as new rope; it was neither very rusty nor very bright.

Nothing more was done until February 23, 1912, when the libelant called Alexander Fritzberg, one of the two witnesses upon whom her case must rest. It was not until his redirect examination that he said anything about the defective appearance of the rope, and we cannot help noting as an unusual circumstance that, although this testimony was of the greatest importance to the libelant, the witness gave no hint of it, either on direct or on cross examination. He was assistant to the foreman in charge of the stevedores, and was "just on the wharf looking around," when the accident took place. He was then asked on direct examination:

"Q. Did you look at this rope that was broken?

"A. I looked, but I didn't examine it. * * *

"Q. Did you get hold of this rope after the accident, and look over it at all?

"A. I didn't examine it."

And on cross-examination he testified as follows:

"Q. I understood you to say, Mr. Fritzberg, that it was your province to inspect—to look at—the different ropes and machinery?

"A. But not on the ship. If I see it sometimes, helping the ship's crew, I tell them; but it is not my business to do it.

"Q. You did not see anything the matter with this rope, or you would have told them?

"A. I didn't examine them; it was not my business.

"Q. If you would have seen it, you would have told them?

"A. Yes, sir.

"Q. You didn't say anything about it before the accident?

"A. No, sir."

This would seem to be definite enough, but after he had been under re-examination on other matters for some time he was asked again, "Was this rope, the ship's rope, which broke, was that a new rope or an old rope?" and he then proceeded to testify in detail and for the first time that the rope was not new; he could see on the wire that some yarns or strands were shaved off, and that the rope broke at that place. He also said that he had seen the broken rope while he was

down in the hold helping to attend to Modzelewski, saying then that the break in the rope was about 15 feet from the tub—"about 15 feet away from the end, * * * (from) both ends, center parted near"—but declaring soon afterwards that "I didn't examine it exactly where it was broke; when I rigged up the ship for the discharging of the cargo I saw the wire," adding that he saw that the rope was worn when he "reeved the rope through." Upon recross-examination he testified that he saw this defective condition "when I started the ship," evidently meaning by that when the ship began unloading on the preceding day. He did not put up the rope himself, although he seems to say so in part of his testimony; but he says distinctly that he noticed its condition at the time when he "started the ship." He did not object to using it—"the ship is responsible for its gear; I have nothing to do with that"—saying that he had told nobody that it was chafed, as that was not his business; he didn't know whether the rope was sufficiently chafed to make it dangerous for use; he thought it was "good enough; I didn't think it was as dangerous as that; * * * I don't know how strong the wire was; I didn't examine." He repeated that he did not think it was dangerous, and said that he had told no one about it, and that nobody had said anything to him about it.

"Q. Whom did you first tell that you saw a chafed place in this rope? A. I didn't say it to nobody yet. Q. This is the first time you said it to anybody? A. Yes, sir; nobody asked me anything about it."

On March 2, a few days after Fritzberg's examination, Frank Fisher, the other witness, was called. He was a repairman in the employ of the contracting stevedore, but had nothing to do with looking after the tackle on the ship. He said he had seen the broken rope down in the hold, but had made no examination of it; "I seen it laying there, that's all." He testified further, however, that he had noticed the condition of the rope when "the ship started," or soon after, and that it then "looked pretty bad—it was splintered." He then stated—and, in view of Fritzberg's testimony, this is important—that he heard Fritzberg ask the mate whether the rope was all right; whether he (the mate) did not think it was "a bad wire." Fisher declared that the rope was "like shaved—splintered; * * * you could see the rope; there is a small rope inside of the wire runner; you could see that when it was splintered there is strands like breaking"; he said the splintered part was between the bucket and the upper block of the boom—"I think, as far as I can remember, between the bucket and gin block, I think; that is as far as I can remember it so long ago." He said he had seen Fritzberg "last Friday"—apparently the day when Fritzberg testified—and that Fritzberg had told him that the libelant's counsel wanted to see him, "so I came here to-day." Fritzberg had said nothing about his own testimony, and nobody had; Fritzberg had had no talk with him about the wire rope, and he himself had had no talk with anybody on that subject from the time of the accident up to the time of giving his testimony. He said that the condition of the wire—which he went into in some detail—was easy to be seen, so that anybody could have seen it, but said that he had not warned any of the men, because it was none of his business.

"But Fritzberg had mentioned it to the mate, and when he had mentioned it, it was none of my business. * * * Fritzberg had told the mate. I thought it was the mate's place to change the wire."

He also declared that this was the first time he had ever told anybody that Fritzberg had talked with the mate, repeating that he had never spoken with Fritzberg about it.

After Fisher had given the foregoing testimony, Fritzberg was recalled on April 20, and then testified for the first time, in contradiction of what he had said before, that he had had a conversation with the chief mate, and had spoken to him about the ropes, both at No. 1 and at No. 4 hatch, telling him "they looked pretty bad." He explained that he did not testify about this at his previous examination, because he had never been a witness before, and "He put too many questions to me, and I got excited and couldn't answer all of them." He went on to testify that the mate promised to see about it, and that a new wire had been put up at No. 4. Being asked what caused him to mention about the wire ropes, he replied:

"I do that of my own free will. If I see anything that don't fit very well, I tell them about it, and if I don't want it I go away; sometimes I am too busy, and I don't get a chance to tell about it."

On cross-examination he was asked whether anybody was near when he said this to the mate, and replied:

"No; I don't think so. There might have been; it is hard to tell, because it is too long; I can't remember."

He had not told his foreman (Shannon) that he thought the wire was not in proper condition to be used, and had told nobody except the mate; he thought the wire at No. 1 had been used a good deal, probably to unload two or three or four or five cargoes; when the hook (holding the tub) "was at the top of the hatch coamings," the worn place would be "about the top of the gin block"; his foreman could have seen what was the matter, but he was not there; he also denied that he had talked with Fisher on the subject.

The libellant offered no further evidence about the rope, but on May 14, 1912, Charles Shannon, the foreman in charge of the stevedores, was called for the respondent, and testified that the rope was the usual and proper kind and size for discharging such cargo; that it was always his custom to examine the ropes before they were used, so that he might see if they were in proper condition; and that he had examined this particular rope, and also those at the other hatches. If there had been anything the matter with them, he would not have permitted them to be used; and, later in his examination, it appeared that while this cargo was being discharged the rope at No. 3 was found to be "kind of furry," whereupon he complained at once and a new rope was immediately furnished. As to the rope at No. 1, he said distinctly that after an examination at 7 o'clock in the morning, before the discharging began, he could not find that there was anything the matter with it; he could see no flaws; it appeared all right to him; he heard no complaints about it from anybody; if he had heard any, he would have ordered a new one to be put in its place; it would have

been the hatch tender's duty to call his attention to any such defect; the hatch tender had called his attention to the unsafe condition of the wire at No. 3 hatch; his men were always instructed that if they saw anything like signs of wear in a rope to give notice of it at once; the tub could not have been overloaded, because it would not hold more than a ton.

This is a sufficient outline of the testimony, and we think its decided weight is in favor of the respondent. To accept the story of the two witnesses referred to requires us to attach no value to the testimony of the three officers, of the foreman, of the winchman, and of the hatch tender; and we are not prepared to take that step. The conflict here does not permit us to reconcile the testimony, but requires us to choose between the opposing witnesses. In such a situation minds will differ, and we find ourselves obliged to take a different view from that taken by the court below. Even on the assumption that the doctrine of *res ipsa loquitur* applies to the facts before us—and we intimate no opinion whatever on that subject—the respondent has satisfactorily sustained the burden imposed by that rule, and has proved affirmatively that he discharged every duty of care required to be taken. We find no sufficient proof of negligence, and we see no ground upon which a recovery of damages can be satisfactorily rested.

The decree is reversed, with costs in this court, and with instructions to dismiss the libel; each party to pay the costs of his own witnesses in the District Court.

SOUTHERN COTTON OIL CO. V. SHELTON.

(Circuit Court of Appeals, Fourth Circuit. November 30, 1914.)

No. 1249.

1. APPEAL AND ERROR **883**—REVIEW—QUESTION OF FACT—ESTOPPEL.

Where the existence of a certain fact is assumed in the trial court, and the trial proceeds on that assumption without objection, neither party may question the existence of such fact in the appellate court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3611; Dec. Dig. **883**.]

2. EJECTMENT **31**—NATURE OF ACTION—PLEADING.

Code Civ. Proc. S. C. 1912, § 123, subd. 2, which gives a plaintiff two actions for the recovery of real property or of possession of real property, provided the costs of the first action are first paid and the second action is brought within two years after the first is terminated by judgment or nonsuit, in view of section 218, which permits the joinder of several causes of action, legal or equitable, or both, in the same suit, is not limited in its application to actions in which the sole relief sought is the recovery of real estate or possession thereof, but applies as well to actions in which two causes are joined, and whether or not such an action is within the statute must be determined by the essential nature of the complaint, in view of the facts alleged and the prayer for relief.

[Ed. Note.—For other cases, see Ejectment, Cent. Dig. §§ 120–122; Dec. Dig. **31**.]

3. EJECTMENT **63**—CONSTRUCTION OF PLEADINGS.

Complaints in two actions brought by plaintiff against the same defendant construed, and both held to be actions for the recovery of real prop-

For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

erty and of possession thereof, within the meaning of Code Civ. Proc. S. C. 1912, § 123, subd. 2, which requires as conditions precedent to a second action for such relief that the costs of the first action be first paid, and that the second be brought within two years after the first has been finally determined.

[Ed. Note.—For other cases, see Ejectment, Cent. Dig. §§ 154–157; Dec. Dig. ☞33.]

4. PLEADING ☞34—CONSTRUCTION OF COMPLAINT—PRAYER.

The prayer of a complaint may be disregarded for some purposes, but not where there is a contention made by the plaintiff as to the character of the action presented by his own pleading, in which case the prayer is to be considered.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 5½, 66–74; Dec. Dig. ☞34.]

5. ACTION ☞37—LEGAL OR EQUITABLE—CONSTRUCTION OF PLEADING—WAIVER.

Where, on removal of a cause, it was docketed on the law side in the federal court, and tried to a jury as a law action, without objection by the plaintiff, he waived the right to have his complaint construed as a bill in equity.

[Ed. Note.—For other cases, see Action, Cent. Dig. §§ 311–319; Dec. Dig. ☞37.]

6. EJECTMENT ☞39—SUCCESSIVE ACTIONS—IDENTITY OF PARTIES.

Two actions by the same plaintiff to recover land from a holding-over tenant—the first against the tenant and another, to whom it was alleged he had wrongfully attorned, and against whom relief was also asked, and the second against the tenant alone—have sufficient identity of parties to bring them within the scope of a statute requiring a second action to recover real property to be brought within two years after the first has been terminated by judgment or nonsuit.

[Ed. Note.—For other cases, see Ejectment, Cent. Dig. § 131; Dec. Dig. ☞39.]

Pritchard, Circuit Judge, dissenting.

In Error to the District Court of the United States for the Eastern District of South Carolina, at Columbia; Henry A. Middleton Smith, Judge.

Action at law by William J. Shelton against the Southern Cotton Oil Company. Judgment for plaintiff, and defendant brings error. Reversed.

D. W. Robinson, of Columbia, S. C. (Thomas & Lumpkin, of Columbia, S. C., on the brief), for plaintiff in error.

William H. Lyles, of Columbia, S. C. (Lyles & Lyles, of Columbia, S. C., on the brief), for defendant in error.

Before PRITCHARD and WOODS, Circuit Judges, and McDOWELL, District Judge.

McDOWELL, District Judge. The plaintiff in error was a defendant below, and will be herein referred to as the Oil Company. The defendant in error was the plaintiff below, and will be usually referred to as the plaintiff. In September, 1911, the plaintiff filed in the common pleas court of Fairfield county, S. C., the following complaint:

"State of South Carolina, Fairfield County.

"In the Court of Common Pleas.

"Wm. J. Shelton, Plaintiff, v. Southern Cotton Oil Company, Defendant.

"The plaintiff, complaining of the defendant, alleges:

"1. That the plaintiff is, and at the times hereinafter referred to was, seized in fee and possessed of a tract of land situate in Fairfield county, on the line of the Southern Railway track, at Shelton station, lying on both sides of said Southern Railway track and embracing the lots of land herein-after described.

"2. Upon information and belief, that the defendant is a corporation duly organized and existing under the laws of some state other than the state of South Carolina, and is doing business as such foreign corporation within the state of South Carolina, its business, amongst other things, being the manufacture of oil and cotton seed meal from cotton seed, and for the conduct of its business it occupies warehouses at a great many points in the state of South Carolina, and has acquired by lease, purchase, or otherwise quite a number of oil mills operating at different points within the state of South Carolina.

"3. That during the year 1897 this plaintiff leased to the Union Oil & Manufacturing Company, a corporation of the state of South Carolina, two lots of land comprised within the tract of land so owned by this plaintiff as aforesaid, of the dimensions of 20 by 30 feet each, both situate on the west side of the track of the Southern Railway at Shelton station, said lease to continue from year to year until terminated by two calendar months' notice in writing, given by this plaintiff to said Union Oil & Manufacturing Company. That said lease continued for a period of three years, when the said Union Oil & Manufacturing Company, or its property, rights, and franchises, was in some manner absorbed or acquired by the Charleston Cotton Oil Mill, a corporation of the state of South Carolina, as this plaintiff is informed and believes. Whereupon the 18th day of September, 1900, this plaintiff leased the said lots of land to the said Charleston Cotton Oil Mill for the period of three years for the sum of \$60 paid in advance.

"4. That thereafter the defendant, the Southern Cotton Oil Company, having in some manner absorbed or acquired the property rights and interests of the Charleston Oil Mill, as this plaintiff is informed and believes, took possession of the said premises and occupied the same under the terms of the said lease until the expiration of said three years, to wit, the 18th day of September, 1903.

"5. That at the expiration of the said lease in September, 1903, the said Southern Cotton Oil Company applied to this plaintiff to lease to it four lots lying alongside of the Southern Railway at Shelton station, two of the said lots being the two which had previously been leased to the Charleston Cotton Oil Mill, and the other two lots being of the dimensions of 20 by 30 feet, and this plaintiff agreed to lease the same to said Southern Cotton Oil Company at and for the price of \$25 per lot per annum, making a total of \$100 per annum for the four lots, said lease to extend for three years, to wit, to September 18, 1906, and said defendant took possession of the said four lots under said agreement and erected thereon two seed houses, in addition to the seed houses which had been previously erected thereon by the Union Oil & Manufacturing Company, or the Charleston Cotton Oil Mill, under the leases above referred to, and since the expiration of said lease the defendant has continued to hold said lots of land.

"6. That said defendant, after getting possession of the said lots of land and erecting buildings thereon, under the terms of said agreement, wrongfully refused to execute the lease, which had been agreed upon, and wrongfully refused to pay the rental of \$100 per annum, payable in advance, which was agreed upon for the term of the said lease, but has continued to hold the said lots of land, although the rental value thereof has greatly increased, and since September, 1906, has amounted to at least \$200 per annum for the four lots, which the defendant wrongfully refuses to pay to this plaintiff, and wrongfully refuses to surrender the possession of said lots, which are of the

value of \$150 each, although demand has been made upon said defendant for the said rent and for the possession of said lots.

"Wherefore plaintiff demands judgment, first, that the defendant, its servants and agents, be enjoined and restrained from further occupying, or in any manner using, any of the said lots of land in violation of the rights of this plaintiff; and, second, that the plaintiff have judgment against the defendant for the sum of \$1,300, the rental of such premises, together with interest thereon at 7 per cent. per annum from the dates when the same became due according to the terms of said agreement, together with the costs of this action, and such other and further relief as may be just and equitable.

"Lyles & Lyles, Plaintiff's Attorneys."

The Oil Company removed the cause, on the ground of diversity of citizenship, to the federal court. In the petition for removal it is alleged:

"That the defendant holds the said premises under a lease from Southern Railway Company, which is a corporation organized and existing under the laws of the state of Virginia, and is a citizen and resident thereof, which company claims to be the owner thereof, and the Southern Railway Company, as defendant's landlord, is a proper party to the said suit, and should be made a party thereto by order of court."

Before the petition for removal was filed the Oil Company served on the Southern Railway Company, to be hereafter referred to as the Railway Company, a notice of the suit, in order that the latter, as landlord, might come into the suit and defend it. Thereafter the plaintiff moved to remand the cause to the state court. It distinctly appears that the only ground for this motion was a contention on the part of the plaintiff that the value of the matter in controversy did not exceed \$2,000. It does not appear that the plaintiff contended that the value of the premises should not be considered in arriving at the value of the matter in controversy. On the other hand, it seems a fair inference from the ruling made by the trial court that the only dispute was as to the value of the premises. In the complaint this had been stated to be \$600; in the petition for removal, at exceeding \$1,000. The court found that "the value of the property in dispute and the buildings thereon exceeds the sum of \$700." As there was also a demand for \$1,300 for the use and occupation of the premises, exclusive of interest, the motion to remand was overruled.

Thereupon the Oil Company answered the complaint. It asserts five defenses. The first is in brief that the premises belong to the Railway Company and that the Oil Company is in possession of part of the premises as the lessee of the Railway Company, and of the remaining part of the premises as sublessee of the Railway Company, and it is alleged that the Oil Company had been paying rent to the Railway Company for the premises since it went into possession in September, 1904. The second defense is based on 20 years of adversary possession by defendant and its predecessors. The third ground is adversary possession of over 10 years. The remaining grounds of defense are alleged as follows:

"For a fourth defense: This defendant alleges that heretofore, to wit, on the 2d day of September, 1905, the plaintiff above named duly commenced an action against the defendant above named for the recovery of the possession of the real property described in the complaint, in the court of common pleas for the county of Fairfield, in the state of South Carolina, and that,

said cause having been removed to the Circuit Court of the United States for the District of South Carolina, the plaintiff took from the said Circuit Court of the United States for the District of South Carolina on the 14th day of January, 1908, an order discontinuing said action, said order requiring the plaintiff to pay the costs of the action, but that such costs have not been paid; that the said action now pending in this court was commenced in the court of common pleas for the county of Fairfield, in the state of South Carolina, by the service of summons and complaint on the 2d day of September, 1911, for the recovery of the possession of the real property described in the complaint, which was the same property described in the action commenced by said plaintiff against the defendant on the 2d day of September, 1911, and that the said second action was not brought within two years from the granting of the order of nonsuit in the first action.

"For a fifth defense: This defendant alleges that the Southern Railway Company claims to be the owner of the premises described in the complaint, and claims to have good right and title thereto, and said Southern Railway Company is a necessary party to this action, and was on the 16th day of September, 1911, served with notice of said action to come in and make such defense as it may have.

"Wherefore defendant prays that an order be made making the Southern Railway Company a party defendant to this action, and that the complaint be dismissed with costs.

Thomas & Lumpkin,

"Attorneys for the Southern Cotton Oil Company.
"Columbia, S. C., January 19, 1911."

This present action was, without objection by the plaintiff so far as appears, docketed on the law side of the trial court. The Railway Company was made a party defendant, appeared, and adopted as its own the answer of the Oil Company. The action thereupon went to trial before a jury. The following is taken from the record:

"The plaintiff offered evidence tending to show title in himself to the lands over and along which the tracks of the Southern Railway Company were constructed and operated, and offered evidence tending to show that in September, 1897, plaintiff leased to Union Oil & Manufacturing Company, a corporation of the state of South Carolina, the premises in question for the period of three years, and that before the expiration of said period the Charleston Cotton Oil Mill, a corporation of the state of South Carolina, in some way acquired all of the property, rights, and franchises of the Union Oil & Manufacturing Company and entered into possession of the premises in question; that in September, 1900, this plaintiff executed to the Charleston Cotton Oil Mill a new lease of the premises for a period of three years, expiring on the 18th day of September, 1903; that before the expiration of said lease the defendant, Southern Cotton Oil Company, in some way acquired the property, rights, and franchises of the Charleston Oil Mill, and by virtue thereof entered into possession of the premises in question; and that just prior to the expiration of said lease so renewed, to wit, some time in September, 1903, the defendant company agreed with the plaintiff for a lease of said premises for a period of three years and for the right to erect additional buildings thereon at a rental of one hundred dollars (\$100.00) per annum, to be paid in advance, and that it thereupon commenced the erection of such buildings and continued to hold possession of said premises, but refused upon demand to execute the lease which had been agreed upon.

"The defendant the Southern Cotton Oil Company offered in evidence leases or licenses for the use of the different parts or parcels of land which constitute the property in controversy, all of said leases or licenses being terminable upon thirty days' notice from Southern Railway Company, to wit:

"(a) Agreement between Southern Railway Company and J. G. Wolling and J. G. Wolling, Jr., dated October 20, 1897.

"(b) Agreement between the same parties, dated August 7, 1899, with map attached.

"(c) Agreement between the same parties, dated June 1, 1900, with map attached.

"(d) Agreement between same parties, dated January 7, 1902, with map attached.

"All of the foregoing lease or license agreements cover portions of land in controversy, and the defendant, the Southern Cotton Oil Company, claimed to have entered under and to be holding possession under said Wolling.

"(e) Lease or license agreement between Southern Railway Company, dated September 23, 1904, with map attached, covering the remaining portion of the land in controversy."

The defendants also offered in evidence the following record from the District Court of the United States for the District of South Carolina:

"Record.

"State of South Carolina, County of Fairfield.

"In the Court of Common Pleas.

"William J. Shelton, Plaintiff, v. Southern Railway Company and Southern Cotton Oil Company, Defendants.

"Complaint.

"The plaintiff above named, complaining of the above-named defendants, alleges:

"1. That the defendant Southern Railway Company is a corporation, and at the times hereinafter mentioned was a corporation, duly created and organized under the laws of the state of Virginia, and is and has been since the year 1894 operating the railroad formerly known as the Spartanburg & Union Railroad, which formerly belonged to the Spartanburg & Union Railroad Company, and, as plaintiff is informed and believes, has become successor to all the rights and franchises and liable to all the duties of the said Spartanburg & Union Railroad Company under the charter granted the said Spartanburg & Union Railroad Company by the General Assembly of this state.

"2. That the said Spartanburg & Union Railway Company acquired under its charter unto itself and its successors a right of way through and over a certain tract of land lying along and on both sides of the said railroad at Shelton depot, in the county of Fairfield and state aforesaid, of which said tract of land the plaintiff herein is seized in fee simple, subject to the said right of way; but the plaintiff alleges that the said right of way was acquired by the said Spartanburg & Union Railroad Company over and through the said tract of land for the purpose of the said railroad only, and for so long only as the same should be used for the purpose of said railroad and no longer, and that the defendant Southern Railway Company has no right of way over and through the said tract of land, save such as was acquired by the said defendant as successor to the said Spartanburg & Union Railroad Company.

"3. That the defendant the Southern Cotton Oil Company is a corporation duly created and organized according to law, and as such is engaged in doing business in this state.

"4. That heretofore the plaintiff let to the defendant the Southern Cotton Oil Company a small parcel of the land referred to in paragraph 2, containing one-eighth of an acre, more or less, lying along or near the track of the said railroad at Shelton, which was to be used by the said defendant for the purpose of storing cotton seed in a certain house which had been erected on said land, and when the term of the lease made by the plaintiff to the said defendant had expired and plaintiff proposed to renew the same, the said defendant refused to renew the said lease, alleging that plaintiff had no right to let the said premises, and that it had obtained a lease thereof from the defendant Southern Railroad Company.

"5. That the contract of lease from the plaintiff under which the defendant Southern Cotton Oil Company held possession of the said premises expired on the 31st day of December, 1903, since which time the said defendant, with the sanction and connivance of the defendant Southern Railway Company,

has wrongfully held said premises after demand by the plaintiff for the possession thereof, and without the consent of the plaintiff has erected three other houses thereon, which have become by operation of law the property of the plaintiff herein.

"6. That the said lot or parcel of land on which the said houses are located is entirely outside the right of way of the defendant Southern Railway Company, but plaintiff alleges that if the said strip of land should be within the limit of the right of way of the defendant Southern Railway Company that plaintiff is still the owner thereof in fee and entitled to make any proper use thereof not inconsistent with [use thereof by] said defendant Southern Railway Company, [which] could not have any right or authority to let or lease the same to another for other than railroad purposes.

"7. That as plaintiff is informed and believes the defendant Southern Railway Company has undertaken to authorize the defendant Southern Cotton Oil Company to occupy and hold possession of the said premises and the houses erected thereon, although the said Southern Railway Company well knew that the plaintiff is the owner thereof and seised in fee simple, and the plaintiff alleges that the act of the defendant Southern Railway Company in attempting to hold the defendant Southern Cotton Oil Company in possession of said premises, knowing of plaintiff's title thereto, is a willful, wanton, and high-handed denial of and invasion of the plaintiff's rights, to his damage in the sum of one thousand (\$1,000.00) dollars.

"8. That the reasonable rental value of the said premises is \$120 per annum.

"9. That the plaintiff is the owner of a Fairfield scales located on the said premises, referred to in paragraph No. 2 of this complaint, which is wrongfully withheld by the defendant and used by the defendant Southern Cotton Oil Company in weighing cotton seed without the consent of the plaintiff.

"Wherefore plaintiff demands:

"First. That he be adjudged the owner in fee of the premises described in paragraph 4 and for the recovery of the possession thereof.

"Second. That the defendant Southern Railway Company, its agents and servants, be forever enjoined from using or permitting or granting the right to others to use the aforesaid right of way over plaintiff's lands for any other purpose than railroad purposes, in violation of the plaintiff's right as owner in fee of said land.

"Third. That the plaintiff have judgment against the defendants for the sum of \$120 per annum, the value of the use and occupation of the said land.

"Fourth. That plaintiff have judgment against the defendants for the sum of \$1,000 damage sustained by him as alleged in paragraph No. 6 in this complaint.

"Fifth. That the plaintiff have judgment for the costs of this action and for such other and further relief as may be just.

"Ragsdale & Dixon, Plff's Attys."

The record of the action of 1905 also contained the answer of the Oil Company (which asserted title in the Railway Company and also relied upon both 20 years and 10 years of adversary possession), and an order granting the motion of the plaintiff for a nonsuit, made January 14, 1908. There was also offered and admitted without objection a certificate by the clerk that the costs of the action of 1905 had not, up to September 11, 1911, been paid.

At the close of the evidence on the trial of the present action the Oil Company moved the court to direct a verdict in its favor on the ground that this was a second action for the recovery of real property, instituted more than two years after nonsuit taken in a former action to recover the same property. This motion was overruled and exception was duly taken. Thereupon, on the motion of the Railway Company, the court dismissed the action "in so far as it affects the rights of"

the Railway Company. To this the Oil Company also excepted. The court then charged the jury, saying in part:

"When you find your verdict, you will find in these words: If you find for the defendant you simply say, 'We find for the defendant.' If you find for the plaintiff, Shelton, you will say, 'We find for the plaintiff the property in dispute.' If, in addition to that, you find that there had been no rentable value to it, nor any damages to which he has been subjected, you will stop there. If you find, however, that there has been rentable value for use and occupation (you have heard the testimony on that point), then you will add, 'and so many dollars damages,' not exceeding the sum of \$1,300."

The verdict was:

"We find for the plaintiff the property in dispute."

The Oil Company then moved for a new trial, and this motion was overruled. The order of the court then made will be set out later. The judgment was that the plaintiff recover of the defendant the Southern Cotton Oil Company the property in dispute and its costs.

In 2 Code of Civil Procedure 1912, § 123, subd. 2, is the following statute:

"Plaintiff Limited to Two Actions for Recovery of Real Property.—The plaintiff in all actions for recovery of real property or the recovery of the possession thereof, is hereby limited to two actions for the same, and no more: Provided, that the costs of the first action be first paid, and the second action be brought within two years from the rendition of the verdict or judgment in the first action, or from the granting of a nonsuit or discontinuance therein."

The first assignment of error is that the trial court erred in overruling the motion of the Oil Company for a directed verdict in its favor. The contentions of the plaintiff may be conveniently stated in the following order:

(1) The present action is not one to recover possession of real property, but is a mere demand for double rent. In the brief for plaintiff it is said:

"The allegation of demand for possession [in the present complaint] was for the purpose of affecting the amount of the rental and not for making out a possessory action." 1 Code 1912, § 3497.

(2) There is no evidence that the premises involved in the first action are the same as the premises involved in the present action.

(3) The first action was not one to recover possession of real estate.

(4) The present action asserts only a right to equitable relief.

(5) Even if both actions were to recover possession of real property, the trial court was right in holding that the differences between the two actions prevented the operation of the statute.

1. The first contention of the plaintiff may be disposed of rather briefly. The section of the Code referred to requires a demand of possession in writing as a condition precedent to the recovery of double the rental value of the premises. There is no allegation in the present complaint that demand in writing had been made, and there is no prayer for double the rental value of the premises. We are unable therefore to read the complaint as is now suggested.

[1] 2. The contention that there is no evidence of identity of the premises involved in the actions requires some discussion. On the trial below the Oil Company introduced in evidence, without objection, the record of the former action. If the plaintiff at that time was contending that there was want of identity of the premises involved this failure to object and to require evidence of identity is inexplicable. But if the plaintiff then conceded the identity of the premises, the course taken was the one to be expected. The order made by the trial court on the Oil Company's motion for a new trial reads as follows:

"The defendants have also moved for a new trial, mainly upon the ground that the court should have held that the present action, being an action for the recovery of the possession of real property, was brought more than two years after the discontinuance of the previous action, which was also an action for the recovery of real property; the property in dispute in the former action being the same premises as those sought to be recovered in the present action, and the costs in which previous action had not been paid.

"Upon a comparison of the complaint in the original action, which was discontinued, with that in the present action, it would appear that there are some slight differences. The former action was brought against two defendants, the Southern Railway Company and the Southern Cotton Oil Company, and was framed, so to say, somewhat in a double aspect, as asking under one aspect for the recovery of the possession of the property on the ground that the plaintiff was absolutely entitled to it, and in the other aspect for an injunction to prevent its further use by the defendants for the purposes for which it was being used as not being compatible with the easement upon the property possessed by the railroad company. In other words, in one aspect the former action treated the case as if the railroad company had properly acquired an easement for a right of way only over the premises, and by virtue of such easement had no right to rent it out to others to use for a storage of seed, or for cotton seed house, and should be enjoined from so doing. The present action is brought against a single defendant, the Southern Cotton Oil Company, and can only be construed, upon reading the facts alleged in the complaint, and giving them any sort of logical construction, and ignoring the prayer of the complaint, as an action for the recovery of real property. Under the language of the decision in Carr v. Mouzon, 93 S. C. page 161, 76 S. E. 201, Ann. Cas. 1914C, 731, where a party plaintiff is to be debarred from the second action to recover real estate, unless brought within the time specified in the statute, the two actions are to be construed strictly as being both for recovery of the possession of the same piece of real estate, and for no other purpose. Giving the benefit of any doubtful construction to the plaintiff in this case as to the effect and meaning of the complaint in the first action which was discontinued, in the opinion of the court there were different parties to the two actions. They were not brought for exactly the same purposes; that is, the first action covered other purposes than are included within the scope of the second, and therefore the bar of the statute would not in this case apply.

"The motion for a new trial on behalf of the defendant is accordingly overruled."

If the identity of the premises involved in the two actions had not been conceded by counsel for plaintiff, if the case had not been tried on the theory that there was such identity, we cannot believe that the court would have failed to mention this most obvious ground for the conclusion reached. But we are not left to inference on this point.

On the oral argument here counsel for the Oil Company moved for certiorari to bring up the stenographer's transcript. In so doing it was stated by him that plaintiff's contention of nonidentity of premises had been made for the first time in the brief filed in this court. This

assertion was not denied. On the other hand, the contention of counsel for plaintiff was that he could thus shift his position as it was done in *support of the judgment below*. We have found no authority sustaining such contention. On the other hand, we read the authorities as holding that it is not allowable for any party, who has taken one position on a question of fact on the trial below, to take an inconsistent position in the appellate court. In *Brown v. Gurney*, 201 U. S. 184, 190, 26 Sup. Ct. 509, 511 (50 L. Ed. 717) it is said:

"But the Supreme Court applied the rule that where the existence of certain facts is assumed in the trial court and the trial proceeds, without objection, on that assumption, and the case is decided in reliance thereon, *neither party* will be heard in the court of review to question there, for the first time, the existence of the facts, and especially not where the alleged omissions might have been supplied if called to the attention of the trial court, and properly applied it, for the identity of the ground in controversy and the validity of the original Kohno location were conceded by both parties; and, indeed, counsel really does not deny them as matters of fact, but simply objects that the stipulation did not include them."

In *Baker v. Kaiser*, 126 Fed. 317, 319, 61 C. C. A. 303, 305, it is said:

"* * * A theory of a case or an assumption of fact adopted by a trial court with the acquiescence of the parties will be followed by an appellate court to which the cause is taken. * * * Appellate courts are especially careful to prevent injustice from resulting from the *affirmance of a judgment* upon a ground not presented to the trial court, and which might have been overthrown by additional evidence, had attention been directed to it."

In 2 Standard Procedure, 244, 245, it is said:

"Consistency of position is a fundamental requisite in appellate proceedings. Parties will not be permitted to take in the appellate court a course at variance with, or inconsistent with, the course followed by them below. Where a case is heard or tried in the lower court upon a certain theory, another and different theory cannot be presented upon appeal."

See, also, 16 Cyc. 796; 11 Am. & Eng. Ency. (2d Ed.) 446; Powell, Appellate Proc. §§ 102, 115; Bigelow, Estoppel (5th Ed.) 717 et seq.; 2 Herman, Estoppel, p. 951; Meinderback v. Hopkins, 8 Johns. (N. Y.) 437; Newell v. Meyendorff, 9 Mont. 254, 23 Pac. 333, 8 L. R. A. 440, 18 Am. St. Rep. 738, 742; Railroad Co. v. McCarthy, 96 U. S. 258, 267, 24 L. Ed. 693; Lesser Co. v. Railroad Co., 114 Fed. 133, 140, 52 C. C. A. 95; Bensieck v. Cook, 110 Mo. 173, 19 S. W. 642, 33 Am. St. Rep. 422, 426; Norfolk Co. v. Norfolk, 115 Va. 169, 179, 78 S. E. 545.

While in the great majority of the reported cases it was a plaintiff in error who sought to take an inconsistent position in an effort to reverse the judgment, there are two sufficient reasons for holding that the rule above stated applies to a case where a defendant in error seeks to sustain a judgment by a change of position as to some fact. To permit such change in position is to permit an injustice to the plaintiff in error. In the case at bar the plaintiff in error was, by the silence of the plaintiff, relieved of the duty of introducing evidence of identity of premises at the time when it should have been ready to do so. He who was silent when he should have spoken cannot subsequently be heard to speak.

Again: The jurisdiction of this court on writ of error is to *re-examine* the rulings on questions of law made by the trial court. Unless the state of facts accepted by the trial court be accepted here, this court could not review or *re-examine* the rulings made below. The trial court has never ruled on the case now sought to be presented by the defendant in error. We overrule the motion for certiorari and will consider the case only on the theory that the premises involved in both actions are identical.

[2, 3] 3. Let us now consider the contention that the first action was not one to recover possession of real property within the meaning of the statute. Under the South Carolina Code of Civil Procedure (section 218) a plaintiff may unite several causes of action, legal or equitable, or both, if they all arise out of the same transaction, or transactions connected with the same subject of action. The plaintiff had a legal cause of action against the Oil Company, in that the latter was alleged to be an overstaying tenant of the plaintiff, who refused to surrender possession. The plaintiff also had or supposed he had an equitable cause of action in that the Oil Company had attorned to the Railroad Company, alleged to be making through its tenant, the Oil Company, a use of plaintiff's land which it was not authorized to make. We deem it unnecessary to express an opinion as to the existence of a right to equitable relief under the complaint of 1905. We shall assume its existence in order to present the case as strongly as possible for the plaintiff. These causes of action were properly joined under the section of the Code above mentioned.

[4] And we should say here that we find no cause for refusing to read and consider the prayers of the complaint in order to ascertain the purpose of the pleader. For some purposes the prayer of a complaint may be disregarded, but not where there is a contention made by the complainant as to the character of the action presented by his own complaint. The prayers of this complaint are most significant. The first is that the plaintiff "be adjudged the owner in fee of the premises * * * and for the recovery of the possession thereof." Had the plaintiff been content to present only his equitable, or supposed equitable, cause of action, there would have been less difficulty in holding that the action was not one to recover possession of real property. But he saw fit, not only to present his legal cause of action, but to make it the primary and chief feature of his complaint. As drawn, the pleading presents as the fundamental cause of complaint the unlawful detention of the possession of the premises, and the most important purpose on the part of the pleader was to recover possession.

We regard as controlling the ruling in *Tompkins v. Railroad Co.*, 30 S. C. 479, 9 S. E. 521, to the effect that a complaint, which presents a right to an injunction to prevent a railroad company from appropriating land which it is not authorized to take, does not institute an action to recover real property or the possession thereof within the meaning of the statute. But we are unable to perceive that plaintiff's action of 1905 falls under this ruling. In the first action mentioned in the opinion in the *Tompkins Case* a landowner presented

an equitable cause of action and prayed for none but the relief obtainable in a court of equity. In essence the case was one in which a land-owner sought by injunction to prevent a railroad company from unlawfully appropriating his land, and incidentally sued for damages. In the present plaintiff's complaint of 1905 he saw fit to allege that the Oil Company obtained possession as his own tenant and was in the untenable position of an overstaying tenant who had illegally attorned to another. While it was also alleged, in order to set up a right to injunctive relief, that it was a railroad company to which the Oil Company had attorned, still it was the former allegation which indelibly stamped the case as being chiefly and primarily one to recover possession of the premises. It should here be said that if the complaint of 1905 did not present a right to injunctive relief the complaint so clearly instituted an action to recover possession of real property, that the question needs no further discussion.

But, treated as a complaint presenting both a legal and an equitable cause of action, we cannot escape the conclusion that the action of 1905 was, within the meaning of the statute, one to recover possession of real property. Its paramount purpose both in form and in essence was to have the right of possession adjudicated. We are fully aware that the statute is in derogation of a common-law right, and that it operates only when both the first and second actions are in essence strictly actions to recover real property or the possession thereof. We hold, as we must under the South Carolina decisions construing this statute (and we use here the phraseology of the common-law jurisdictions in order to express our meaning more clearly), that a common-law action of trespass q. c. t., a suit for partition, although the plaintiff's title be denied, or a bill in equity to foreclose a mortgage, or to enjoin a defendant having the power of eminent domain from appropriating land which it is not authorized to take, are all actions which do not fall within the meaning of this statute.

We are further of opinion that the mere similarity in practical result between some of the last above named actions and an action which is strictly one to recover real property or the possession thereof does not afford reason for disregarding the intent of the statute. In South Carolina there is but one form of action. Code Civ. Proc. § 114. Consequently there is no technical form of action for the recovery of real property or for the recovery of the possession of real property. The essential nature of the complaint, in view of the facts alleged and the relief prayed, must determine the nature of the actions to which this statute applies. Mere joinder of equitable rights, and a *fortiori* of merely supposed equitable rights, with legal rights, cannot as we believe, be sufficient to prevent the application of the statute. We have found no authority for the supposition that either action must be solely to recover real property or the possession thereof. Nor do we perceive any good reason for so holding. When the statute in practically its present form was first enacted, in 1744, there could be no such thing as a joinder of a legal and an equitable cause of action. When the code pleading was adopted in 1870 this ancient statute was not repealed or amended. If the Legislature had intended that the statute of 1744 should not apply to actions to recover real property

or the possession thereof, when presented in conjunction with some equitable cause of action, it would seem that this intent would have been expressed. And even if not expressed in 1870, it would seem that during the 40 years intervening between the adoption of the code system of pleading and the institution of the present action, some expression of this intent would have found its way into the statute law.

We are therefore brought to the conclusion that the action of 1905 was an action to recover the possession of real property within the meaning of the statute.

4. We are now brought to a further consideration of the nature of the present action. In the brief for the plaintiff it is said (page 14):

"Upon the same principle the court should have construed the present action strictly as an equitable action based upon the equitable rights alleged in the complaint in favor of the plaintiff against the defendant, which unquestionably could be maintained even if the former action was for the recovery of the land."

In holding that no such right is shown, we do not need to rely upon the federal doctrine that a plaintiff out of possession suing a defendant in possession of real estate has no standing in equity under the facts asserted in this complaint. *Whitehead v. Shattuck*, 138 U. S. 146, 11 Sup. Ct. 276, 34 L. Ed. 873; *Erhardt v. Boaro*, 113 U. S. 537, 5 Sup. Ct. 560, 28 L. Ed. 1113; *Black v. Jackson*, 177 U. S. 349, 363, 20 Sup. Ct. 648, 44 L. Ed. 801; *Buchanan Co. v. Adkins*, 175 Fed. 692, 99 C. C. A. 246. We have failed to find any authority authorizing a belief that there is in the state courts of South Carolina a right to equitable relief under the circumstances here. As the sole defendant has not the power of condemnation, we see no room for applying the doctrine of *Bird v. Railroad Co.*, 8 Rich. Eq. 46, 64 Am. Dec. 739; *Tompkins v. Railroad Co.*, supra, 30 S. C. 479, 9 S. E. 521; *Ragsdale v. Railroad Co.*, 60 S. C. 381, 38 S. E. 609; 1 High, Inj. (4th Ed.) § 622; 2 High, Inj. (2d Ed.) §§ 622, 625, 629; 2 Lewis, Em. Dom. (3d Ed.) §§ 901, 902, 904. We have therefore a pleading which, treated as a bill in equity, is fatally wanting in equity. Had this action, on removal, been docketed on the equity side of the federal court, a motion to dismiss for want of equity would necessarily have prevailed.

[5] We need not concern ourselves with the propriety of treating such a complaint, over the objection of the complainant, as presenting a legal cause of action. The complaint here alleged that the Oil Company "wrongfully refuses to surrender the possession of said lots, * * * although demand has been made upon said defendant * * * for the possession of said lots." On removal of the cause it was apparently placed on the law docket. The plaintiff made no motion to have the cause docketed on the equity side. He could have had his supposed right to equitable relief tested by so doing. On the other hand, without objection, he permitted the cause to remain on the law side, and went into a trial by a jury. The evidence offered by the plaintiff bore directly on his right to the possession of the premises, and on nothing else. Having submitted his complaint, treated as one setting up a legal cause of action, to the decision of a jury, he must be held to have waived his right to object on this point.

And we have no difficulty in arriving at the conclusion that this course of action was not the result of ignorance or of mistake.

The learned counsel for plaintiff must have known that the chances of maintaining the complaint in the federal court as a bill in equity were, to say the least, exceedingly slight. They also presumably hoped to escape the bar of the statute in question in exactly the manner that it was escaped in the trial court. It is true that the complaint, treated as a declaration, might have been considered as a mere assumpsit for money for the use and occupation of real estate. But this method of escaping the bar of the statute was not only not accepted by plaintiff, but he waived the right to have the complaint so treated. He made no motion for leave to strike out the above-quoted allegation, and his every word and act as shown by the record indicates a purposeful intent to submit to the jury the question of his right to recover the possession of the premises. The belief of counsel for plaintiff that the differences between the action of 1905 and the present action prevented the statute from being applicable is, we must believe, the explanation of this course of action. The conclusion that the plaintiff never for a moment intended his complaint to be treated as a declaration for money only is fortified by the fact that counsel for plaintiff had at the outset moved to remand the cause to the state court for want of sufficient value in controversy. If the complaint were treated as a mere declaration for \$1,300 for the use of real estate or for rents, the want of jurisdiction of the trial court was too apparent to be supposed to have escaped the attention of the experienced and astute counsel representing the plaintiff. Moreover, with the above-quoted allegation left in the complaint, it was properly worded in order to recover possession and rents in arrear, and was inappropriately worded as a mere demand for rents in arrear or for compensation for the use and occupation of real estate. It is also a fact that the answer presented clearly the issue of the right of possession. By going to trial on such an issue the plaintiff (although his original intention was different) must assuredly be held to have waived the right to now have his complaint construed otherwise than as a declaration for the recovery of possession of the premises and for compensation for its unlawful use and occupation by the oil company.

[6] Having reached the conclusion that the present action must be treated as one to recover possession of real property, we must now consider the reasons which led the learned trial court, at the instance of the plaintiff, to rule that the present action is not barred by the statute in question. These reasons are want of identity of parties, and that the first action covered purposes other than are included within the scope of the present action. In order that the statute may apply some identities are necessary. There must be substantial identity of parties to the two actions, identity of premises involved, and identity of cause of action. The only difference in parties consists in the fact that the Railway Company, the landlord of the Oil Company, was made a party defendant on the face of the first complaint and is not mentioned in the present complaint.

It is unnecessary that we base our conclusion on the fact that the Railway Company had been brought into the present action as a de-

fendant, and was still before the court as such when the Oil Company's motion for a directed verdict was overruled, or on the privity between landlord and tenant. In reason and by authority the absence of the landlord, had it existed, from the second action, does not destroy sufficient identity of parties. The fact that the plaintiff in both actions is the same person, and that the Oil Company is a defendant in both actions is sufficient. We so say because of the analogy between the present situation and a case where a prior judgment is relied upon as an estoppel. The analogy exists because by the statute the same effect is given to an order of nonsuit rendered in the first action more than two years before the institution of the second that is given by general law to a final judgment on the merits rendered in the first action. In 23 Cyc. 1112, it is said:

"But where a former judgment is pleaded in bar, it is no objection to its operation as an estoppel that the former action included some parties who are not joined in the present suit or vice versa, provided the judgment was rendered on the merits, and not on an objection as to parties, and provided the cause of action in the two suits is the same, and the party against whom the estoppel is set up was actually a party to the former litigation."

In 1 Herman, Estoppel, § 94, it is said:

"To make a judgment, pleaded in bar, a technical bar, it must appear to have been between the same or substantially the same parties. A nominal, but not substantial, difference in parties does not effect the estoppel."

See, also, Thompson v. Roberts, 24 How. 233, 241, 16 L. Ed. 648; Green v. Bogue, 158 U. S. 478, 503, 15 Sup. Ct. 975, 39 L. Ed. 1061.

As has been shown, we must treat the identity of the premises in controversy in the two actions as being established. We are unable to perceive that there is any difference between the cause of action in the first complaint and that in the second. The gist of both complaints is the same. An alleged illegal detainer of the possession of the premises by the plaintiff's tenant, the Oil Company, is the gist of the complaint in both actions. In both the Oil Company is alleged to have obtained possession by virtue of leases made by the plaintiff. In both it is alleged that the Oil Company is an overstaying tenant. The mere fact that the complaint of 1905 contains an allegation that the Oil Company has committed the grievance with the sanction and connivance of the Railway Company, which is not made in the present complaint, would not prevent the application of the strict doctrine of estoppel by judgment.

Having, then, substantial identity of parties, identity of premises, and identity of causes of action, we doubt if any difference of purpose on complainant's part in bringing the two actions could possibly avail to prevent the operation of the statute. However, it is unnecessary to so decide. We are unable to see that there is any difference of purpose, such as could possibly be of moment here. We believe that we have satisfactorily shown that in the first complaint, even assuming that it set up an equitable right, the chief and primary purpose was to recover possession of certain premises. Treated as the plaintiff acquiesced in having it treated, the chief and primary purpose in the second complaint was to recover the possession of the

same premises. We are therefore unable to find any sufficient reason for holding that the statute did not apply. As the present action was barred, the motion of the Oil Company for a directed verdict should have been granted.

It is unnecessary that we consider the remaining assignments of error. We are of opinion to reverse, at the cost of defendant in error, and to remand for such further action as may be proper.

Reversed.

PRITCHARD, Circuit Judge, dissents.

KERCHEVAL v. ALLEN et al.

(Circuit Court of Appeals, Eighth Circuit. January 4, 1915.)

No. 3724.

1. INTERNAL REVENUE ~~42~~—SEARCHES AND SEIZURES—STATUTORY PROVISIONS.

Rev. St. § 3462 (U. S. Comp. St. 1913, § 6364), authorizing the issuance of search warrants when an internal revenue officer makes oath that he has reason to and does believe that a fraud on the revenue has been or is being committed upon or by the use of the premises sought to be searched, and section 3177 (section 5900), authorizing any collector, deputy collector, or inspector to enter in the daytime any building or place where articles subject to tax are made, produced, or kept, for the purpose of examining such articles, imposing a penalty for a refusal to admit such officers, and providing that, when such premises are open at night, such officers may enter them while so open, are general in their nature, suitable for the collection of internal revenue taxes subsequently imposed by Congress, and as they are repugnant to no provisions of the Oleomargarine Act (Act Aug. 2, 1886, c. 840, 24 Stat. 209 [Comp. St. 1913, §§ 6215-6232]), they are applicable to the collection of the special taxes imposed by that act.

[Ed. Note.—For other cases, see Internal Revenue, Cent. Dig. §§ 114-116; Dec. Dig. ~~42~~.]

2. INTERNAL REVENUE ~~42~~—SEARCHES AND SEIZURES—STATUTORY PROVISIONS.

Rev. St. § 3462, does not require that searches, made under search warrants thereby authorized, shall be made only by the one officer who verified the application for the warrant.

[Ed. Note.—For other cases, see Internal Revenue, Cent. Dig. §§ 114-116; Dec. Dig. ~~42~~.]

3. INTERNAL REVENUE ~~22~~—SEARCHES—ACTIONS FOR WRONGFUL SEARCHES—INSTRUCTIONS.

Even though a search warrant to search premises, where it was believed a fraud upon the revenue was being committed, limited the search to the officer who verified the application for the warrant, in an action against him and other officers for damages, it was not error for the court to charge that the officer having the warrant in charge had a right to execute it, and to refuse instructions that the warrant furnished no jurisdiction for an entry into plaintiff's dwelling house, or for a search therein by any of the defendants, as such instructions would have condemned as

~~42~~ For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

unlawful the acts of the officer who verified the application, while the instruction given referred only to him.

[Ed. Note.—For other cases, see Internal Revenue, Cent. Dig. §§ 47-61; Dec. Dig. ☞22.]

4. INTERNAL REVENUE ☞22—SEARCHES—LIABILITY OF OFFICERS.

Internal revenue officers, in executing a search warrant addressed to them which was fair on its face, did not have the duty of deciding whether a proper application was made to the United States commissioner who issued the warrant, nor whether he properly exercised his discretion in issuing it, since, if an officer or tribunal possesses jurisdiction over a subject-matter on which a judgment is passed, with power to issue an order or process for the enforcement of such judgment, and the order or process is regular on its face, it will give full and entire protection to the ministerial officer executing it, though serious errors may have been committed by the officer or tribunal in reaching the conclusion or judgment on which the order or process is issued.

[Ed. Note.—For other cases, see Internal Revenue, Cent. Dig. §§ 47-61; Dec. Dig. ☞22.]

5. INTERNAL REVENUE ☞22—SEARCHES—ACTIONS—ISSUANCE.

In an action against internal revenue officers for an alleged wrongful search of plaintiff's premises, under a warrant authorizing them to search such premises for oleomargarine unlawfully manufactured, plaintiff could not attack the warrant because it directed the seizure of all papers, route cards, lists, and bills, and all other documents relating to the manufacture, purchase, etc., of oleomargarine, where no complaint was made that defendants seized any such papers.

[Ed. Note.—For other cases, see Internal Revenue, Cent. Dig. §§ 47-61; Dec. Dig. ☞22.]

6. INTERNAL REVENUE ☞42—SEARCHES—ACTIONS FOR WRONGFUL SEARCHES—INSTRUCTIONS.

In an action against internal revenue officers for damages from an alleged wrongful search of plaintiff's premises, where the evidence showed that the door of plaintiff's house was open, and that the officers entered through that door, an instruction that the search warrant gave them no authority to enter plaintiff's premises and make a search at night was properly refused, as it ignored the right of the officers to exercise in the nighttime the authority given by Rev. St. § 3177, which provides that, when premises where articles subject to tax are made, produced, or kept are open at night, such officers may enter them while so open.

[Ed. Note.—For other cases, see Internal Revenue, Cent. Dig. §§ 114-116; Dec. Dig. ☞42.]

7. INTERNAL REVENUE ☞42—SEARCHES—EXECUTION OF SEARCH WARRANT IN NIGHTTIME.

The execution of a search warrant issued under Rev. St. § 3402, to search premises for oleomargarine, manufactured in fraud of the revenue laws, by entering plaintiff's dwelling house through a door which was open at half past 8 at night, was not illegal.

[Ed. Note.—For other cases, see Internal Revenue, Cent. Dig. §§ 114-116; Dec. Dig. ☞42.]

8. INTERNAL REVENUE ☞30—SEARCHES—ACTIONS FOR WRONGFUL SEARCHES—INSTRUCTIONS.

In an action for damages against internal revenue officers, an instruction which predicated an unlawful act upon the destruction of internal revenue stamps on tubs containing oleomargarine, belonging to plaintiff, was properly refused, where there was evidence that the stamps on the tubs had been canceled many months before, and that the tubs appeared dirty and greasy, as an inference might be drawn from this evidence that the tubs had been refilled after the original contents had been withdrawn, and under Act Aug. 2, 1886, c. 840, §§ 6-13, 24 Stat. 210, 211 (Comp. St.

1913, §§ 6218-6225), the stamps would protect the tubs only until the original contents were emptied, and thereafter it was the duty of the person in whose hands the tubs were, or of any revenue officer, to destroy the stamps thereon.

[Ed. Note.—For other cases, see Internal Revenue, Cent. Dig. §§ 86, 91; Dec. Dig. 22.]

9. INTERNAL REVENUE 22—SEARCHES—ACTIONS FOR WRONGFUL SEARCHES—INSTRUCTIONS.

In an action against a collector of internal revenue and his deputies for damages from an alleged unlawful search of plaintiff's premises, where some of the acts shown by testimony were lawful and not injurious, while there was an issue as to the occurrence of other acts, an instruction that the collector was responsible for the acts of any of his deputies, as mentioned in the evidence, was properly refused.

[Ed. Note.—For other cases, see Internal Revenue, Cent. Dig. §§ 47-61; Dec. Dig. 22.]

10. TRIAL 261—INSTRUCTIONS BAD IN PART.

There was no error in refusing a requested instruction, a part of which could not have been properly given.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 484, 660, 671, 673, 675; Dec. Dig. 261.]

11. INTERNAL REVENUE 22—WRONGFUL SEARCH—PUNITIVE DAMAGES.

A collector of internal revenue, who was not present when other revenue officers attempted to break into plaintiff's dwelling house, or when they unlawfully entered and searched such dwelling house, and who neither participated in, authorized, nor ratified the acts done, was not liable for punitive damages; and hence an instruction that the rule as to the recovery of such damages against him was the same as was declared in the charge as to the other defendants was properly refused, where such rule allowed the recovery of punitive damages if the acts of defendants were malicious.

[Ed. Note.—For other cases, see Internal Revenue, Cent. Dig. §§ 47-61; Dec. Dig. 22.]

In Error to the District Court of the United States for the Eastern District of Missouri; David P. Dyer, Judge.

Action by Charles E. Kercheval against Edmund B. Allen and others. Judgment for defendants, and plaintiff brings error. Affirmed.

William R. Orthwein, P. H. Cullen, Thomas T. Fauntleroy, and Shepard Barclay, all of St. Louis, Mo., for plaintiff in error.

Homer Hall, Asst. U. S. Atty., of St. Louis, Mo. (Charles A. Houts, U. S. Atty., of St. Louis, Mo., on the brief), for defendants in error.

Before CARLAND, Circuit Judge, and T. C. MUNGER and YOUNG MANS, District Judges.

T. C. MUNGER, District Judge. The plaintiff in error, herein-after referred to as plaintiff, sued the five defendants in error, herein-after referred to as defendants, alleging that they were officers or agents in the internal revenue service of the United States, and as a first cause of action that on February 14, 1911, they attempted to break and enter his dwelling house without warrant or authority, causing an injury to a door. The second cause of action alleged that on February 17, 1911, the defendants unlawfully entered into his dwelling house, and publicly searched the house and premises, and

unlawfully emptied three partially filled tubs of oleomargarine into a fourth, and defaced and destroyed the canceled United States internal revenue stamps thereon, for which acts he prayed the recovery of damages.

The defendant Allen, who was the collector of United States internal revenue for that district, filed an answer containing a general denial of the plaintiff's charges, while the answers of the other defendants, in addition to a denial of any trespass, justified their entry as officers of the internal revenue service of the United States, and as possessed of a warrant from a United States commissioner, authorizing them to make the entry and search. The evidence showed that plaintiff for some years had been a dealer in oleomargarine in St. Louis, Mo., and carried on the business in the basement of a one-story dwelling house, in which he and his family resided. Three of the defendants made an endeavor to get in the door on the date stated in the first count, and four of them entered the house at the date stated in the second count, and made an investigation and search of the portion where the oleomargarine was kept and handled.

There was a trial and verdict for the defendants. Of the errors relied on by plaintiff, the first relates to the validity of a search warrant. The plaintiff himself offered in evidence the search warrant, issued by a United States commissioner at St. Louis, directed to defendant Allen as collector, and to any and all deputy collectors of internal revenue for that district, which contained the following recitals and commands:

"Whereas, complaint has this day been made before me upon oath of John T. Richardson, deputy collector of internal revenue, First district of Missouri, charging and alleging that he has good reason to believe and does verily believe that one Charles Kercheval, in the Eastern division of the Eastern judicial district of Missouri, in a certain one-story and basement dwelling house, known as No. 4832 Leduc street, in the city of St. Louis, state of Missouri, and in a brick stable in the rear of said dwelling house, unlawfully carries on the business of a manufacturer of colored oleomargarine without having first paid the special tax therefor as required by law, by mixing coloring matter with white or uncolored oleomargarine and thereby making a product to resemble butter in a shade of yellow for sale, thereby defrauding the United States out of its revenue, said Charles Kercheval has in his possession in said premises certain white or uncolored oleomargarine, and certain colored oleomargarine which has been unlawfully colored in the manner aforesaid by the said Charles Kercheval, and that said colored oleomargarine is being concealed by the said Charles Kercheval; and

"Whereas, said J. T. Richardson has upon oath stated such facts as lead me to believe and find that there is probable cause for believing that the said Charles Kercheval is unlawfully carrying on said business of manufacturing colored oleomargarine without having first paid the special tax therefor as required by law:

"Now, therefore, this is to command and authorize you and any of your deputies to enter and search the said premises known as No. 4832 Leduc street, and the brick stable in the rear thereof, in the city of St. Louis, state of Missouri, and to take possession of and secure all of the colored oleomargarine in said premises which has been unlawfully manufactured as hereinbefore described, all white or uncolored oleomargarine in said premises, all coloring matter used in coloring white or uncolored oleomargarine, all oleomargarine tubs, all papers, route cards, lists, and bills, and all other documents in said premises relating to the manufacture, purchase, sale, or delivery of white or uncolored oleomargarine, colored oleomargarine, and coloring matter, and to hold and dispose of the same according to and as directed by law."

[1] The application for the search warrant was also offered in evidence. Section 3462, Revised Statutes of the United States, providing for the issuance of search warrants, is as follows:

"The several judges of the Circuit and District Courts of the United States, and commissioners of the Circuit Courts, may, within their respective jurisdictions, issue a search warrant, authorizing any internal revenue officer to search any premises within the same, if such officer makes oath in writing that he has reason to believe, and does believe, that a fraud upon the revenue has been or is being committed upon or by the use of the said premises."

A further provision in section 3177 of the Revised Statutes, relating to the duty of officers of the United States internal revenue, is as follows:

"Any collector, deputy collector, or inspector may enter, in the daytime, any building or place where any articles or objects subject to tax are made, produced, or kept, within his district, so far as it may be necessary, for the purpose of examining said articles or objects. And any owner of such building or place, or person having the agency or superintendence of the same, who refuses to admit such officer, or to suffer him to examine such article or articles, shall, for every such refusal, forfeit five hundred dollars. And when such premises are open at night, such officers may enter them while so open, in the performance of their official duties."

These provisions of the Internal Revenue Act are general in their nature, are suitable for the collection of internal revenue taxes subsequently imposed by Congress, and, as they are repugnant to no provisions of the Oleomargarine Act, are applicable to the collection of the special taxes imposed by that act. *United States v. Barnes*, 222 U. S. 513-519, 32 Sup. Ct. 117, 56 L. Ed. 291.

[2, 3] The plaintiff requested instructions declaring the search warrant to be void, and to furnish no justification for entry by any of the defendants into the plaintiff's dwelling house, or for a search therein; but the court denied the request, and told the jury that the warrant was legal and that the officer having it in charge had a right to execute it. Several objections are made to this action by the court. It is said that warrant was void because section 3462, Revised Statutes, authorizes its issuance only to the internal revenue officer who verifies the application therefor; whereas, it was served, in this instance, not only by that officer, but by two other deputy collectors. It would unduly hamper the service of such warrants to limit searches made thereunder to the one officer who had sworn to the application therefor, and no such construction of the statute is necessary; but the objections urged are not tenable in this case, because the requested instructions included in the sweep of their condemnation as unlawful the acts of the officer who had made the preliminary oath, and the instruction given by the court was limited to a declaration that the officer who had the warrant in charge had the right to execute it.

[4] Another reason assigned for the imputed error in these instructions is that the search warrant was void, because it was for an unreasonable search of the plaintiff's premises, thereby offending against the restrictions of the fourth amendment to the United States Constitution. In support of this theory it is said that officers of the internal revenue service had been through plaintiff's place of business and had made several examinations within a few days' time prior

to the entry complained of. It is also claimed that the facts stated in the application for the warrant were insufficient to justify its issuance, and that it was void because it called for the seizure of the books, papers, and accounts of plaintiff. But the officers, the defendants here, in executing a specific warrant addressed to them which was fair on its face, did not have the duty of deciding if a proper application had been made to the United States commissioner who issued the warrant, nor if he had properly exercised his discretion in issuing the warrant. "If the officer or tribunal possess jurisdiction over the subject-matter upon which judgment is passed, with power to issue an order or process for the enforcement of such judgment, and the order or process issued thereon to the ministerial officer is regular on its face, showing no departure from the law, or defect of jurisdiction over the person or property affected, then, and in such cases, the order or process will give full and entire protection to the ministerial officer in its regular enforcement against any prosecution the party aggrieved * * * may institute against him, although serious errors may have been committed by the officer or tribunal in reaching the conclusion or judgment upon which the order or process is issued." Erskine, Collector, v. Hohnbach, 14 Wall. 613-616, 20 L. Ed. 745; Haffin v. Mason, 15 Wall. 671-675, 21 L. Ed. 196; Bryan v. Ker, 222 U. S. 107-113, 29 Sup. Ct. 684, 56 L. Ed. 114; Harding v. Woodcock, 137 U. S. 43-46, 11 Sup. Ct. 6, 34 L. Ed. 580; Conner v. Long, 104 U. S. 228-237, 26 L. Ed. 723; Matthews v. Densmore, 109 U. S. 216, 3 Sup. Ct. 126, 27 L. Ed. 912; Stutsman County v. Wallace, 142 U. S. 293-309, 12 Sup. Ct. 227, 35 L. Ed. 1018.

[5-7] It is urged that the search warrant was void because it directed the seizure of "all papers, route cards, lists, and bills, and all other documents in said premises relating to the manufacture, purchase, sale, or delivery of white or uncolored oleomargarine, colored oleomargarine, and coloring matter"; but, as no complaint is made that the defendants seized any of these papers, this ground of attack upon the warrant is not open to the plaintiff. The plaintiff assigns error in the refusal of tendered instructions which declared that the search warrant gave no authority to the defendants to enter plaintiff's premises and to make a search at night. The evidence shows that the officers called at plaintiff's house at half past 8 in the night, but that the door to his house was open and they entered through that door.

Section 3177, Revised Statutes, above quoted, authorizes any collector to enter in the daytime any building or place where any articles subject to a tax are made, produced, or kept within his district, so far as it may be necessary, for the purpose of examining said articles, and when said premises are open at night such officers may so enter them while so open, in the performance of their official duties. The instructions tendered proceeded on the theory that the officers' rights to enter and make examination were referable solely to the law authorizing search warrants, and ignored the right of the officers to exercise, in the nighttime, the authority given by section 3177, Revised Statutes. Moreover, the statute cited authorizing the issu-

ance of search warrants does not limit service thereof to the daytime, and we are cited to no cases which hold that service should be so limited. Search warrants are analogous to warrants for arrest for crime, and the two commands are often combined in one warrant. It is proper, and often necessary, that arrests for crime be made in the nighttime. 2 Hale, P. C. 113; 1 Russell on Cr. 840; 1 Bishop, Cr. Proc. 207-1. The execution of a search warrant is so similar to that of a warrant of arrest for crime that the officer, in executing it, may break open the outer door of a dwelling. 1 Chitty, Cr. Law, 57-66; 2 Hale, P. C. 151; 2 Bishop's Cr. Proc. 208-1. Unless a search warrant may be served in the night season, many offenses may be committed with impunity, as the unlawful business may be carried on only during that time, and the evidences of its commission may be gone when the day returns. We think the execution of the search warrant in the nighttime was authorized, and there was no error in refusing the instructions.

[8] There was evidence that one of the defendants, finding several tubs in plaintiff's place of business, each of which contained but a few pounds of oleomargarine, emptied the contents on the table used by plaintiff for preparing and printing the packages which he sold, and then destroyed the stamps on the tubs so emptied. Complaint is made of the refusal of an instruction relating to this act; but we find no error in its refusal, because it predicates an unlawful act of the officer upon the destruction of the stamps on the tubs, provided there was some oleomargarine in the tubs which was the property of plaintiff, whereas, the stamps protect such tubs only until the original contents have been emptied, when it becomes the duty of the person in whose hands the tub is, or of any revenue officer, to destroy the stamps thereon. Sections 6-13, 24 Stat. 209, 1 Supp. Rev. Stats. 508. There was evidence that the stamps on these tubs had been canceled many months before, and that the tubs appeared dirty and greasy, so that there was an inference to be drawn that they had been used for refilling after the original contents had been withdrawn.

[9] The plaintiff was not entitled to the instruction requested charging Allen, as collector, with responsibility for the acts of the deputies, because there was an issue as to the occurrence of some of these acts, and some of the acts depicted in the testimony were lawful, and not injurious, while the instruction requested a declaration by the court that the collector was responsible "for any act or acts of any of his deputies, as mentioned in evidence."

[10, 11] It is also assigned as error that the court refused a tendered instruction declaring that no defense had been made out for Allen, the collector, because his answer did not plead a justification for the acts of the deputy collectors; and complaint is also made that a portion of the court's charge gave Allen the benefit of the evidence of justification, although such defense was not pleaded. This assumption as to the charge of the court is founded on an error of construction of the charge, as it only declared that the general denial put in issue all the facts pleaded and complained of in plaintiff's petition. There was no error in refusing the instruction asked (Blanton v. United States, 213 Fed. 320, 130 C. C. A. 22, Ann. Cas. 1914D,

1238), a portion of which related to the right of Allen to the defense of justification, because another portion of that instruction told the jury that the rules of law as to the recovery of punitive damages against Allen were the same as declared in the charge as to the other defendants, and that rule allowed the recovery of punitive damages, if the jury found that the acts of defendants were malicious; but the evidence was undisputed that Allen was not present at either of the occasions complained of, nor did he participate in, authorize, or ratify the acts done, and therefore he was not liable for punitive damages. Lake Shore & Michigan Southern Railway Co. v. Prentice, 147 U. S. 101-107, 13 Sup. Ct. 261, 27 L. Ed. 97; Western Union Tel. Co. v. Cashman, 132 Fed. 805-807, 65 C. C. A. 607; Pacific Packing & Navigation Co. v. Fielding, 136 Fed. 577-579, 69 C. C. A. 325; Toledo, St. L. & W. R. Co. v. Gordon, 143 Fed. 95-98, 74 C. C. A. 289; Norfolk & P. Traction Co. v. Miller, 174 Fed. 607-609, 98 C. C. A. 453.

The judgment of the lower court is affirmed.

In re PETRONIO et al.

E. PETRONIO & CO. v. CENTRAL TRUST CO. OF ILLINOIS.

(Circuit Court of Appeals, Seventh Circuit. November 2, 1914.)

No. 2144.

1. BANKRUPTCY ~~439~~—APPELLATE PROCEEDINGS—MODE OF REVIEW—“PLENARY SUIT”—“SUMMARY PROCEEDING.”

A proceeding in a court of bankruptcy, on petition of a trustee to determine the title to property in his possession, but claimed adversely by one not a party to the proceedings, but brought in by citation, is not a “plenary suit,” but a “summary proceeding” in the bankruptcy matter, and an order made therein is reviewable by petition to revise, under Bankr. Act July 1, 1898, § 24b, c. 541, 30 Stat. 553 (U. S. Comp. St. 1913, § 9608).

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 915; Dec. Dig. ~~439~~.

For other definitions, see Words and Phrases, Second Series, Plenary Proceeding or Suit; also First and Second Series, Summary Proceeding.

Appeal and review in bankruptcy cases, see note to In re Eggert, 43 C. C. A. 9.]

2. BANKRUPTCY ~~212~~—ORDER RELATING TO POSSESSION OF PROPERTY—MATERIALS CONCLUDED.

A summary order of a court of bankruptcy, directing an adverse claimant of property to deliver possession of the same to its receiver, is not an adjudication of the title or right to ultimate possession.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 236; Dec. Dig. ~~212~~.]

3. BANKRUPTCY ~~224~~—JURISDICTION OF REFEREE—ADVERSE CLAIM TO PROPERTY.

A referee in bankruptcy is without jurisdiction to determine summarily, on petition of a trustee, the validity of a transfer of property to one not a party to the proceedings, who claims the same adversely, and

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does not consent to the jurisdiction; nor does the District Court acquire jurisdiction on review of the referee's order.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 383; Dec. Dig. ~~224~~224.]

Petition to Review and Revise Order of the District Court of the United States for the Eastern Division of the Northern District of Illinois.

In the matter of Eliza Petronio and Luigi Zarosi, trading as E. Petronio & Co., bankrupts; the Central Trust Company of Illinois, trustee. On petition of E. Petronio & Co., a corporation, to review and revise an order of the District Court in the above-entitled bankruptcy proceedings, approving a referee's order therein certified for review. Reversed.

Henry S. Blum, of Chicago, Ill., for petitioner.

Alvin H. Culver, of Chicago, Ill., for respondent.

Before BAKER, SEAMAN, and KOHL, SAAT, Circuit Judges.

SEAMAN, Circuit Judge. [1] The proceeding and orders of which review is sought by this original petition appear from the record to be of the summary nature in bankruptcy proceedings, defined in the recent opinion of this court in *In re Morris Goldstein and Benjamin Moseson, Bankrupts*, 216 Fed. 887, 889, 133 C. C. A. 91, and not of the plenary class defined in the opinion handed down therewith, entitled *In re Breyer Printing Co., Bankrupt*, 216 Fed. 878, 133 C. C. A. 82, which is cited in support of respondent's motion to dismiss the petition for want of jurisdiction. This petitioner corporation was neither party to nor voluntary intervener in the bankruptcy proceedings, had no interest in the distribution of any estate vested in the bankrupts, and had filed no suit or petition in the District Court or before the referee for recovery of the property in controversy. Therefore, on the authority of the above first mentioned opinion and cases cited therein, the motion to dismiss its petition must be overruled.

[2] The facts presented by the record are substantially these: Proceedings in bankruptcy were instituted against the bankrupts individually, as members of E. Petronio & Co., a copartnership, on April 2, 1912, and adjudication ensued accordingly. A receiver appointed therein petitioned the court for an order upon "E. Petronio & Co., a corporation," and its officers, to turn over to such receiver personal property in its possession, averring in substance that the property referred to (mainly a stock of goods) was owned by the bankrupts in their copartnership business up to December 21, 1911; that on December 4, 1911, "while insolvent and with intent to prefer the Italian Swiss Colony over the rest of their creditors," and "without any present consideration" and for a pre-existing debt, the bankrupts made a mortgage in favor of such debtor (covering the above-mentioned property), which was duly recorded; that on December 21, 1911, the bankrupts (with two other parties who contributed nothing) incorporated under the same name used in their copartnership, with \$2,500 as the amount of capital stock issued, in 250 shares; that the entire

copartnership property above mentioned was transferred to such corporation, in payment for such capital stock, and the business was thereafter carried on under such incorporation, managed by the bankrupts; that soon thereafter the stockholders deposited the shares of stock with a representative of the above-mentioned mortgagee, as further security for the mortgage, 240 of such shares having been issued to the bankrupt Zarosi; that such transfer to the corporation "was fraudulent and void as to the creditors of said copartners," and "no title passed to the corporation," but remains in the bankrupts; that such corporation was formed at the instance and request of such mortgagee; that both mortgage and incorporation were made for the purpose of preferring the mortgagee over other creditors, and to hinder, delay, and defraud the other creditors of the bankrupts; that the mortgagee threatens prosecution of the receiver in the event of his taking possession of the property; and that it is necessary for preservation of the estate that the receiver "be allowed to take possession of the property which is now claimed to belong to the corporation." The District Court cited the corporation to appear and answer the petition, and its special appearance and answer are exhibited, challenging jurisdiction "over the respondent or any of its assets," with averments of possession and valid title to the property vested in the corporation from and after December 21st, and that its business was carried on therewith and debts contracted therein which are unpaid. Thereupon the court entered an order, April 10, 1912, requiring the corporation to turn over to the receiver "all the property of every nature and description claimed by" the corporation. The property referred to was so turned over—no review of such order having been sought—and thus came to the possession of the trustee in bankruptcy (respondent herein), and constitutes the subject-matter of the subsequent proceedings, brought for review under this original petition of such corporation.

[3] On June 6, 1912, the respondent trustee in bankruptcy filed a petition before Referee Eastman, having charge of the bankruptcy proceedings, averring, in substance, his reception of the property in question from the receiver, and that the above-mentioned corporation had notified the trustee of its claim of ownership, together with demand for the property and notice that sale thereof by the trustee would be treated as conversion of its assets, and praying for an order requiring the corporation "to show what interest, if any," it "has in the aforesaid property by a short day to be fixed by this court," and to abide any "judgment of this court" therein, and on failure of compliance "to be forever foreclosed and barred from any interest in said property." Under the referee's order accordingly the corporation appeared and answered, "for the sole and exclusive purpose of objecting to the jurisdiction of this court" over the respondent or the subject-matter, and set forth its claim of ownership, substantially as stated in its above-mentioned answer filed in the District Court, April 10, 1912. To this answer the trustee interposed a so-called "replication," setting up the above-mentioned order of April 10, 1912, as res adjudicata. For the hearing of any issue thus raised, the referee's certificate thereof, as filed January 28, 1914, for review by the Dis-

trict Court, shows that on consideration of these various averments in the pleadings, together with his inferences from previous testimony before him "for discovery of assets," without introduction of evidence under the pleadings, the referee's conclusions were: (a) That "the partnership owed a considerable amount of money at the time the property was transferred" and that such transfer to the corporation "consisted either of an illegal preference or a transfer to hinder and delay creditors"; (b) that he was "inclined to believe that the matters at issue before" the District Court, upon which its above-mentioned order of April 10, 1912, was made, "were substantially the same as the matter at issue before me in this proceeding"; (c) that he was of opinion that the order referred to "is binding upon me in this controversy," and "so finds"; and (d) that he finds accordingly that the corporation "was not the owner of and was not entitled to the possession of the property in question." On July 19, 1912, the referee entered as his finding and order that the property referred to "is the property of said trustee" and that the corporation "has no right, title, or interest therein." On September 19, 1912, the referee, on motion of the corporaion, vacated this order (for cause not stated), and further ordered that it be "re-entered as of this date." Petition for review of such order by the District Court was duly filed, and the proceedings certified accordingly as above mentioned. The ultimate ruling of the District Court thereupon appears in its order made March 7, 1914, that the referee's order, "be and the same is hereby affirmed."

Thus the only reviewable question herein is whether such ruling was erroneous "in matters of law," and its solution rests on the inquiry of jurisdiction to that end, over both corporation and subject-matter.

The first mentioned order of the District Court, made April 10, 1912, is plainly without force in the present inquiry, beyond proving that possession of the property was thus obtained by the receiver and transmitted to the trustee, in a summary proceeding, without either (a) consent or waiver on the part of corporation holding possession thereof and claiming ownership, or (b) attempted determination either of ownership or ultimate possession of the property. So the above-recited finding of the referee (affirmed on review) of res adjudicata effect therein was plainly an erroneous conclusion of law.

Consideration of the other findings certified by the referee—that the transfer of property made by the bankrupts to the corporation, December 21, 1911, "consisted either of an illegal preference or a transfer to hinder and delay creditors"—involves alone the force and effect of the averments of fact and claim of title set forth on the part of the corporation, and we are of opinion that the issue so raised was not within the jurisdiction either of the referee or of the District Court on review of his order, for determination in such proceedings. The claim of adverse ownership expressly appeared, both in the trustee's petition before the referee and in the corporation's pleading of want of jurisdiction. Whatever may be the merits of that controversy over the title, and whatever may be assumed as powers vested in the District Court for determination of such controversy—either through application or consent of the claimant in the course of bankruptcy proceedings, or through its exercise of the powers of a court of equity—

the claimant is entitled to determination thereof in judicial proceedings to that end. We believe these summary proceedings before the referee were not of that nature; that they were neither within the statutory powers vested in him as referee in bankruptcy, nor authorized by reference to him, for hearing and report, on any issue of law or fact pending in the District Court; that both proceedings and order are nullities; and that the order of affirmance thereof, on review by the District Court, cannot be upheld.

The order against the petitioner is reversed, accordingly, with direction to dismiss the summary proceedings and order certified by the referee.

THE C. S. HOLMES.

(Circuit Court of Appeals, Ninth Circuit. February 1, 1915.)

No. 2402.

1. SEAMEN ☞29—ACTION FOR INJURY—LIABILITY OF VESSEL IN REM.

A vessel is not liable in rem to a seaman for an injury alleged to have been caused by a negligent order of the master directing libelant in the performance of his duties.

[Ed. Note.—For other cases, see Seamen, Cent. Dig. §§ 186, 188-194; Dec. Dig. ☞29.]

2. SEAMEN ☞11—INJURY IN SERVICE—FAILURE TO FURNISH PROPER MEDICAL TREATMENT AND CARE.

The master of a vessel represents the owner in respect to the duty of the owner to furnish care and maintenance to an injured seaman, and a libel which alleges that, after libelant was injured in course of his duty, the master refused to take him to a marine hospital, which was at no great distance, but instead took him to another port, and left him with a doctor, with no arrangement for payment, states a cause of action in rem against the vessel.

[Ed. Note.—For other cases, see Seamen, Cent. Dig. §§ 39-44, 187; Dec. Dig. ☞11.]

Appeal from the District Court of the United States for the Northern Division of the Western District of Washington; Jeremiah Netterer, Judge.

Suit in admiralty by Gust Fondahn against the schooner C. S. Holmes. From an order sustaining exceptions to amended libel, libelant appeals. Reversed in part.

For opinion below, see 212 Fed. 525.

Daniel Landon, of Seattle, Wash., for appellant.

Richard A. Ballinger, Alfred Battle, Robert A. Hulbert, and Bruce C. Shorts, all of Seattle, Wash., for appellee.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

ROSS, Circuit Judge. The court below sustained exceptions to the first two counts of the amended libel, and its ruling in that regard is the ground of the present appeal.

☞ For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes
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The first count is as follows:

"That during the month of December, 1912, the libelant signed articles as an able seaman to make a trip on board the schooner C. S. Holmes from San Francisco, Cal., to Everett, Wash., and return, at \$45 per month. That while on the return voyage, and while performing his duty as a seaman, on the 3d of January, 1913, in the afternoon, a heavy storm arose, and the ship sought shelter in Neah Bay. A tug was sent out to look at the condition of the weather, and came back and reported that it was not fit for any vessel to go out on account of the mountain of sea running at 12 o'clock noon. With the weather conditions unchanged the steamer Goliah gave the said C. S. Holmes a steel cable of 5 inches thickness, which was taken on board and made fast on the forward end of the said ship by being placed three times around a square bitt; and by order of the captain of the said ship C. S. Holmes the steamer Goliah towed her to sea, it taking the steamer 7 hours to tow the C. S. Holmes a distance of 8 miles. That at about 7 o'clock, and while weather conditions were unchanged, the said steamer blew her whistle to let go the wire; the captain of the Holmes gave general orders for everybody to go forward and take hold of the wire; the crew held back; when they received the orders the second time, everybody went forward, but none went to the wire, except the libelant; the captain was standing about 4 feet above the libelant, where he could see everything going on, libelant being in a position where he could not see the condition of the wire; libelant inquired of the captain how the wire was on the bow, and he was told by the captain that the wire was slack, and that everything was all right, and to let go; and libelant let go the lashings and went away as quickly as possible to avoid danger. The wire was tight, and sprang back, and hit libelant, causing a compound fracture of libelant's right arm, paralyzing and bruising his side."

The exceptions to the foregoing are to the effect that the allegations thereof are not sufficient to constitute a cause of action, nor to bring it within the jurisdiction of admiralty.

The second count is in these words:

"That the captain gave orders to go back to Port Angeles. Libelant requested to be taken to Port Townsend to the marine hospital, but was informed that it would cost \$100 to do so, and that there was a marine doctor at Port Angeles, and so refused. They arrived at Port Angeles at 3 o'clock in the morning. The libelant again requested to be taken to Port Townsend to the marine hospital, and the captain again refused. At about 7 or 8 o'clock the captain took libelant to Dr. Taylor, wrote out a permit, gave it to the said doctor, informing him at the same time that it was good for all expenses incurred. The said doctor asked the captain to explain the permit. The captain then told him: 'I have nothing to explain. The man is in your care now, and he is out of my hands'—at the same time laughing at the doctor in a manner that would indicate that he had knowingly deceived him. The captain knew all the time that there was no marine doctor at Port Angeles, and that the permit was valueless for any purpose, other than to be used for admission at the Port Townsend marine hospital. The captain deliberately put libelant off at Port Angeles for the purpose of getting rid of him, knowing and intending that he would at most only receive temporary relief; at the same time he knew, or should have known, that libelant needed prompt and permanent attention on account of the condition of his injuries. That the libelant was taken to the office of the doctor, and in the presence of the captain an attempt was made by the then unwilling doctor to fix him up temporarily, which was not successful, and two days later, while libelant was still in a helpless condition, the doctor requested the libelant to leave. Libelant was unable to move. He received no more attention or treatment for six days longer, when with considerable effort he made his way to Port Townsend. During the time he was at Port Townsend blood poison set in, and after two months' treatment at the marine hospital at Port Townsend an attempt was made to set the bones, but the ends of the bones so broken had commenced to decay by reason of treatment being neglected when injured,

and the arm was in such condition that the plates used to hold the bones together broke loose and the bones are still continuing to decay."

To this the exceptions are as follows:

"That this action, instituted by a seaman in rem against a vessel to recover damages for improper treatment of personal injuries sustained by him at sea, by a physician at a port to which the vessel put to obtain medical and surgical attendance for him, is not an admiralty and maritime cause of action, and is not within the jurisdiction of this honorable court. That libelant has no cause of action against the vessel for damages alleged to have resulted from improper treatment of personal injuries sustained as alleged in the libel, by a physician at a port to which the vessel put back to obtain medical and surgical attendance for him, as alleged in the libel."

[1] Undoubtedly the libel is not well drawn, but courts of admiralty are always liberal in the construction of pleadings, especially as against seamen, whose lives at best are hard, and who are often spoken of as wards of the court. But as a matter of course no court can create a liability where none exists under the law; and so, in respect of the first of the two counts here presented for consideration, it is impossible to hold it sufficient. It rests simply upon the allegation to the effect that from where the libelant stood he could not see "how the wire was on the bow," and that the captain could see from his position, and that, when the libelant had inquired of the captain concerning the matter, he was told that the wire was slack, and that everything was all right, and to let go, which the libelant thereupon did, resulting in his injury. Manifestly that was a matter relating solely to the ordinary navigation of the vessel.

In *The Osceola*, 189 U. S. 158, 23 Sup. Ct. 483, 47 L. Ed. 760, the questions considered and determined by the Supreme Court were whether "the vessel was liable in rem to one of the crew by reason of the improvident and negligent order of the master in directing the hoisting of the gangway for the discharge of cargo, before the arrival of the vessel at her dock, and during a heavy wind." The court, after a full review of English and American authorities upon the questions, announced the settled law to be as follows:

"1. That the vessel and her owners are liable, in case a seaman falls sick, or is wounded, in the service of the ship, to the extent of his maintenance and cure, and to his wages, at least so long as the voyage is continued.

"2. That the vessel and her owner are, both by English and American law, liable to an indemnity for injuries received by seamen in consequence of the unseaworthiness of the ship, or a failure to supply and keep in order the proper appliances appurtenant to the ship. *Scarf v. Metcalf*, 107 N. Y. 211, 13 N. E. 796, 1 Am. St. Rep. 807.

"3. That all the members of the crew, except perhaps the master, are, as between themselves, fellow servants, and hence seamen cannot recover for injuries sustained through the negligence of another member of the crew, beyond the expense of their maintenance and cure.

"4. That the seaman is not allowed to recover an indemnity for the negligence of the master, or any member of the crew, but is entitled to maintenance and cure, whether the injuries were received by negligence or accident."

In the case of *Olson v. Oregon Coal & Navigation Co.* (decided by this court) 104 Fed. 574, 44 C. C. A. 51, we held in effect that the owner of a ship which has exercised due care in making her seaworthy for a voyage, in her equipment and supplies, and the selection of her

officers and crew, cannot be held responsible for the proper performance of the details of navigation during the voyage, and is not liable for an injury received by a member of the crew through the negligence of an officer or another member in leaving a hatchway open; the navigation of the ship during the voyage being a common undertaking, for which all the ship's company in their several stations are employed, and in respect of which they are regarded by the maritime law, as well as the common law, as fellow servants. In that case, as in the present one, there was no averment in the libel tending to show that the ship was not properly equipped with all necessary and proper appliances, or that she was not properly manned, or not entirely seaworthy, or that there was any neglect on the part of the owner in the selection of the officers or crew of the ship. In the course of the opinion (104 Fed. 575, 44 C. C. A. 52), it was said:

"The owner, who is usually ashore, and in this case was a corporation, cannot, in the nature of things, see to the details of navigation. The officers and crew are employed for that purpose, and it would be quite as reasonable to hold the owner responsible for the negligent handling of a rope or sail as for the failure to close a hatch. It is undoubtedly true that the master represents the owner in respect to the personal duties and obligations which the latter owes to the seamen, such, for instance, as the maintenance of the ship and her supplies, the supplying of the crew with sufficient food and with medical attendance and care in case of injury or sickness, and for his neglect in any of those particulars the owner is liable."

We are therefore of the opinion that the court below was right in its ruling regarding the first count of the amended libel.

[2] Not so, however, in respect to the second count; for, although it is not very clear or positive in its averments, still, in view of the liberal rule that prevails in admiralty in respect to pleadings, enough, we think, appears to show that the injured libelant was not accorded by the master of the schooner the treatment to which he was entitled under the law.

The injuries sustained by him were a compound fracture of his right arm and injuries to his side. Obviously therefore, what he needed were the services of a competent surgeon, if one was within reasonable reach. The accident occurred near Cape Flattery at about 7 o'clock in the evening; further up the straits was Port Townsend, at which there was a marine hospital, and towards which the schooner was proceeding, and to which the injured seaman requested the captain to take him. According to his allegations the captain refused the request, telling the libelant that to do so would cost \$100, and that there was a "marine doctor at Port Angeles," back to which place he turned, reaching there about 3 o'clock in the morning, when the libelant again requested to be taken to Port Townsend, to the marine hospital, which request was again refused. Instead, at about 7 or 8 a. m., the captain took the libelant ashore—

"to Dr. Taylor, wrote out a permit, gave it to the said doctor, informing him at the same time that it was good for all expenses incurred. The said doctor asked the captain to explain the permit. The captain then told him: 'I have nothing to explain. The man is in your care now, and he is out of my hands.'"

It is alleged that the captain knew at all the times in question that there was no marine doctor at Port Angeles, and that the permit was valueless for any purpose, except for the admission of the libelant to the marine hospital at Port Townsend, and that the captain deliberately put the libelant off the schooner at Port Angeles for the purpose of getting rid of him, knowing and intending that he would at most only receive there temporary relief; that in the office of Dr. Taylor and in the presence of the captain "an attempt was made by the then unwilling doctor to fix him [libelant] up temporarily, which was not successful, and two days later, while libelant was still in a helpless condition, the doctor requested the libelant to leave," which he was unable to do, and that he received no more attention or treatment for six days longer, after which he made his way to Port Townsend.

For the purpose of disposing of the exceptions, those averments are, of course, to be taken as true. So taken, it cannot, in our opinion, be properly held that the vessel is without liability. Assuming the competency of the doctor at Port Angeles, the effect of the allegations is not only that he was not employed by the captain to give to the injured seaman proper medical care, but, on the contrary, that the captain gave to the doctor a written paper informing him that "it was good for all expenses incurred," while at the same time well knowing that it was valueless for any purpose except that of the admission of the libelant to the marine hospital at Port Townsend, which averments are supported by the further allegation that the captain deliberately put the libelant ashore at Port Angeles "for the purpose of getting rid of him, knowing and intending that he would at most only receive temporary relief," and that even that was not accorded him. Of course, no such tricks are sanctioned by the admiralty or any other law. That it is the duty of the owner of a vessel to furnish an injured seaman with proper medical care, and that the master represents the owner with respect to that duty is well settled—each case depending upon its own circumstances. See *The Iroquois*, 194 U. S. 240, 24 Sup. Ct. 640, 48 L. Ed. 955.

In so far as concerns the exceptions to the second count of the amended libel, the order appealed from is reversed, with directions to overrule the exceptions thereto, and with leave to answer.

UNITED STATES v. DOWDEN et al.

(Circuit Court of Appeals, Eighth Circuit. January 4, 1915.)

No. 4143.

INDIANS ~~14~~—ALLOTMENT OF LANDS—VESTING OF RIGHT—POWER OF SECRETARY OF THE INTERIOR TO CANCEL ALLOTMENTS.

The selection of an allotment of land by a member of the Chickasaw or Choctaw Tribe of Indians, and the issuance of a certificate of allotment therefor by the Commission to the Five Civilized Tribes, pursuant to statute, vests the allottee with an absolute right to a patent, which may be enforced in the courts, and the Secretary of the Interior has no power to thereafter cancel the allotment and segregate the land for a townsite.

[Ed. Note.—For other cases, see Indians, Cent. Dig. §§ 2, 31-36, 46; Dec. Dig. ~~14~~.]

Appeal from the District Court of the United States for the Eastern District of Oklahoma; Ralph E. Campbell, Judge.

Suit in equity by the United States against E. Dowden and others. Decree for defendants, and the United States appeals. Affirmed.

D. H. Linebaugh, U. S. Atty., of Muskogee, Okl., and C. C. Herndon, Sp. Asst. U. S. Atty., of Tulsa, Okl., for the United States.

Bond, Melton & Melton, of Chickasha, Okl., for appellees.

Before CARLAND, Circuit Judge, and T. C. MUNGER and YOUNG, District Judges.

T. C. MUNGER, District Judge. The questions involved in this controversy concern the title to a tract of land in Oklahoma, the land formerly having been in the domain of the Chickasaw Nation in Indian Territory. See *United States v. Dowden* (C. C.) 194 Fed. 475.

A portion of the land was selected as an allotment on July 22, 1903, by the administrator of Aaron Colbert, deceased. Aaron Colbert's name appeared upon the approved roll of the Choctaw Indians as a duly enrolled citizen, but he had died after the ratification of the agreements of distribution made by the Choctaws and Chickasaws and the United States through the Commission to the Five Civilized Tribes, and approved by Congress in section 29 of the act of June 28, 1898 (30 Stat. 505, c. 517), and in Act July 1, 1902, c. 1362, 32 Stat. 641. Conveyances of this land selected were afterwards made by the heirs of Aaron Colbert to Dowden, appellee and thereafter, on April 29, 1904, the Commission to the Five Civilized Tribes issued a certificate of allotment of the land in the name of Aaron Colbert, dated July 22, 1903, and delivered it to Colbert's administrator.

Another portion of the land was selected on January 3, 1905, as a part of her surplus allotment by Carrie L. McClure a white person, without Indian blood, but who was an intermarried citizen of the Choctaw Nation, and whose name appeared on the approved roll of the Choctaw Indians. She then conveyed the land to Dowden and another. A certificate of allotment of this land, dated January 3, 1905, was issued by the Commission and delivered to her before May 27, 1905.

A railroad had been built through this land in 1901, and settlers occupying part of the land had formed a village, and inhabitants thereof in 1902 had petitioned the Commission to the Five Civilized Tribes to recommend to the Secretary of the Interior that the land be reserved as a townsite, and the Commission so recommended in February, 1903; but the Secretary refused the request in March, 1903. Further petitions were presented and on September 15, 1904, the Commission again recommended the reservation of a townsite on the land. Finally, in May, 1905, and after the certificate of allotment had been issued, as before stated, the Secretary of the Interior ordered the segregation of this land as a townsite and that it be surveyed and platted as such and made an order canceling the selection of the allotment by the administrator of Aaron Colbert and in the following month made a like order canceling the selection of the allotment by Carrie L. McClure. The validity of the action of the Secretary of the Interior in ordering the segregation of this land for townsite purposes, and in canceling the

allotments made to Aaron Colbert and Carrie L. McClure, is the question prosecuted in this case, as it is conceded that there is no question of the rights or methods in the selection of the allotments, or of the rights of the heirs of the allottees to make the conveyances, nor that Dowden thereby acquired whatever title the grantors possessed.

In the trial court, the bill of complaint of the United States, whereby it sought to quiet its title to these lands, was dismissed, and it presents this appeal. On behalf of appellant, it is contended that the Secretary of the Interior has discretion to grant or refuse approval of an allotment, and therefore may cancel an allotment certificate issued by the Commission and order the lands to be set aside as a townsite. In the case of *Ballinger v. Frost*, 216 U. S. 240, 30 Sup. Ct. 338, 54 L. Ed. 464, the statutes which govern the issuance of such an allotment and the segregation of land for a townsite are reviewed. The Secretary of the Interior in that case claimed the right, after the issuance of a certificate of allotment to a Choctaw Indian, and after the execution of a patent to him by the chief officers of the Choctaw and Chickasaw Nations, but before its delivery, to cancel the allotment and to set aside the land as a townsite. This claim was based upon an assumed official discretion so to do, in view of a previous urban occupancy of the land. In denying this claim, and in affirming the award of a mandamus against the Secretary of the Interior for the delivery of the patent, the court said:

"The Interior Department has general control over the affairs of the Indians—wards of the government. In addition, the Secretary of the Interior was by these several acts specially charged with the duty of supervising the action of the Commission to the Five Civilized Tribes in making the allotments authorized by those acts. On both of these grounds he claims authority to have done what he did, and that his acts in that respect are not subject to review by the courts. We have no disposition to minimize the authority or control of the Secretary of the Interior, and the court should be reluctant to interfere with his action. But, as said by Mr. Justice Field in *Cornelius v. Kessel*, 128 U. S. 456, 461 [9 Sup. Ct. 122, 124 (32 L. Ed. 482)]: 'The power of supervision and correction is not an unlimited or an arbitrary power. It can be exerted only when the entry was made upon false testimony, or without authority of law. It cannot be exercised so as to deprive any person of land lawfully entered and paid for. By such entry and payment the purchaser secures a vested interest in the property and a right to a patent therefor, and can no more be deprived of it by order of the Commissioner than he can be deprived by such order of any other lawfully acquired property. Any attempted deprivation in that way of such interest will be corrected whenever the matter is presented so that the judiciary can act upon it.' See, also, *Orchard v. Alexander*, 157 U. S. 372, 383 [15 Sup. Ct. 635, 639 (39 L. Ed. 737)], in which it was declared: 'Of course, this power of reviewing and setting aside the action of the local land officers is, as was decided in *Cornelius v. Kessel*, 128 U. S. 456 [9 Sup. Ct. 122, 32 L. Ed. 482], not arbitrary and unlimited. It does not prevent judicial inquiry. *Johnson v. Towsley*, 13 Wall. 72 [20 L. Ed. 485]. The party who makes proofs, which are accepted by the local land officers, and pays his money for the land, has acquired an interest of which he cannot be arbitrarily dispossessed.' Whenever, in pursuance of the legislation of Congress, rights have become vested, it becomes the duty of the courts to see that those rights are not disturbed by any action of an executive officer, even the Secretary of the Interior, the head of a department. However laudable may be the motives of the Secretary, he, as all others, is bound by the provisions of congressional legislation. It must be borne in mind that this allotment provided by Congress contemplated a distribution among the Choctaw and Chickasaw Indians of the lands that belonged to them

in common. They were the principal beneficiaries, and their titles to the lands they selected should be protected against the efforts of outsiders to secure them. White men settling on townsites were not the principal beneficiaries. Congress, it is true, authorized townsites, and the town of Mill Creek was established in compliance with the statute. It further provided for an enlargement of any townsite upon the recommendation of the Commission to the Five Civilized Tribes. That recommendation was made in respect to the town of Mill Creek, but disapproved by the Secretary of the Interior. Thereafter the relator selected the land in controversy, a tract of 40 acres, on which were her improvements. Notice was given as required, and the time in which contest could be made—nine months—elapsed. Thereupon, as provided by the statute, the title of the allottee to the land selected became fixed and absolute, and the chief authorities of the Choctaw and Chickasaw Nations executed to her a patent, as required, of the land selected. The fact that there may have been persons on the land is immaterial. They were given nine months to contest the right of the applicant. They failed to make contest, and her rights became fixed. Thereafter the Secretary of the Interior had nothing but the ministerial duty of seeing that a patent was duly executed and delivered."

The effect given to the selection and certification of an allotment in that case necessarily determines the decision here. The allotments were made when the proper selections had been designated and the Commission had approved them by the issuance of the certificates of allotment. They were subject to contest within the nine-months period provided by statute; but if no successful contest was waged, upon the expiration of that period the right to the patent was absolute. The statute says:

"Allotment certificates issued by the Commission to the Five Civilized Tribes shall be conclusive evidence of the right of any allottee to the tract of land described therein." 32 Stat. 644, § 23.

Nothing but a ministerial duty remained to be performed, that of issuance of patents to the allottees. *Mullen v. United States*, 224 U. S. 448, 32 Sup. Ct. 494, 56 L. Ed. 834; *Wallace v. Adams*, 143 Fed. 716, 74 C. C. A. 540; *Thomason v. Wellman & Rhoades*, 206 Fed. 895, 124 C. C. A. 555; *Wood v. Gleason* (Okl.) 140 Pac. 418.

It is also urged that, because a contest was initiated against the allotment of Aaron Colbert within nine months after its selection by the administrator, the entry was thereby suspended, so that the Secretary of the Interior had the power of cancellation of the selection. It appears that no notice of this contest was served upon the administrator of Aaron Colbert, and that the contestant moved a dismissal of her proceedings, and after a hearing and the taking of testimony on the application the Commission dismissed the contest. The pendency of this contest conferred no power upon the Secretary of the Interior to cancel the certificate without notice to the parties to be affected, and upon a different ground, namely, the desire to segregate the land for a townsite; the contest having been dismissed by the one instituting it.

A further suggestion is made that the filing of a petition before the Commission within nine months from the selection of the allotment, asking for a reservation of a townsite on this land, in effect also was a contest of the claim of allotment; but there is no evidence that notice

of this petition was given to the allottees or to Dowden, and the action of the Secretary appears to have been an executive order.

As the allottees were entitled to a patent for the lands selected by them, and it is conceded that there was no restriction upon their right of alienation of the land to Dowden, the decree of the lower court is affirmed.

THE ATLANTIC CITY.

(Circuit Court of Appeals, Third Circuit. January 28, 1915.)

No. 1884.

1. ADMIRALTY ~~101~~—**JURISDICTION—DISTRIBUTION OF FUND IN COURT.**

A court of admiralty has jurisdiction to determine the validity and rank of claims against a fund remaining in its registry after the payment of maritime liens for which a vessel has been sold, although the claims are not maritime in character.

[Ed. Note.—For other cases, see Admiralty, Cent. Dig. §§ 684-708; Dec. Dig. ~~101~~.]

2. MARITIME LIENS ~~16~~—**STATUTORY LIENS NOT MARITIME—VALIDITY.**

A lien given by a state statute for the building of a vessel is not maritime in its nature, and derives nothing from the maritime law, and its validity depends entirely upon compliance with the conditions imposed by the statute.

[Ed. Note.—For other cases, see Maritime Liens, Cent. Dig. § 21; Dec. Dig. ~~16~~.]

Liens created by state laws, see note to The Electron, 21 C. C. A. 21.]

3. MARITIME LIENS ~~32~~—**STATUTORY LIENS NOT MARITIME—VALIDITY—NOTICE.**

Under Lien Law (Consol. Laws, N. Y. c. 33) §§ 80, 82, which give a lien for work or material furnished for the building of a vessel, subject to the requirement that a notice of lien shall be filed within 90 days, to which, if the debt is based on a written contract a copy of such contract shall be attached, a failure to attach such copy is fatal to the lien; but where extra work and material are furnished under subsequent oral contracts, not authorized by the written contract, the notice, if otherwise sufficient, will create a lien therefor, although a copy of the original contract is not attached.

[Ed. Note.—For other cases, see Maritime Liens, Cent. Dig. §§ 49-52; Dec. Dig. ~~32~~.]

Appeal from the District Court of the United States for the District of New Jersey; William H. Hunt, Judge.

On distribution in admiralty of proceeds of the steamer Atlantic City. From a decree giving priority to the claim of Staten Island Shipbuilding Company, the West Jersey Trust Company appeals. Modified.

Howard M. Long, of Philadelphia, Pa., for appellant.

Henry W. Baird, of New York City, for appellee.

Before BUFFINGTON, McPHERSON, and WOOLLEY, Circuit Judges.

J. B. McPHERSON, Circuit Judge. [1] The dispute in this case grows out of the distribution of a fund in the admiralty. The steamer

~~For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes~~

Atlantic City, owned by the Atlantic City Transportation Company, had been attached under a libel for maritime supplies, and on May 9, 1913, she was sold as perishable. The price obtained at the sale was deposited in the registry of the court, and a commissioner was appointed to make distribution. After the maritime liens had been allowed, a considerable sum of money remained, to which three claimants appeared, the Staten Island Shipbuilding Company, the West Jersey Trust Company, and Warren Webster. Neither of them presented a claim that was maritime in its nature; the Shipbuilding Company asserted a lien growing out of work done in the construction of the vessel; the Trust Company asserted a lien under a blanket first mortgage given by the Transportation Company; and Warren Webster's claim rests upon a second mortgage on the steamer. The jurisdiction of the admiralty to entertain these claims was challenged, but in support of the jurisdiction we need only refer to *Schuchardt v. Babbage*, 19 How. 239, 15 L. Ed. 625, and *The J. E. Rumbell*, 148 U. S. 1, 13 Sup. Ct. 498, 37 L. Ed. 345.

The claim of Warren Webster is conceded to be the third in rank; and, since the balance for distribution is not large enough to pay either of the other two claims in full, we shall confine ourselves to the principal question at issue between the Shipbuilding Company and the trustee of the first mortgage. For that purpose we shall assume that the mortgage binds the vessel, and shall consider whether the District Court was right in awarding the balance of the fund to the Shipbuilding Company. The validity of the company's liens is attacked, and as the opinion below does not discuss this question we shall be obliged to take it up. The Trust Company cannot share in the fund, if the claims for construction are entitled to priority, and therefore it is vital to determine whether the liens are good.

The facts are as follows: Early in 1911 the Transportation Company, a New Jersey corporation whose principal business was the carriage of freight and passengers by water between Atlantic City and Philadelphia, and Atlantic City and New York, bought an uncompleted vessel then at City Island, N. Y. Soon afterwards, in the following May, the company gave the first mortgage in question to secure \$100,000 of bonds. The mortgage covered the company's real estate, with other property, including three steamships, described as "Str. Alpha, Str. Goldboro, and N. Y. Str. (complete)." (The "N. Y. Str." was named Atlantic City in March, 1912.) On January 29, 1912, the Shipbuilding Company (whose yard is at Port Richmond, N. Y.), having previously done a little work on the uncompleted vessel, agreed in writing with the Transportation Company to do further work thereon, and to furnish materials and supplies in accordance with the plans and specifications annexed to the contract. No departure from these plans and specifications was to be allowed unless authorized in writing, and no compensation for additions or alterations was to be made unless these had been first similarly authorized. For the work and material specifically included in the contract the Shipbuilding Company was to receive \$36,910 in the following manner: \$3,910 when the steamer should be delivered to the Port Richmond yard, and \$33,000 when the work should be finished and the steamer delivered—\$13,000 in cash,

and \$20,000 in three-months notes, the notes to enjoy the privilege of renewal in whole or in part during five years, but to be secured by the Transportation Company's first mortgage bonds, \$1,200 in bonds for \$1,000 in notes, the bonds to be released proportionally as the notes should be reduced. After January 29 the Shipbuilding Company brought the uncompleted vessel to Port Richmond, and went on with the contract. During the construction extra work was agreed upon—for which \$9,540.14 is still unpaid—and this was authorized in part by letters written to the Shipbuilding Company by the Transportation Company and by Mr. Drake, its supervising architect. There is no dispute about the accuracy of the foregoing figures.

On July 16, as the time approached for delivering the steamer, the parties interested—namely, the Transportation Company, the Shipbuilding Company, and Warren Webster, who was a large holder of the Transportation Company's stock and bonds—entered into a written agreement, to which the Trust Company was not a party. It is likely that one reason for the agreement was the fact that all the first mortgage bonds had been disposed of, so that the Transportation Company had none to deliver as security for its notes. But Webster had bonds in considerable amount, and he agreed to turn over \$24,000 of them to the Transportation Company, so that the contract of January 29 could be complied with in this respect, and the steamer delivered. The agreement of July 16 provided that the Shipbuilding Company should file a notice of lien against the steamer for \$33,000 under the New York statute hereafter referred to; that bonds for \$24,000 should pass from Webster to the Transportation Company, and thence to the Shipbuilding Company; that the Transportation Company should give its three-months note for \$20,000 to the Shipbuilding Company, secured by Webster's bonds; that, when the note first fell due, the interest and at least \$1,000 of the principal should be paid, whereupon the note should be extended for three months; that similar extensions should be granted if similar payments should be made thereafter during a period of five years; that, whenever a payment of principal should be made, a proportional amount of the bonds held as collateral security should be returned; that Webster should be subrogated to the rights of the Shipbuilding Company under its lien, so far as the company should receive money on account of its claim of \$33,000; and, finally, that the agreement of January 29 should in no wise be affected, except as the subrogation of Webster might affect it.

On July 22, 1912, the steamer was delivered, and the Transportation Company gave a note for \$20,000, secured by the \$24,000 of bonds. Under the contract of January 29 the Shipbuilding Company had received in cash the first payment of \$3,910, and \$13,000 additional; the remainder of the agreed price being secured by the note and bonds referred to. On October 23—the due date of the note—the Shipbuilding Company was paid the interest and \$1,000 on account, and the note was thereupon extended for three months; and on March 3, 1913, a further payment of \$1,000 was made, which was apparently accepted as a second three months' renewal, although the payment was made several weeks after the note fell due for the second time. No other payment appears to have been made, and indeed the Transportation

Company went into the hands of a receiver before October 18, 1912. Webster had advanced \$6,000 of the \$13,000, and also the \$2,000 just referred to.

Meanwhile, on September 3, 1912, the Shipbuilding Company had filed a notice of lien with the county clerk of the proper county, claiming a lien for \$33,000 under the law of New York (Consol. Laws 1909, c. 33, art. 4, §§ 80, 82, 83) for the labor and materials specifically covered by the contract of January 29. And on October 28 another notice was filed under the same statute for extra work amounting to \$9,540.-14. The sufficiency of these notices must now be considered.

The sections in question are as follows:

"Sec. 80. Liens on Vessels. A debt which is not a lien by the maritime law, and which amounts to fifty dollars or upwards, on a seagoing or ocean bound vessel, or fifteen dollars or upwards on any other vessel shall be a lien upon such vessel, her tackle, apparel and furniture, and shall be preferred to all other liens thereon, except mariners' wages, if such debt is contracted by the master, owner, charterer, builder or consignee of such ship or vessel, or by the agent of either of them, within this State, for either of the following purposes:

"1. For work done or material or other articles furnished in this State for or towards the building, repairing, fitting, furnishing or equipping of such vessel. * * *

"Sec. 82. Notice of Lien, When to be Filed. Every debt specified in section eighty shall cease to be a lien upon such vessel unless the lienor shall, within ninety days after the debt becomes due, except as hereinafter provided, file a notice of lien, containing the name of the vessel, the name of the owner, if known, the particulars of the debt and a statement of the amount claimed to be due from such vessel, and verified by the lienor, his legal representative, agent or assignee, to be true and correct. If the debt is based upon a written contract, a copy of such contract shall be attached to such notice. The notice shall be filed in the office of the clerk of the county in which the debt is contracted. * * *

"Sec. 83. Duration of Lien. Every lien for a debt shall cease, if the vessel navigates the western or northwestern lakes, or either of them, or the St. Lawrence river, at the expiration of six months after the first of January next succeeding the time when the debt was contracted, and in case of any other vessel, at the expiration of twelve months after the debt was contracted. If, upon the expiration of the time herein limited in either of such cases, such vessel shall be absent from the port at which the debt was contracted, the lien shall continue until the expiration of thirty days after the return of such vessel to such port. If proceedings are instituted for the enforcement of the lien within the time herein limited, such lien shall continue until the termination of such proceedings."

[2] It is well settled that a contract for the construction of a vessel is not a maritime contract (*Knapp v. McCaffrey*, 177 U. S. 643;¹ *The Robert W. Parsons*, 191 U. S. 25, 24 Sup. Ct. 8, 48 L. Ed. 73; *The Winnebago*, 141 Fed. 945, 73 C. C. A. 295), and therefore the statute of a state cannot give a maritime lien for such a service. A state may sometimes create maritime liens, and these are enforceable as of right and exclusively in a court of admiralty. *The Glide*, 167 U. S. 606, 17 Sup. Ct. 930, 42 L. Ed. 296. But undoubtedly a state Legislature may give a lien of some kind (not maritime) for the construction of a vessel, and sometimes, as in the present situation, a court of admiralty will permit such a claim to be presented against the balance of a fund that may remain in the registry after satisfying maritime liens. We repeat, however, that a lien given by a state

¹ 20 Sup. Ct. 824, 44 L. Ed. 921.

statute for building a ship is not maritime in its nature, and is not to be treated as if it enjoyed the rights belonging to that class of obligations. It must stand on the statute that gives it birth, and its validity must be judged thereby. It is a right created by the statute, but upon conditions; and if the conditions are not complied with, the lien either does not arise at all or will afterwards be lost. There are numerous decisions to this effect on the general subject, among which we cite *The Newcomb* (D. C. Pa.) 12 Fed. 735; *The Helen Brown* (D. C. Mass.) 28 Fed. 111; *The Huron* (D. C. Mass.) 29 Fed. 183; *The Levering* (D. C. N. J.) 35 Fed. 783; *The Cara* (C. C. La.) 50 Fed. 222; *The Vigilant* (C. C. A., 3d Cir.) 151 Fed. 747, 81 C. C. A. 371. And the following citations refer either to the consolidated statute now under consideration, or to one of its predecessors that dealt with a similar subject: *The Arctic* (D. C.) 22 Fed. 126; *The Ella B.* (D. C.) 26 Fed. 111; *The Niagara* (D. C.) 31 Fed. 163; *The Allianca* (D. C.) 56 Fed. 612, and 70 Fed. 258; *The Warner Miller Co.* (D. C.) 120 Fed. 520; *The Colfax* (D. C.) 179 Fed. 975; *The Whiting* (C. C. A., 2d Cir.) 99 Fed. 445, 39 C. C. A. 592; *The Edith*, 94 U. S. 518, 24 L. Ed. 167.

[3] This being the established law, we need only add that (so far as the notice filed in September is concerned) the Shipbuilding Company failed to comply with one of the important conditions laid down by the New York statute. It failed to obey the requirement that, "if the debt is based upon a written contract, a copy of such contract shall be attached to such notice." The debt that is the subject of this notice was certainly based on the written contract of January 29, but no copy of such contract was attached to the notice. The decision in *American Trust Co. v. Fletcher* (C. C. A., 1st Cir.) 173 Fed. 471, 97 C. C. A. 477, on which the Shipbuilding Company mainly relies, is not in point. The claim for construction that was allowed to prevail in that case against a mortgage was a valid lien under a statute of New Jersey, whereas the claim now under examination must be rejected because it never became a lien at all. We have reached this conclusion with some reluctance, for we agree that the claim has much to recommend it, but in our opinion it cannot support a lien, either legal or equitable, because the Shipbuilding Company failed to comply with the conditions laid down by the law of New York. This being so, the claim has no standing in this distribution, and must yield place to the first mortgage. Inferentially, the decree of the District Court declares the mortgage to be valid, and in that respect the decree is not attacked. The only person interested in such an attack is Warren Webster, and he has taken no appeal.

But the debt for extras embraced in the notice filed in October requires further consideration. As it seems to us, this claim stands upon a different footing. Items for extra work are not based on the contract of January 29; on the contrary, that agreement excludes them, for it forbids the parties either to allow or to compensate them unless a further written contract be made in relation thereto. But of course the parties were at liberty to modify this provision by subsequent agreement, and it is clear that they did so modify it. No dispute on this subject exists between them, neither insists that the

provision shall be enforced, and both admit that the provision was disregarded, and that the extra work was ordered and furnished in accordance with their convenience. On three occasions (Exhibits 14 and 15, Exhibit 24, and Exhibit 25) a written contract appears to have been made, but in the great majority of instances this was not the case. Sometimes the Transportation Company gave a written order, and this was verbally accepted; sometimes the Shipbuilding Company made a verbal bid, and this was accepted in writing; sometimes no written evidence appears of so important a term as the price; sometimes everything was verbal—in a word, the evidence leaves no room to doubt that hardly any attention was paid to the provision in question. Of course, in the instances where the contract is actually found in writing, the New York statute must govern, and, as a copy thereof was not filed, the items thus dealt with—amounting to \$335+\$368+\$145=\$848—must fall. But we see no defense to the other items. As all these extras were ordered and furnished, and as the prices charged are correct, the statute allows a lien therefor. And as it was all one transaction, and not a series of separate and independent contracts, the notice of lien was filed in time.

It follows, therefore, that the decree below must be modified in accordance with this opinion; the October lien is to be allowed for the amount claimed, less \$848, but the September lien to be disallowed. And we further direct that the costs in this court and in the District Court shall be equally divided.

NORTHERN PAC. RY. CO. v. TRIPP.

(Circuit Court of Appeals, Eighth Circuit. January 4, 1915.)

No. 4238.

RAILROADS ☞327—**CROSSING ACCIDENTS—CONTRIBUTORY NEGLIGENCE—FAILURE TO LOOK.**

An automobile driver, driving five miles an hour, whose view of the main track of a railroad east of a crossing was obstructed wholly or partly until he was within 43 feet of such main track, and whose brakes and appliances were in good working order, and who could have stopped his automobile by customary methods in less than 5 feet, was guilty of contributory negligence as a matter of law in failing to look towards the east while driving such distance of 43 feet.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1043-1056; Dec. Dig. ☞327.]

In Error to the District Court of the United States for the District of North Dakota; Charles F. Amidon, Judge.

Action by L. A. Tripp against the Northern Pacific Railway Company. Judgment for plaintiff, and defendant brings error. Reversed, and new trial granted.

E. T. Connly, of Fargo, N. D. (C. W. Bunn, of St. Paul, Minn., and Watson & Young, of Fargo, N. D., on the brief), for plaintiff in error
Arthur W. Fowler, of Fargo, N. D., for defendant in error.

Before CARLAND, Circuit Judge, and T. C. MUNGER and YOUNG, District Judges.

T. C. MUNGER, District Judge. The defendant in error had a verdict and judgment against the plaintiff in error in an action for negligence. For convenience the parties will hereafter be referred to as plaintiff and defendant, as they appeared in the trial court.

At the town of Sheldon, N. D., the defendant maintained four railway tracks running east and west over a public highway which crossed the tracks at right angles thereto. The center of the most southerly of the tracks, called the "house track," was 13 feet from the center of the track next north, called the "passing track," and from the center of the passing track to the center of the next track to the north, called the "main track," was 35 feet and 2 inches. The fourth track was about 45 feet north of the north rail of the main track, but its location is not of importance in this suit.

A portion of the business section of Sheldon was situated just north of these tracks, but elevators, a hotel, and many other buildings were situated south of the tracks. Just south of the house track the highway curved sharply to the west across a sidewalk, and then turned again to the south in front of a hotel, which was about 100 feet south of the house track. The main track as it approached the highway from the east had a slight downgrade, and the grade of the highway rose about 3 inches to the foot from the passing to the main track.

The plaintiff was in the livery business at a neighboring town, had owned and used automobiles for several years, and owned and was operating the one in which he was at the time of the accident. He frequently passed over this crossing, and had crossed it going south with some passengers but a few minutes before he was injured. The accident occurred about 10 o'clock in the forenoon of a bright July day. The plaintiff, after discharging his passengers at the hotel, had started his automobile north, and about 15 feet west of the sidewalk he had turned to the east, and continued eastward till he had crossed the sidewalk, when, following the curve in the road, he drove in a northeasterly direction about 68 feet to the first crossing, and thence north to the main track, where a passing train from the east struck his automobile and caused his injuries. That there is sufficient evidence of the defendant's negligence as to the speed of the train and the failure to give proper warning by bell or whistle is not disputed; but it is contended that the undisputed evidence shows plaintiff's contributory negligence, because he failed to use proper care to look and listen for approaching trains. The plaintiff testified that he looked to the east for a train, when his automobile started east at the point 15 feet west of the sidewalk. At this point his view was somewhat obstructed by two box cars, one on the house track 43½ feet east of the crossing, and one on the passing track 475 feet east of the crossing and by a pile of cordwood, lumber, a coal shed, and a grain elevator situated along the south side of the passing track; but he could see over a section of the main track at a distance of 700 or 800 feet, and he says he saw no train approaching. His view further east than 800 feet was entirely obstructed by the coal shed and elevator.

Plaintiff then drove 68½ feet from the sidewalk around the curved road to the center of the crossing over the house track and 48 feet further to the main track. After his view was unobstructed by the box car on the house track, and after passing the north rail of the house track, he had a distance to go before reaching the nearer rail of the main track of 43 feet, and from any point along this distance of 43 feet his view to the east along the main track was unobstructed, and he could see an approaching train for at least 800 feet. He did not look in this direction after passing the obstruction of the box car. He testifies that his automobile did not travel in excess of 5 miles per hour, and that he was looking to the west from the time he was on the house track until he had gone 30 or 40 feet, and meanwhile he was listening for the approach of a train, but he did not still the noise of his automobile. His view was cut off to the west, until he passed the house track, by an elevator and a box car, and to some extent thereafter by a coalhouse and trees between the passing and main tracks. He heard the rumbling of the approaching train when he was about half way between the passing and main tracks, and in some excitement then attempted to drive on over the main track. The plaintiff had had experience as a railroad man, having spent 15 years as a brakeman and freight and passenger conductor.

If the plaintiff were traveling at 5 miles per hour, and had a distance to go of 116 feet before he reached the main track, a train running at 35 miles an hour would cover the 800 feet that is admitted to have been the limit of his vision down the main track, and be upon the crossing at the same time he would reach it; and one running at a less speed would be in such proximity as to make a crossing dangerous, such as men of ordinary prudence would not hazard.

The brakes and appliances of plaintiff's automobile were in good working order, and the undisputed testimony is that he could have stopped it by the customary methods in less than 5 feet at any time after he passed the obstruction of the box car on the house track. For the distance of 43 feet in which he had a clear view to the east after passing that car, he was master of his movements, with an ample factor of safety. If the speed at which he was driving was such that he had not enough time to look in both directions along the railway track, reasonable care required that he should control that speed until his safety could be assured. If one traveling in an automobile at 5 miles per hour may continue toward a railway track for a distance of 43 feet after passing an obstruction without looking in each direction, then one traveling in such a vehicle at 25 miles per hour need not look out for a distance of 235 feet, and a pedestrian walking at the not unusual rate of 3 miles per hour would be authorized to travel 25 feet while having opportunity for a clear view and neglecting it.

In the case of *Chicago Great Western Ry. Co. v. Smith*, 141 Fed. 930, 73 C. C. A. 164, the person injured was walking across railway tracks, and after passing a "dead engine" on one track had but 7 feet to go to the next track; but a failure to look while going that distance was held fatal to recovery by this court. It was said:

"These facts permit of no other conclusion than that the deceased went upon the coal track without taking the precautions necessary to determine

whether he could do so in safety. This was negligence. The place was one of great danger, and the track was itself a warning. As was said in *Elliott v. Chicago, etc., Ry. Co.*, 150 U. S. 245, 248, 14 Sup. Ct. 85, 86, 37 L. Ed. 1068: 'It can never be assumed that cars are not approaching on a track, or that there is no danger therefrom.' The law requires of one going into so dangerous a place the vigilant exercise of his faculties of sight and hearing at such short distance therefrom as will be effectual for his protection, and if this duty is neglected, and injury results, there can be no recovery, although the injury would not have occurred, but for the negligence of others."

In the case of *Horan v. Boston & M. R. R.*, 183 Fed. 559, 106 C. C. A. 535, one walking 15 feet to a railway track after having looked and listened and without looking again was held guilty of contributory negligence. A similar rule was applied to the driver of vehicles in the case of *Pyle v. Clark*, 79 Fed. 744, 25 C. C. A. 190, where the driver of a team had stopped 15 to 25 feet from the railway track and looked in both directions before driving forward. This court said:

"Pyle was the driver of the team, and he was responsible for its movements. He was sitting on the north side of the wagon, on the side from which the train that collided with his wagon approached. His view of the track on which it came was unobstructed for 2,000 feet. His horses were not afraid of the cars, and they were standing still from 15 to 25 feet from the track. He sat quietly in his wagon for a minute after he looked to the north, and then, without looking north again, he drove slowly upon the track, and the engine coming from that direction caught him. His failure to use his eyes diligently, his failure to look to the north for an entire minute before he drove upon the track, and his act of starting his horses forward upon it, without glancing alternately in each direction, were acts of gross negligence. If he had not been guilty of them, the accident could not have happened. If he had not driven his horses upon the track in front of the approaching engine, there would have been no collision; and if he had looked to the north immediately before he drove them forward, he would never have done so. Upon this state of facts, there was no escape from the conclusion that the negligence of Pyle was the proximate cause of the collision."

See, also, *Chicago, M. & St. P. Ry. Co. v. Bennett*, 181 Fed. 799, 104 C. C. A. 309; and note in 37 L. R. A. (N. S.) 139.

The same reasons that require pedestrians and drivers of other vehicles to subordinate their desire to continue at a fixed rate of speed to the prudent use of their senses to discover an approaching train apply to the drivers of automobiles. As was remarked in *New York Cent. & H. R. R. Co. v. Maidment*, 168 Fed. 21, 93 C. C. A. 413, 21 L. R. A. (N. S.) 794:

"With the coming into use of the automobile, new questions as to reciprocal rights and duties of the public and that vehicle have and will continue to arise. At no place are those relations more important than at the grade crossings of railroads. The main consideration hitherto with reference to such crossings has been the danger to those crossing. A ponderous, swiftly moving locomotive, followed by a heavy train, is subjected to slight danger by a crossing foot passenger, or a span of horses and a vehicle; but, when the passing vehicle is a ponderous steel structure, it threatens, not only the safety of its own occupants, but also those on the colliding train. And when to the perfect control of such a machine is added the factor of high speed, the temptation to dash over a track at terrific speed makes the automobile, unless carefully controlled, a new and grave element of crossing danger. On the other hand, when properly controlled, this powerful machine possesses capabilities contributing to safety. When a driver of horses attempts to make a crossing and is suddenly confronted by a train, difficulties face him to which the automobile is not subject. He cannot drive close to the track, or

stop there, without risk of his horse frightening, shying, or overturning his vehicle. He cannot well leave his horse standing, and if he goes forward to the track to get an unobstructed view and look for coming trains he might have to lead his horse or team with him. These precautions the automobile driver can take, carefully and deliberately, and without the nervousness communicated by a frightened horse. It will thus be seen an automobile driver has the opportunity, if the situation is one of uncertainty, to settle that uncertainty on the side of safety with less inconvenience, no danger, and more surely than the driver of a horse. Such being the case, the law, both from the standpoint of his own safety and the menace his machine is to the safety of others, should, in meeting these new conditions, rigidly hold the automobile driver to such reasonable care and precaution as go to his own safety and that of the traveling public. If the law demands such care, and those crossing make such care, and not chance, their protection, the possibilities of automobile crossing accidents will be minimized. In the case of trolleys crossing railroads at grade, the practice is general for the conductor to go ahead and from the track signal the halted car to advance. This would, of course, be impracticable as a rule for automobiles; but it illustrates the trend of the law, as the size of crossing vehicles makes collision with them more serious, to enforce greater safety precautions."

See, also, *Brommer v. Pennsylvania R. Co.*, 179 Fed. 577, 103 C. C. A. 135, 29 L. R. A. (N. S.) 924.

In the present case the evidence is undisputed that the plaintiff was advised that his vision was limited at the time he looked to the east. He knew that it would grow more so until he approached the crossing over the house track, where it would be entirely cut off by the box car to the east. After he passed this obstruction he looked constantly to the west, where obstructions prevented effective vision, and he was aware that he had not looked again to the east, and so continued until he reached the final danger point. The obstruction to the west, instead of being an excuse, was a warning, not only that he was in danger from that direction, but also from the opposite direction, because of his lack of attention there. Under such circumstances, his duty was plain. He should have taken time in which to glance in the opposite direction, where the slightest glance would have shown his danger, or he should have exercised his control over his vehicle, so that he could listen for approaching trains, or have stopped it, if necessary, until he could use his senses of sight and hearing, and the failure to do so was negligence on his part. *Chicago & N. W. Ry. Co. v. Andrews*, 130 Fed. 65, 64 C. C. A. 399; *Chicago, R. I. & P. Ry. Co. v. Pounds*, 82 Fed. 217, 27 C. C. A. 112; *Grimsley v. Northern Pac. Ry. Co.*, 187 Fed. 587, 109 C. C. A. 417; *Chicago, M. & St. P. Ry. Co. v. Bennett*, 181 Fed. 799, 104 C. C. A. 309; *Chicago, B. & Q. R. Co. v. Munger*, 168 Fed. 690, 94 C. C. A. 176; *Davis v. Chicago, R. I. & P. Ry. Co.*, 159 Fed. 10, 88 C. C. A. 488, 16 L. R. A. 424.

The motion for a directed verdict should have been sustained, on the ground that the evidence showed contributory negligence on the part of the plaintiff, and the judgment must accordingly be reversed, and a new trial granted.

UNITED STATES ex rel. LAIKUND v. WILLIFORD.

(Circuit Court of Appeals, Second Circuit. January 12, 1915.)

No. 169.

1. HABEAS CORPUS ~~16~~—ENLISTMENT OF MINOR—ARREST FOR FRAUDULENT ENLISTMENT.

Under Rev. St. § 1117 (Comp. St. 1913, § 1885), providing that no person under the age of 21 years shall be enlisted into the military service without the written consent of his parents or guardians, while the parent or guardian of a minor, who has not consented to his enlistment, may reclaim the custody of the minor, where a minor who falsely stated his age when enlisting was arrested for fraudulently enlisting in violation of the sixty-second article of war after the service of a writ of habeas corpus sued out by his mother, but before the hearing thereon, he would not be taken from the custody of the military authorities, in view of Rev. St. § 761 (Comp. St. 1913, § 1289), providing, relative to habeas corpus, that the court shall dispose of the party as law and justice require.

[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. § 16; Dec. Dig. ~~16~~.]

2. HABEAS CORPUS ~~1~~—SCOPE OF INQUIRY.

The writ of habeas corpus is not designed to pass upon the merits, but merely to determine the cause of detention, and whether the detention is lawful.

[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. §§ 1, 3; Dec. Dig. ~~1~~.]

3. ARMY AND NAVY ~~19~~—FRAUDULENT ENLISTMENT—PUNISHMENT.

A minor, who in enlisting stated that he was over 21, was punishable, if found guilty of having fraudulently enlisted in violation of the sixty-second article of war.

[Ed. Note.—For other cases, see Army and Navy, Cent. Dig. §§ 45-50; Dec. Dig. ~~19~~.]

Appeal from the District Court of the United States for the Southern District of New York.

G. C. Young, of New York City, for appellant.

Earl B. Barnes, Asst. U. S. Atty., of New York City, for appellee.

Before LACOMBE, WARD, and ROGERS, Circuit Judges.

WARD, Circuit Judge. March 7, 1914, Nathan Love enlisted in the United States army, stating that he was 21 years and 5 months of age, whereas in fact he was 2 years younger, and thereupon received the clothing and allowance that are regularly issued to enlisted soldiers. August 29th he made written application for his discharge, supported by the affidavits of his mother and grandmother, to the effect that he was when enlisted and still was an infant, that his mother had never given consent to his enlistment, and that his services were necessary to the support of his grandmother, who had brought him up, was not able to support herself, and was without support; her daughter having married again. This application was denied, on the ground that the regulations of the War Department restricted the privilege of purchasing a discharge to soldiers who have served at least one year prior to the application.

~~16~~For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

[1] October 5th a writ of habeas corpus at the relation of Love's mother was served upon the military authorities, and upon the same day, but after the service of the writ, Love was arrested and confined upon the charge of having fraudulently enlisted in violation of the sixty-second article of war. Judge Mayer dismissed the writ and remanded Love, feeling bound by the decision of Judge Holt in *Ex parte Lewkowitz*, 163 Fed. 646. We think he was clearly right in following this decision. There have been many irreconcilable cases in the lower courts in habeas corpus proceedings taken to obtain the discharge of minors who have enlisted in the United States army or navy. Sections 1116 and 1117, Rev. St. U. S. (Comp. St. 1913, §§ 1884, 1885), read as follows:

"Sec. 1116. Recruits, enlisting in the army, must be effective and able-bodied men, and between the ages of sixteen and thirty-five years, at the time of their enlistment. This limitation as to age shall not apply to soldiers re-enlisting.

"Sec. 1117. No person under the age of twenty-one years shall be enlisted or mustered into the military service of the United States without the written consent of his parents or guardians: Provided, that such minor has such parents or guardians entitled to his custody and control."

Some courts have held that such enlistments were wholly void, and that the minors never became soldiers or sailors, or subject to punishment for military offenses. Other courts have held that they were voidable at the option of the minor, and still others that they were only voidable upon the application of the parent or guardian. The Supreme Court, however, set most of these questions at rest in the case of *In re Morrissey*, 137 U. S. 157, 11 Sup. Ct. 57, 34 L. Ed. 644, holding that the enlistment was a good contract so far as the minor is concerned, which changed his status from that of a civilian to that of a soldier or sailor. A parent or guardian, however, who had not consented in writing to such enlistment, could reclaim custody of the minor.

[2, 3] The only question, therefore, is whether the fact of Love's arrest and confinement, after the writ was served, on the charge of his original fraudulent enlistment, is a good answer to the writ. Some cases, like *Ex parte Houghton* (C. C.) 129 Fed. 239, go on the theory that in such a case the civil court, having first got jurisdiction, supersedes subsequent proceedings by the military authorities to punish for military offenses committed either before or after the writ issued. This general principle regulating the relations of different courts of equal jurisdiction undertaking to dispose of the same matter we think does not apply. The writ of habeas corpus is not designed to pass upon the merits, but merely to determine the cause of the detention and whether the detention is lawful. Love would himself, of course, be punishable, if found guilty of the offense charged against him. *Ex parte Lewkowitz*, supra; *United States v. Reaves*, 126 Fed. 127, 60 C. C. A. 675. If the charge had been made and Love arrested before the writ issued, the return would certainly have been a good answer. His status could not have been changed in favor of his mother until he had made amends to the United States for his offense. *In re Miller*, 114 Fed. 838, 52 C. C. A. 472; *In re Scott*, 144 Fed. 79, 75 C. C. A. 237; *Moore v. United States*, 159 Fed. 701, 86 C. C. A. 569.

Section 761, Rev. St. U. S. (Comp. St. 1913, § 1289), reads:

"Sec. 761. The court, or justice, or judge shall proceed in a summary way to determine the facts of the case, by hearing the testimony and arguments, and thereupon to dispose of the party as law and justice require."

Law and justice do not, in our opinion, require Love to be withdrawn from the military authorities and relieved of liability for his offense in favor of his mother's right to his custody. This is the theory upon which *In re Dowd* (D. C.) 90 Fed. 718, proceeded; Judge De Haven saying:

"After that judgment has been fully executed, the petitioner will be entitled to his custody, unless he shall then stand charged with some other military offense, committed since the service of the writ issued herein; and, in view of the near expiration of the term of imprisonment fixed by such judgment, I deem it a proper exercise of discretion to not finally discharge the writ at this time. It is ordered that the said Thomas H. Dowd be remanded to the custody whence he was taken, there to remain until November 28, 1898, and that upon that day, at the hour of 11 o'clock a. m., he be, by the respondent herein, Herbert I. Choynski, produced before this court, and that the respondent then and there show cause, if any there be, why the said Thomas H. Dowd should not be then committed to the custody of the petitioner."

The order is affirmed without prejudice.

UNITED STATES v. DENVER & R. G. R. CO.

(Circuit Court of Appeals, Eighth Circuit. January 4, 1915.)

No. 4183.

MASTER AND SERVANT ~~©~~13—RAILROADS—HOURS OF SERVICE ACT—EMERGENCY.

In an action against a railroad company to recover penalties for violation of Hours of Service Act March 4, 1907, c. 2939, § 2, 34 Stat. 1416 (Comp. St. 1913, § 8678), by requiring telegraph operators in a night and day office, who dispatched orders affecting the movement of trains, to remain on duty for more than 9 hours in 24-hour periods, an answer which alleges as a reason for such requirement that a train dispatcher in the office became "abusive, insubordinate, and defiant," and it became necessary to dismiss him, because his retention would have endangered the public, and that he was replaced as soon as possible, states a case of "emergency" within the meaning of the statute, which constitutes a defense.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 14; Dec. Dig. ~~©~~13.

Hours of service of employés, see note to *United States v. Houston Belt & Terminal Ry. Co.*, 125 C. C. A. 485.]

In Error to the District Court of the United States for the District of Colorado; Robert E. Lewis, Judge.

Action by the United States against the Denver & Rio Grande Railroad Company to recover penalties. Judgment for defendant, and plaintiff brings error. Affirmed.

Henry E. Lutz, Sp. Asst. Atty. Gen., of Denver, Colo. (Harry E. Kelly, U. S. Atty., of Denver, Colo., on the brief), for the United States.

J. G. McMurry, of Denver, Colo. (E. N. Clark, of Denver, Colo., on the brief), for defendant in error.

Before CARLAND, Circuit Judge, and T. C. MUNGER and YOUNG, District Judges.

T. C. MUNGER, District Judge. The United States brought an action against the defendant in error to recover penalties, because of violations of the Hours of Service Act. 34 Stat. 1415. It was charged that the defendant in error (hereinafter referred to as the railroad company) required and permitted telegraph operators, who dispatched orders affecting the movement of trains, to remain on duty more than 9 hours in 24-hour periods, in an office operated continuously day and night. A demurrer to the answer was overruled, and, as the plaintiff elected to stand upon the demurrer, the action was dismissed, and this proceeding seeks to review that action of the court.

The essential portion of the answer to one of the counts is as follows: The defendant alleges:

"That the defendant admits that H. A. Hulse remained on duty for a period longer than 9 hours in a 24-hour period, as in said first cause of action alleged; but defendant says that the said H. A. Hulse so remained on duty because of an emergency, and not otherwise, and that said emergency consisted, among other things, in this, to wit: That on or about September 8, 1912, one J. T. Barrett was employed by this defendant at the said station of the defendant at Salida, Colo., as train dispatcher, and had been in said employ for some time prior thereto; that on said day the said Barrett was called upon to explain the manner in which he had performed his duties shortly prior thereto, and that the said Barrett then and there exhibited violent temper, and became abusive, insubordinate, and defiant, and it became necessary to dismiss him from the service of the company because of such insubordination, and because his retention in the service thereafter would be inconsistent with discipline and dangerous to the interests of the company and to the safety of the public; that it was impossible to obtain a dispatcher or operator to take the place of the said Barrett until the 10th of September, 1912: and that until additional help could be obtained it was necessary to employ the said Hulse for more than 9 hours in a period of 24 hours."

The answer to the other counts of the petition varies only as to the name of the operator who had worked for more than a 9-hour period. Counsel for the United States contend that the facts alleged in the answer do not state a defense. This contention is amplified to the statements that the answer consists of legal conclusions only, and that the employment of an operator for more than 9 hours under the circumstances alleged is not an emergency provided by the statute.

The pertinent portion of section 2 of the act of Congress bearing on the questions involved, is as follows:

"That no operator, train dispatcher, or other employé who by the use of the telegraph or telephone dispatches, reports, transmits, receives, or delivers orders pertaining to or affecting train movements shall be required or permitted to be or remain on duty for a longer period than nine hours in any twenty-four hour period in all towers, offices, places, and stations continuously operated night and day, nor for a longer period than thirteen hours in all towers, offices, places and stations operated only during the daytime, except in case of emergency, when the employés named in this proviso may be permitted to be and remain on duty for four additional hours in a twenty-four hour period of not exceeding three days in any week."

The allegations do not appear to be conclusions of law, but rather are conclusions of fact. To avoid prolixity in pleading, it is proper

to allege the ultimate facts, and this involves some conclusions or characterizations as to groups of circumstances. The allegations of the answer graphically exhibit the situation confronting the railroad company, the action it took, and the resulting hours of labor exacted of an employé, fairly apprise the plaintiff of the defense relied upon, and as against a demurrer the facts were sufficiently depicted.

It is urged that no emergency is shown, because insubordination by an employé is but a violation of the rules of employment, and a railroad company may not create an emergency at will by discharging an employé for infraction of rules, and thus require remaining employés to render extra labor. But in the situation alleged in the answer the railroad company did not create the emergency, but merely acted in one. Under the allegations of the answer that the employé became of violent temper, abusive, insubordinate, and defiant, the defendant could have shown that the employé had the power, disposition, and purpose to endanger the safety of those who traveled subject to his care by acts of omission or commission. The primary purpose of the act of Congress was to provide for the safety of those intrusted to the supervision of the employés, from the dangers arising from their lack of attention and misjudgment, owing to fatigue (Baltimore & Ohio Railroad Co. v. Interstate Commerce Commission, 221 U. S. 612, 31 Sup. Ct. 621, 55 L. Ed. 878; United States v. Missouri Pac. Ry. Co., 213 Fed. 169, 130 C. C. A. 5); but the danger from such a source is not greater than arises from the disobedience, willfulness, or malice of employés.

The facts stated in the answer allege an emergency within the definition declared by this court in United States v. Southern Pac. Co., 209 Fed. 562, 126 C. C. A. 384, and the judgment of the lower court is affirmed.

BAY v. MERRILL & RING LOGGING CO.

(Circuit Court of Appeals, Ninth Circuit. February 1, 1915. Rehearing Denied March 8, 1915.)

No. 2447.

COMMERCE ~~27~~—EMPLOYERS' LIABILITY ACT—RAILROADS "ENGAGED IN INTERSTATE COMMERCE."

An owner of timber land in the state of Washington, which owned and operated a logging railroad from such lands to Puget Sound for the sole purpose of hauling logs and poles to the Sound, where they were placed in the water and there sold to purchasers, who resold the same or the lumber made therefrom largely in other states, is not "engaged in interstate commerce," within the meaning of Employers' Liability Act April 22, 1908, c. 149, 35 Stat. 65 (Comp. St. 1913, §§ 8657-8665), and an employé cannot maintain an action for a personal injury thereunder.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. § 25; Dec. Dig. ~~27~~.

For other definitions, see Words and Phrases, First and Second Series, Interstate Commerce.

Employés engaged in interstate commerce within Employers' Liability Act, see note to Baltimore & O. R. Co. v. Darr, 124 C. C. A. 571.]

Ross, Circuit Judge, dissenting.

In Error to the District Court of the United States for the Northern Division of the Western District of Washington.

Action at law by August Bay against the Merrill & Ring Logging Company. Judgment for defendant (211 Fed. 717), and plaintiff brings error. Affirmed.

The plaintiff in error was injured while in the employment of the Merrill & Ring Logging Company, the defendant in error, and while he was engaged in loading logs on a flat car in the woods, where the logs had been cut preparatory to transporting them to the waters of Puget Sound. His right to bring an action for damages in the court below under the provisions of the federal Employers' Liability Act depended upon the answer to the question whether or not the logging company was at the time of the accident engaged in interstate commerce. Upon the conclusion of the trial the court directed a verdict in favor of the defendant, upon its motion, based upon the grounds: First, that the testimony did not establish that the defendant was a common carrier; and, second, that it was not engaged as a common carrier in interstate commerce.

The facts shown by the evidence are in substance as follows: The logging company owned extensive tracts of timber in Snohomish county, Wash., and was engaged solely in cutting logs on its own lands and hauling them over its own road to the waters of Puget Sound, where it dumped them from the cars into a boom. At that point it sold the logs to purchasers, who paid for them there, and there took possession of them and towed them away by tugs. The most of the logs were sold to nearby mills on the Sound, which were engaged in the manufacture of lumber, and this lumber, when manufactured, was for the most part ultimately disposed of and shipped to points outside of the state of Washington. In addition to these transactions in logs, the logging company had at times taken out some poles, which also it sold and delivered at its boom to the National Pole Company, a purchaser which did business at Everett, and which bought and paid for the poles after they were delivered in the water, and thereafter sold them for shipment to California. The road is a standard-gauge logging railroad, and is operated as a part of the logging business of the defendant in error, and is connected by switches with the Great Northern and the Interurban roads; but those connections are used only for the purpose of bringing supplies to the company's logging camps. No logs or timber of any kind were at any time transferred to these other roads. One shipment of steel rails had gone over the logging road for the Interurban at the time when the latter was constructing its road. For that service the actual expense of operating the locomotive was the only charge made, and the Interurban assumed all liability on account of accidents occurring in the transportation.

John T. Casey, of Seattle, Wash., for plaintiff in error.

Hughes, McMicken, Dovell & Ramsey, of Seattle, Wash., for defendant in error.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

GILBERT, Circuit Judge (after stating the facts as above). We may assume from the evidence that the defendant in error was a common carrier; but it is clear that it was not engaged in interstate commerce. In that respect the facts in the case are identical with those which were before this court in the recent case of Nordgard v. Marysville & Northern Railway Company, 218 Fed. 737, 134 C. C. A. 415, and we need not add to the discussion that was there had.

The judgment is affirmed.

ROSS, Circuit Judge. I dissent, for the reasons stated in my dissenting opinion in the case of Nordgard v. Marysville & Northern Railway Company, above referred to.

JACKSON CO. et al. v. GARDINER INV. CO.

(Circuit Court of Appeals, First Circuit. January 30, 1915.)

No. 1067.

On petition for rehearing. Denied.

For former opinion, modifying decree for complainants, see 217 Fed. 350, 133 C. C. A. 266.

BINGHAM, Circuit Judge. The appellees, in their petition for rehearing, reiterate the contention, urged by them at the argument, that Mason v. Pewabic Co., 133 U. S. 50, 10 Sup. Ct. 224, 33 L. Ed. 524, is "substantially on all fours with the present case." That we have been unable so to regard the decision referred to we think sufficiently obvious from our opinion handed down November 19, 1914, in which specific comment upon it was deemed unnecessary. In that case it appeared that the majority shareholders in the Pewabic Mining Company undertook to liquidate the company and sell its assets to themselves for shares of stock of the par value of \$50,000 in a corporation which they were to organize, and, although provision was made whereby a stockholder, who declined to take stock in the new company, could receive his pro rata share in money, it was found by the master that the fair cash value of the assets of the company was \$498,412.24, and not \$50,000, for which the majority had decided to sell them. The majority, therefore, were undertaking to sell the assets of the company to themselves, and at a price so grossly inadequate as to amount to fraud in fact. In this case, on the other hand, the majority were not undertaking to sell to themselves, but to the Nashua Company, in which they had no interest. The price was not grossly inadequate; and it is expressly found that in doing what they did the majority acted without fraud and in good faith. As the facts in the Pewabic Case differ so materially from those here under consideration, it evidently is not and could not be controlling here; and we think further comment upon it unnecessary.

The position is also taken that the decision handed down November 19, 1914, overrules the one rendered when the case was previously before the court (200 Fed. 113, 118 C. C. A. 287) on exceptions to an order of the District Court entering an ad interim injunction, and contravenes the rule that questions once decided will not be re-examined on a subsequent transfer of the same case. This contention is based on a false assumption, for, as pointed out in our decision of November 19, 1914, the facts alleged in the bill, and upon which the first decision was based, were not the same as those found by the masters (217 Fed. 351, 133 C. C. A. 267). According to the allegations of the bill, the value of the assets of the Jackson Company, as represented by a share of stock, was \$3,277.51, and the owner of a share, under the terms of the sale, was required to take 1½ shares of Nashua Company stock in payment for his share, or the sum of \$975 in cash, which would be less than one-third of the alleged value of what he surrendered. As a dissenting stockholder, according to the alleged facts, would be required to take either a grossly inadequate sum for his in-

terest in the company or to take stock in the Nashua Company, it was very properly held that the effect of the transaction was to compel the minority shareholders to take stock, a thing which was beyond the power of the majority to require them to do.

The further contention is made that the majority never determined that the value of a shareholder's interest in the Jackson Company represented by a share of stock was \$975, but that they determined it to be of the value of \$3,277.51. The case discloses that the valuation of \$3,277.51 was obtained from a report of a stockholders' committee, and was based on an appraisal of the Jackson Company's real estate and tangible property, as made by the official agents of certain mutual insurance companies, and the quick assets of the company taken at their face value. It is well known that mutual insurance companies, in determining the value of mill properties for purposes of insurance, do so upon the replacement theory, and it is evident that the valuation of \$3,277.51 was arrived at in this way. This is also shown from the fact that the masters found that the value of a share of Jackson Company stock, ascertained upon the replacement theory, was, in May, 1911, \$2,721.27, and in May, 1913, \$3,228.13.

That the majority shareholders considered the fair cash value of the assets of the Jackson Company, as represented by a share of its stock, to be \$975, and that that was the basis upon which they agreed to make the sale, is pointed out in our opinion (217 Fed. 352, 133 C. C. A. 268), and needs no further consideration.

Entertaining these views, the members of the court who concurred in the opinion of November 19, 1914, do not deem it necessary to re-open the case for further argument.

The petition for rehearing is denied.

FULTON INV. CO. et al. v. DORSEY et al.

(Circuit Court of Appeals, Eighth Circuit. January 4, 1915.)

No. 4167.

1. APPEAL AND ERROR **497—RIGHT OF REVIEW—INTEREST OF PARTY.**

To sustain an appeal the record must show that appellant has an actual and substantial interest in the decree appealed from.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2954; Dec. Dig. 497.]

2. EQUITY **429—AMENDMENT OF DECREE—POWER AFTER TERM.**

While a federal court may not after the term amend the principles of a final decree, it has inherent power to modify by a subsequent order the time or manner of its enforcement, and under such power it may change the place at which a sale of real estate was directed to be made where by reason of the removal of a county seat the original direction did not conform to the statute.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 1020-1033; Dec. Dig. 429.]

Appeal from the District Court of the United States for the District of Colorado; Robert E. Lewis, Judge.

Suit in equity by E. M. Dorsey and others against the Fulton Investment Company and others. From an order confirming a sale of lands, defendants appeal. Affirmed.

Edwin H. Park, of Denver, Colo., for appellants.

L. F. Twitchell, of Denver, Colo. (Archibald A. Lee, of Denver, Colo., on the brief), for appellees.

Before CARLAND, Circuit Judge, and T. C. MUNGER and YOUNG MANS, District Judges.

T. C. MUNGER, District Judge. In a decree of foreclosure of a mortgage upon real estate, entered by the court below, it was directed that the property be sold in satisfaction thereof, at the town of Hahn's Peak, Routt county, Colo. Soon thereafter, but at the following term, a petition was presented showing that the county seat of Routt county had been changed from Hahn's Peak to Steamboat Springs, and praying that the decree should be modified so as to direct the sale of the property at the courthouse in Steamboat Springs. After notice to counsel and a hearing, the modification prayed for was made. A sale was had in conformity to the amendment, and the sale was confirmed over the objections of one of the appellants.

[1] The pleadings are not contained in the transcript, and it does not appear that the Fulton Investment Company has any interest in the appeal. While it was a party to the suit, it may have been merely a formal and unnecessary party, or may have received all the relief to which it was entitled. The other appellant did not make any objections to the sale or its confirmation, and both join in an appeal. The proceedings could properly be dismissed. *Fitzgerald v. Evans*, 49 Fed. 426, 1 C. C. A. 307; *Midland Valley R. Co. v. Fulgham*, 181 Fed. 91, 104 C. C. A. 151; *Northern Union Gas Co. v. Mayer*, 174 Fed. 817, 98 C. C. A. 525.

[2] The appeal sought to be prosecuted is from the order confirming the sale; it being alleged that the sale at Steamboat Springs was contrary to law. Congress provides that lands sold under an order or decree of any United States court shall be sold at the courthouse of the county, parish, or city in which the property, or the greater part of it, is located, or upon the premises, as the court may direct. Act March 3, 1893, c. 225, 27 Stat. 751. The order of the court sought to make the decree conform to this statute, and pertained only to the enforcement of the decree. While a court may not, after the term, amend the principles of a final decree, it has the inherent right to modify, by a subsequent order, the time of the enforcement, or the manner in which it shall be enforced, and this order was within that power. *Mootry v. Grayson*, 104 Fed. 613, 44 C. C. A. 83; *Royal Trust Co. v. Washburn, B. & I. R. Ry. Co. (C. C.)* 113 Fed. 531; *Bound v. South Carolina Ry. Co. (C. C.)* 55 Fed. 186; *Turner v. Indianapolis, B. & W. Ry. Co.*, 8 Biss. 380, 24 Fed. Cas. 367.

The order of confirmation is affirmed.

UNIVERSAL DRAFT GEAR ATTACHMENT CO. v. BUSH.

(Circuit Court of Appeals, Seventh Circuit. October 6, 1914.)

No. 2099.

PATENTS ~~328~~—ANTICIPATION—DRAFT GEARING.

The Bush patent, No. 838,379, for a draft gearing, claim 1, which is a broad claim covering a yoke for draft gearing in combination with any means for attachment to a coupler designed to form a portion of the car coupler in railway service, held void for anticipation in the prior art.

Appeal from the District Court of the United States for the Eastern Division of the Northern District of Illinois; Kenesaw M. Landis, Judge.

Suit in equity by Samuel P. Bush against the Universal Draft Gear Attachment Company. Decree for complainant, and defendant appeals. Reversed.

The appellant is defendant below to a bill filed by Samuel P. Bush, patentee, for infringement of his patent No. 838,379, issued December 11, 1906, for draft gearing, and this appeal is from a decree of the District Court which sustains the charges of infringement.

The patent in suit contains the following recitals in the specifications:

"My invention relates to improvements in draft gearing, the object of the invention being to so construct the draft yoke as to enable the coupler to be inserted and withdrawn without disturbing the other parts of the draft gearing; and the invention consists in certain novel features of construction and combinations and arrangements of parts, as will be more fully hereinafter described, and pointed out in the claims. In the accompanying drawings, Fig. 1 is a view in side elevation, illustrating my improvements. Fig. 2 is a view in cross-section on the line *x* *x* thereof, and Figs. 3, 4, 5, and 6 are views illustrating a modification.

"1 represents the drawbar of a coupler, having an enlarged oblong butt end 2, as is customary. 3 represents my improved draft yoke, which comprises a single integral casting having parallel top and bottom members connected by a curved rear end and provided with a hood 4 at its forward or outer end. This hood is of the same shape in cross-section as the butt end of the coupler to receive the latter, and the hood 4 and butt end of the coupler are made with aligned openings to receive a key 5 to secure the coupler to the yoke. By this construction it will be observed that the coupler can be removed and replaced without in any manner disturbing the draft gearing on the car, as the forward follower or friction piece will engage the yoke hood when the coupler is removed, and thereby prevent any separation of the operative or movable parts of the draft gearing.

"In the modification illustrated in Figs. 3, 4, 5, and 6, the hood 6 at the forward end of the yoke is of circular or cylindrical form and made with internal oppositely disposed lugs 7. The butt end of the coupler is provided at top and bottom, adjacent to its enlarged rear end, with lugs or enlargements 8, forming grooves or recesses 9 to receive the lugs 7 of the yoke and secure the parts together. To secure the coupler in the yoke, the coupler is turned on its side and its butt end inserted in the hood 6 of the yoke, and then turned to bring its grooves or recesses 9 at top and bottom over the lugs 7 and receive the latter in the grooves or recesses to secure the coupler and yoke together without the employment of any third part.

"Slight changes might be made in the general form and arrangement of the parts described without departing from my invention, and hence I do not restrict myself to the precise details set forth, but consider myself at liberty

to make such slight changes and alterations as fairly fall within the spirit and scope of my invention."

The main drawings, referred to as Figs. 1, 2, and 3, are as follows:

The specifications embrace three claims, but the alleged infringement rests on broad claim 1, which reads as follows:

"A yoke for draft gearing, comprising top and bottom members, rear end, and hooded forward end constructed to receive a coupler, and all cast integral, and means for securing a coupler in the hooded end of the yoke."

The answer of the defendant denies the validity of the patent and sets up the following patents alleged to be anticipations of the device in suit: Jackson, No. 37,448, January 20, 1863; Griffith & Patterson, No. 167,333; Wallace, No. 269,358; Schaffer, No. 303,951; Buhoup, No. 423,727; Westbrook & Cook, No. 457,468; Martin, No. 721,059; Hickey & Wickens, No. 777,785; Pflager, No. 779,559; Brown, No. 781,127; Hartough, No. 785,211; and Wil-lison, No. 1,000,312.

The contentions of invalidity are set forth on behalf of the appellant in the following propositions:

"(a) That it merely applies to the yoke or loop form of coupler extension, the form of construction long since used in the tail bolt and casing type, and without securing any new function or mode of action; (b) that it seeks to monopolize the making of a yoke in one piece which has been made in two pieces, without securing any new function or mode of action; (c) that it seeks to monopolize the use of cast metal, where wrought metal had been previously used, with no new function or mode of action; (d) that the claim of the patent is readable directly on various prior art structures, which, had they been later than the patent, would have infringed it; (e) that it seeks to monopolize a structure which is a mere reversal of several earlier structures."

Louis K. Gillson, of Chicago, Ill., for appellant.

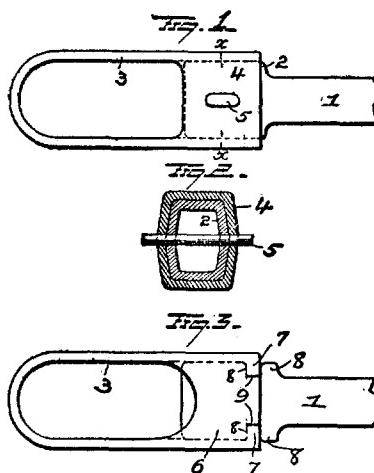
H. A. Seymour, of Washington, D. C., for appellee.

Before BAKER, SEAMAN, and MACK, Circuit Judges.

SEAMAN, Circuit Judge (after stating the facts as above). The decree against the appellant, defendant below, adjudges infringement of the Bush patent, No. 838,379, issued December 11, 1906, for "improvements in draft gearing," and the charge of infringement is predicated on the first of the three claims specified for the grant, reading as follows:

"1. A yoke for draft gearing, comprising top and bottom members, rear end, and hooded forward end, constructed to receive a coupler, and all cast integral, and means for securing a coupler in the hooded end of the yoke."

In the specifications it is stated as the object of the invention, "to so construct the draft yoke as to enable the coupler to be inserted and withdrawn without disturbing the other parts of the draft gearing," and that "the invention consists in certain novel features of construction and combinations and arrangements of parts," as thereafter de-



scribed. It thus appears that the above claim embraces alone the structure of the so-called "yoke for draft gearing," in combination with any means for attachment to a coupler, designed to form a portion of the car coupler in railway service, wherein the entire mechanism for the purpose is known as "draft rigging." As an entirety the draft rigging serves both as a car coupler and as a needful means "to sustain and absorb pulling and buffing strains" in train service, so that it embraces the clutching means or "coupler," so-called "draft lugs" for attachment to the sills of the car, and "draft gear" as the shock absorbing means. In practice the coupler contains three elements: (a) The head or clutching device, (b) a tail piece or coupler extension means for connection with the draft gear; and (c) a shank connecting the head and tail pieces; and the device of the Bush patent is limited to this intermediate means for connection of the coupler head and draft gear.

The fact is uncontested that the appellant's structure for like purpose is within the above-stated terms of claim 1 for the "yoke for draft gearing," as described—although it departs from the form of "hooded" end shown in the drawings—and the validity of such broad claim of invention is challenged as the sole ground for reversal of the decree. As indicated by the foregoing definitions of the various components of the car coupler, the problems of the shock absorbing draft gear, appearing in the devices in evidence of either spring or friction type, are not involved in the issue of patentable novelty in this yoke form, beyond the fact of its adaptability to receive (through the open sides) either of the forms of draft gear. In favor of patentability are not only the presumption arising from the grant, but the proof of simplicity and effectiveness of this yoke form of means for the purpose, together with popular acceptance of the device in railway service. On the other hand, however, it is conceded in the appellee's brief, that "two types of draft rigging, the tail bolt and the *riveted* yoke were in extensive use prior to the date" of the patent, and the prior patents and exhibits in evidence are conclusive as well that no invention was involved in employing the yoke form of operative means for the purpose of the device. So, for support of claim 1, invention must be found in one or both elements described as (a) the "hooded forward end" and (b) "all cast integral"—the means specified for "securing a coupler in the hooded end" not being embraced in such claim, but made the subject-matter of claims 2 and 3. Its terms are equally applicable to the key and (alternative) bayonet joint specified, or to pins, rivets, or other known means for securing the coupler within the hood or clutch. This distinction between claim 1 and the other claims appears to be ignored in the statement, made in the appellee's brief, that "the gist and essence of the improvement which is pointed out in the first claim sued upon, is a draft yoke having upper and lower members, rear end, and hooded forward end all cast in a single piece, and a key readily securing the coupler," etc.; but, excluding the irrelevant mention of the key and its function, the utmost range for exercise of invention within claim 1 is there stated.

The patents introduced in evidence as anticipations of this claim are 12 in number, exhibiting three several types of means, classified

in the briefs as (a) tail bolt, (b) shell or casing, and (c) yoke or tail strap; also several exhibit yoke devices are introduced from the "Car Builders' Dictionary of 1895." On behalf of the appellant, these disclosures of the prior art are analyzed as clearly responding to the terms of claim 1, "either directly or with immaterial deviations," while it is contended in support of the claim that no disclosure thereof appears in any one of them. Their indisputable evidence, however, of want of invention in the yoke form of means renders it unnecessary to discuss the respective contentions in reference to the various means and their functions shown in these prior patents and devices, nor the appellee's contention that devices of the casing type (four-sided) are not applicable to his two-sided yoke form of means, although used in this art as an equivalent. We believe the prior patents clearly serve to narrow the scope of invention to the particular combination of means specified, as an entirety, as that claim 1 cannot be upheld under these pertinent references. Jackson's U. S. patent No. 37,448; Buhop's No. 423,727; Martin's No. 721,059; Hickey & Wickens' No. 777,785; Brown's No. 781,127; Hartough's No. 785,211; Willison's No. 1,000,312 (filed April 27, 1905).

With the object of the Bush invention (as specified) "to enable the coupler to be inserted and withdrawn without disturbing the other parts," it goes without saying that the means of securing the coupler are of the essence of the device. The element called the "hooded forward end" of the yoke is formed by the addition of side plates, making a casing at the open end of the yoke, both to inclose the coupler head and for needful strength of the yoke. Upon selection of the yoke type of structure instead of the tail bolt or casing type, this provision to receive the coupler impresses us to be an obvious mechanical expedient, but it is plainly anticipated by analogous disclosures in the above-mentioned patents; and each prior patent in evidence exhibits analogous means for detachable connection of the coupler with the draft gear. For particular patent references above mentioned we believe the following comments thereon to be sufficient: It is our understanding of the Hickey & Wickens patent that it directly anticipates every element of claim 1 in structure and function, except that it is not "all cast integral," but shows a two-part structure united by rivets. As conceded by the patentee, as a witness, it could obviously have been cast in one piece without riveting. Other distinctions are asserted, for rejection of this patent, in two phases—that the device is correctly described throughout the specifications as a "coupler shank" (although it embraces a yoke), and that it appears of insufficient strength for durability; but neither of these objections impresses us with force. The Martin patent exhibits a cylindrical device of the casing type, having an opening at the bottom (closed with a slide) to receive the draft gear. It is substantially identical with the alternative structure of the Bush patent (shown in Fig. 3), and thus must be treated as an anticipation of claim 1. In the patents respectively of Buhop, Brown, and Williston analogous structures and functions are plainly shown and each cast integral. We believe a structure made in conformity with any of the above-mentioned patents would have infringed the terms of claim 1, if subordinate in grant.

The undoubted merit of the Bush improvement as an entirety, for compactness and utility, cannot serve to authorize monopoly, either of the yoke and "hooded" means adopted from the prior art, or of a cast steel structure therefor. Just protection of the patentee cannot extend to the creation of an unauthorized monopoly against the public. In answer to the contention of patentable invention in this cast steel feature, aside from the anticipations referred to, it is sufficient to cite the recent opinion of this court in *Milwaukee Bronze Casting Co. v. Avery*, 209 Fed. 616, 618, 126 C. C. A. 572, and cases noted, for the settled rule contra. Its departure from prior devices is further alleged, in provision for interchangeable use with the various sizes of standard couplers in service. Such requirement, however, is a development in practice since the date of all the patents in evidence, and plainly not within this patentee's contemplation, as his alternative form of structure (above mentioned) would not permit such interchangeability; and, conceding that his preferred form may readily be so adapted, like adaptation is equally attainable within the scope of various prior patents in evidence.

The decree of the District Court is therefore reversed, with direction to dismiss the appellee's bill for want of equity.

ENTERPRISE MFG. CO. v. WILLIAM SHAKESPEARE, JR., CO.

(Circuit Court of Appeals, Sixth Circuit. February 2, 1915.)

No. 2517.

1. PATENTS ~~26~~—“INVENTION”—NEW COMBINATION OF OLD ELEMENTS.

If a new organization of old elements is such that it produces a new mode of operation and a beneficial result, there may be patentable invention.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 27-30; Dec. Dig. ~~26~~.]

For other definitions, see Words and Phrases, First and Second Series, Invention.

Patentability of combinations of old elements as dependent on results attained, see note to *National Tube Co. v. Aiken*, 91 C. C. A. 123.]

2. PATENTS ~~328~~—VALIDITY AND INFRINGEMENT—FISH BAIT OR LURE.

The Rhodes patent, No. 777,488, for a fish bait or lure, held not anticipated, valid, and infringed.

3. PATENTS ~~26~~—INVENTION.

There is no invention in making two parts of one thing or one part of two, when by such change no different result is obtained.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 27-30; Dec. Dig. ~~26~~.]

Appeal from the District Court of the United States for the Northern District of Ohio; William L. Day, Judge.

Suit in equity by the William Shakespeare, Jr., Company against the Enterprise Manufacturing Company. Decree for complainant, and defendant appeals. Affirmed.

For opinion below, see 211 Fed. 477.

J. B. Fay, of Cleveland, Ohio, and R. H. Parkinson, of Chicago, Ill., for appellant.

O. A. Earl, of Kalamazoo, Mich., for appellee.

Before WARRINGTON, KNAPPEN, and DENISON, Circuit Judges.

KNAPPEN, Circuit Judge. Suit for infringement of United States patent No. 777,488, December 13, 1904, to Rhodes. The District Court held the patent valid and infringed, and entered the usual decree for interlocutory injunction and accounting. This appeal is from that decree.

The patent relates to improvements in fish baits or lures. The stated object of the invention specially pertinent here is "to provide, in a fish bait or lure, an improved means of securing the hooks in position." Figures 1 and 2 of the patent drawings are reproduced herewith; figure 1 being slightly reduced.

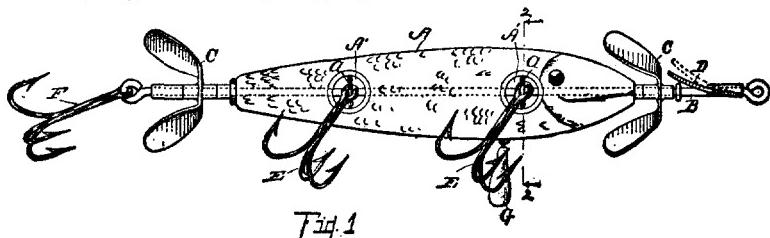


Fig. 1

The specification, following the statement that the improved bait is preferably shaped like a minnow and may be suitably painted or decorated as desired, thus describes in part the construction:

"Arranged longitudinally through the body portion A, which is secured thereto, is a rod B. The front end of the rod B is formed into a loop for convenience in attaching the line. The tail or trailing hook F is secured to the rear end of the rod B. Transverse openings A' are formed through the body, one for each pair of hooks which it is desired the body shall carry. These openings are provided with suitable metal socket-rings, as clearly appears in Fig. 2. A split ring a is provided for each pair of hooks. (See Fig. 2.) By this means the hooks are detachably secured in position and may be readily changed as desired or in case one should become broken may be readily renewed. The shanks of the hooks rest on the edges of the holes or sockets, so that the points of the hooks are supported out from the body in position to receive the strike of the fish. They are also supported so that the body of the minnow is not abraded by the friction of the hook points against the same."

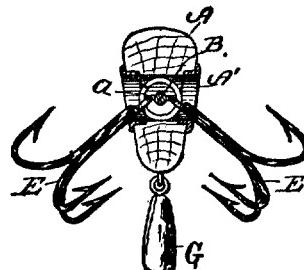


Fig. 2

The claims here involved are Nos. 8, 9, and 10, and are printed in the margin.¹ The defense is that the combinations embraced in the

¹ "8. In a bait or lure, the combination of a body having a transverse opening therethrough; a rod arranged transversely through said opening; a split

claims in issue were without novelty and the claims thus invalid; or, at least, that the claims, if valid at all, must, in view of the prior art, be so narrowly construed as to exclude infringement by defendant's structure. We first consider claims 8 and 10.

A bait in the form of a minnow was old in the art; indeed, the claims in issue do not include the form of the bait. It was old to have hooks arranged on opposite sides of a minnow bait; these oppositely arranged sets of hooks were sometimes stapled on, as in complainant's "Kazoo" bait, were sometimes attached to the outer ends of transverse wires running through the body of the minnow, the hooks being attached to loops formed in the ends of the transverse wire, as in defendant's "Trory," "Muscallonge" and "Yellow Jacket" baits; and sometimes attached by screw eyes in metal-lined sockets, as in the "Heddon" minnow. It was also old to use a rod extending longitudinally through the minnow, for attaching a line to the front end and hooks at the rear end, as in defendant's "Trory," "Muscallonge" and "Yellow Jacket" baits. In some cases this central wire passed through a loop in the transverse wires, as in the "Gaide" and "Pflueger" baits. It was also old to use a split ring for attaching the hooks, as in Duke's patent (1899), to the body of the bait, and, in at least two of the Allcock patents, to the rear end of the snood, which passed slidably and longitudinally through the bait.

[1] But nowhere in the prior art do we find the specific combination of the claims in issue; indeed, as will appear, at least one of the elements is not shown in the art previous to Rhodes, and it is familiar learning that if the new organization of old elements is such that it produces a new mode of operation, and a beneficial result, there may be patentable invention. *Dowagiac Mfg. Co. v. Superior Drill Co.* (C. C. A. 6), 115 Fed. 886, 901, 53 C. C. A. 36. With the exception of baits employing the "Devon" body, the prior art discloses no more plausible approach to the "transverse opening" of the claims here in issue than is found in the perforations which contain transverse hook-supporting wires of the Trory, Muscallonge, Gaide, and Pflueger devices. But these perforations for transverse wires are, we think, in no proper sense the transverse openings of the patent in suit; they are closely filled by the wires, which are practically imbedded, and when so filled no "opening" remains. This "opening" is aptly described in the Gaide patent as a "transverse perforation" intersecting the longitudinal perforation. These openings have no proper relation in either form or function to the permanent metal-socketed transverse openings of the patent in suit, which are not designed to be filled, but in which the element connecting the hooks with the longitudinal rod lies loosely and flexibly.

ring on said rod arranged in said opening; and a pair of oppositely arranged hooks on said ring, for the purpose specified.

"9. In a bait or lure, the combination of a body having a transverse opening therethrough; a rod arranged transversely through said opening; and a hook secured thereto.

"10. In a bait or lure, the combination of a body having a transverse opening therethrough; a rod arranged transversely through said opening; a split ring on said rod arranged in said opening; and a suitable hook on said ring, for the purpose specified."

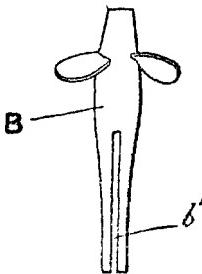
The nearest approach to Rhodes' "transverse openings" is found in the Allcock and similar devices employing the "Devon" hollow metal "spinning" or "rotating" bait, a familiar form of which, minus attachments, is here reproduced.

In two of the Allcock devices for example, which are as close references as any in defendant's favor, the split ring at the rear end of the snood to which the hooks are attached moves slidably in a longitudinal opening extending from the tail end of the bait body nearly to the fins. While a given section of this opening, if such may be imagined, might be said to be transverse to the body of the bait, it is clear that the entire opening is not the transverse opening of the Rhodes patent. This Allcock opening is aptly described in the Millward and Gregory patent as "two longitudinal slots, one in the upper and the other in the lower side of the said body, the said slots extending from the tail end to near the vanes or fins of the body." Nor does the split ring of the Allcock devices operate transversely of the opening; it moves only longitudinally therein; and it is at least open to doubt whether the snood of the Allcock device is the equivalent of the longitudinal wire of the Rhodes patent.

[2] The prominently distinguishing elements of the combinations of the claims in question are the transverse opening through the body of the bait, the longitudinal rod disposed transversely through such opening, and the split ring, whereby the hooks are detachably attached to and supported by the longitudinal wire. It satisfactorily appears from the evidence that this method of attaching the hooks gives great flexibility, presents the hooks in position to receive the strike of the fish, and reduces the danger of release of the fish from the hooks and of breaking the latter through contact with the boat. We think the District Judge rightly concluded that the combination permits ready change or renewal of the hooks by removal of the longitudinal rod and its replacement after change made in the hooks. We think the device of the patent produces a new mode of operation and a beneficial result, and that claims 8 and 10 are thus valid.

Claim 9 contains no reference to the method of securing the hook to the longitudinal rod; but if we have correctly concluded that the openings filled by the transverse wires of Gaide and Pflueger and of the Trory, Muskallonge and Yellow Jacket baits, the longitudinal slots of the Devon bait, and the sockets of Heddon, are not the transverse openings of the Rhodes patent, the combination of claim 9 does not impress us as so clearly found in the prior art as to justify declaring the claim invalid as being too broad. The question is not a practical one here; and, for the purposes of this case, we do not feel justified in holding the claim invalid.

Turning to the question of infringement: Fred D. Rhodes, the inventor, applied for a patent in November, 1903. His uncle, J. B. Rhodes, who was a practical business man as well as an expert fisherman, was attracted by the device and arranged to take an interest with his nephew in the manufacture. A few samples (just how many does not definitely appear) were manufactured strictly according to



the patent drawings. These had flat (as distinguished from round or shaped) bodies. J. B. Rhodes had charge of a manufacturing exhibit at the St. Louis World's Fair of 1904, and in connection therewith proceeded to manufacture fish lures under the Fred D. Rhodes invention, but discovered that flat bodies were expensive to manufacture, as they could not economically be made by machinery. He accordingly adopted a round or shaped body. It was then seen that such thicker body would be practically cut in two by openings large enough for the split ring, as the thicker the body the larger must be the ring, and the opening must be fully as large as the ring. He accordingly adopted an elongated split link in place of the split ring, and instead of an integral and continuous longitudinal wire running through the body employed a threaded rear rod and a threaded front rod, each screwing into the wooden body, one of them passing through the link connecting with the hooks (and, where there were both front and rear body hooks, as in one form of Rhodes' manufacture during the World's Fair or immediately thereafter, each rod engaging a connecting link). The bait so manufactured was received with favor, and many orders were taken. He was advised by counsel that the changes in the manufacture referred to were not patentable, but were merely modifications of the fastenings of the F. D. Rhodes' patent application, presumably then still pending. The structure as built by J. B. Rhodes in 1904 has ever since been on the market, and has met with great favor. J. B. Rhodes, in October, 1905, sold the patent for a substantial sum to the immediate predecessor of complainant company, who, in July, 1908, assigned it to complainant.

In 1907 or 1908, while complainant or its immediate predecessor were actively manufacturing and marketing the device, the defendant, with knowledge of this fact and of the Rhodes patent, began, and has ever since continued, to manufacture practically an exact copy in all substantial respects of the bait as manufactured by J. B. Rhodes and his successors, including complainant; and its superintendent and vice president applied for and obtained a patent (which was assigned to defendant), one claim of which, as allowed, covered the transverse openings and line-attaching threaded rod screwed into the body of the bait, and the method of connection thereto by means of split links, being the substantial and distinguishing features of complainant's commercial structure. It is conceded that the applicant did not invent the device in question, and the only explanation for the action taken is the suggestion of counsel that the claim, which was introduced by way of amendment by applicant's attorney (not defendant's counsel in this case), is not shown to have been allowed with the applicant's knowledge. The record is silent on this subject. Disclaimer as to the claim in question was filed by defendant in the Patent Office, but not until four years after the patent was allowed, nor until after this appeal was filed in this court.

If complainant's commercial structure is within the Rhodes patent, it is clear that defendant's structure infringes. But defendant insists that the invention of the Rhodes patent was impracticable and discarded, and that the structural changes made by J. B. Rhodes involved a substantial departure from the patent, and so are not covered by the claims in suit. In this connection it is urged that the theory of

the patent involved a nondetachable longitudinal rod and the removal of hooks from the split ring while still in engagement with the rod, and that the removal of the rod and its replacement was impracticable except in a machine shop. We think none of these contentions is sustained by the record. While it is true that the removal of the hooks from the split ring while connected with the rod is a difficult operation (though not impossible, as practically demonstrated on the argument), we find nothing in the patent suggesting that the longitudinal wire was nonremovable or not intended to be removed; on the other hand, J. B. Rhodes testified, without dispute, so far as we have found, that the structure as manufactured by the inventor was "one of the best lures I ever used," and that to change the hooks in the lure he had several times opened the eyes at the front, straightened the rod, pulled it through, so that the ring and hooks could be pulled out at one side of the lure, replaced the broken hook, and inserted the rod in its former position, turning the eye back again with pincers. Although in one of the samples of Fred D. Rhodes' manufacture presented by defendant the eye at the front end of the rod is shown soldered down, J. B. Rhodes testified, again without dispute so far as we have seen, that he never knew of a structure being so manufactured by Rhodes. The record convinces us that while the Rhodes device, as made by the inventor, was much less practical than in form later adopted, it contained the invention of the later commercial structure; in other words, that the changes made by J. B. Rhodes, and later adopted by defendant, are mere matters of "structural variation" contemplated by the language of the specifications—not essential and functional, but only of form. The use of separate front and rear threaded rods was not new in the art. Examples are found both in the Heddon bait and in one form of defendant's Trory minnow. Their use in place of the integral and continuous rod was not invention.

[3] There is no invention in making two parts of one thing or one of two, when by such change no different result is obtained. *D'Arcy v. Staples & Hanford Co.* (C. C. A. 6), 161 Fed. 733, 742, 88 C. C. A. 606; *Edward Hilker Mop Co. v. U. S. Mop Co.* (C. C. A. 6), 191 Fed. 613, 617, 112 C. C. A. 176, and cases there cited. The split link in question is substantially only an elongated split ring, and we think the two devices are not different in substance. While Rhodes' contribution to the art may not have entitled him to a very broad range of equivalents, we think the conclusion we have reached involves but a narrow range.

In our judgment, the District Court reached the proper conclusion; and its decree is accordingly affirmed, with costs.

PEDERSEN v. DUNDON.

(Circuit Court of Appeals, Ninth Circuit. February 1, 1915.)

No. 2462.

1. PATENTS ~~245~~—INFRINGEMENT—INCREASING NUMBER OF PARTS.

Neither the joinder of two elements of a patented combination into one integral part, accomplishing the purpose of both, nor the separation of

~~For~~ For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

one integral part into two, which together accomplish substantially what was done by the single element, will avoid infringement.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 386; Dec. Dig. ☞ 245.]

2. PATENTS ☞ 328—INFRINGEMENT—DOOR FOR DIGESTERS.

The Dundon patent, No. 653,503, for a door for digesters, relating to doors for hermetically sealing retorts, digesters, or other vessels that sustain internal pressure, construed, and held not limited to a construction in which the pressing bars which cross the door are also utilized as hinges, and, as so construed, held infringed.

3. PATENTS ☞ 321—SUITS FOR INFRINGEMENT—INTERLOCUTORY DECREE.

An interlocutory decree in an infringement suit, which as to profits and damages recoverable follows the language of the statute, cannot be held erroneous.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 588, 589; Dec. Dig. ☞ 321.]

Appeal from the District Court of the United States for the Second Division of the Northern District of California; Wm. C. Var Fleet, Judge.

Suit in equity by Patrick F. Dundon against L. A. Pedersen. Decree for complainant, and defendant appeals. Affirmed.

The appellee is the patentee of letters patent No. 653,503, issued July 10, 1900, for "door for digesters." In the specifications the invention is described as new and useful improvements in hermetically sealing doors, and relates to doors for hermetically sealing retorts, digesters, or other vessels that sustain internal pressure," and to certain improvements in devices for hinging, closing, and securely sealing such doors, "being an improvement on an invention described in letters patent No. 418,867, granted to me on the 7th day of January, 1890."

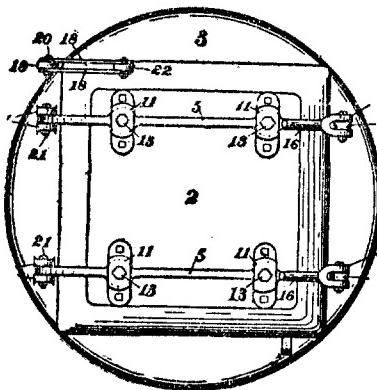
The specifications proceed: "My present improvements consist in two or more bars that span the doors, bearing usually at four points thereon, so selected as to equalize the pressure around the sealed joints, and utilize the full strength of the door itself in resisting the compressing strain; also consists in the manner of hinging the doors by means of the bearing bars and a compensating link pivoted coincident therewith, and in other structural devices that will be particularly pointed out. * * * The main objects of my invention are celerity of action in opening and closing such doors, security against leaks, and to utilize the bearing bars as hinges on which the door may swing, and thus dispense with independent pivoting devices, avoiding the cost and complication of the latter."

Claim 3, which was claimed to be infringed, is as follows:

"3. In a hermetically closing door, pressing bars to force the door upon its seat, bearing at four or more points thereon, forming also hinges for the door, and in combination therewith the radius links 18 pivoted in the same axial line as the pressing bars and holding the door in adjustment thereon, substantially as specified."

The invention is shown in the subjoined drawing.

The court below found that the appellant had infringed claim 3, and decreed that the appellee recover from the appellant the profits, gains, and advantage which the latter had made or received, or which had accrued to him by the manufacture, use, or sale of doors, in violation of said claim.



William K. White, of San Francisco, Cal., for appellant.
Francis M. Wright, of San Francisco, Cal., for appellee.

Before GILBERT and ROSS, Circuit Judges, and WOLVERTON,
District Judge.

GILBERT, Circuit Judge (after stating the facts as above). The appellant's combination differs from that which is described in the patent, in that the crossbars by means of which he applies external pressure to the door to hold it in place and make a tight joint do not combine with that function the function of hinges, but separate hinges are used, and the detachable crossbars were inserted in lugs on either side of the door frames.

The single element in the appellee's combination which is not found in prior combinations of the same kind is the compensating link at the top of the door, which resists the tendency of the door to sag upon its pivots and gives it a steady movement while it is being opened and closed. All the other elements are found in the patent to the appellee of date January 7, 1890, letters patent No. 418,867. So, also, the crossbars, which are employed by the appellant, are old, they having been described in the patent to R. D. Dixon, letters patent No. 439,125, issued October 28, 1890, and, had the appellant omitted the compensating link, there could be no question but that he would have avoided infringement. But the appellant has used everything which is found in the appellee's combination, and in the manner in which it is used therein, with the single exception that he secures the result obtained by the appellee's hinges by the use of two elements: First, the separate hinges; and, second, the crossbars with the accompanying screws to equalize the pressure around the sealed joints.

[1] The two devices so used by him are clearly the mechanical equivalent of the appellee's hinges. Neither the joinder of two elements of a patented combination into one integral part, accomplishing the purpose of both, nor the separation of one integral part into two, which together accomplish substantially what was done by the single element, will avoid a charge of infringement. Bundy Mfg. Co. v. Detroit Time Register Co., 94 Fed. 524, 36 C. C. A. 375, Standard Caster & Wheel Co. v. Caster Socket Co., 113 Fed. 162, 51 C. C. A. 109; H. F. Brammer Mfg. Co. v. Witte Hardware Co., 159 Fed. 726, 728, 86 C. C. A. 202. In Kings County Raisin & Fruit Co. v. United States Consol. S. R. Co., 182 Fed. 59, 63, 104 C. C. A. 499, 503, this court said:

"Infringement is not avoided by the fact that one of the integral elements of his built-up impaling roll is by the appellant separated into two or more distinct parts, so long as the function and operation remain substantially the same."

[2] The only serious question in the case is whether the appellee, by the use of the language found in his specifications and claims, has limited himself to the precise form of combined hinges and pressure bars which he describes. The appellant earnestly contends that the appellee's combination is thus limited, that the main objects of his invention as described in the specifications are "celerity of action in

opening and closing such doors," and "to utilize the bearing bars as hinges on which the door may swing, and thus dispense with independent pivoting devices, avoiding the cost and complication of the latter," and that in claim 3 the pressing bars are limited by the words "forming also hinges for the door," so that a functional limitation is placed in the patent, and the combination is confined to one in which pressing bars not only perform the function of pressing bars, but also the additional function of hinges for the door.

To this it is to be said that the "main objects" of the invention so mentioned are not the only ones enumerated in the specifications. Another main object therein set forth is "security against leaks." Nor do we think that the language of the patent so referred to should be construed as expressing the intention of the inventor to limit his invention to the precise form described therein. What the inventor meant by using the words "main objects" was main advantages. The main advantages of his invention were indeed those which he mentioned as the "main objects" thereof, and we think the words should be so construed. To utilize, as he did, the pressure bars for hinges, was an ingenious and meritorious device. In the absence of an expressed intention on his part to limit his invention to that precise form, we do not think he should be denied the doctrine of equivalents.

[3] Error is assigned to the decree, in that it adjudges that the appellee recover of the appellant, not only the profits which he had received or made by the manufacture, use, or sale of doors in violation of claim 3 of the patent, but also the damages resulting from the infringement. It is said that the decree should have been for the recovery in excess of profits only of such sum as damages as, taken with the profits, would give the appellee complete compensation for the injury. The appellant relies on the rule stated in section 1154, Robinson on Patents, and Westinghouse et al. v. New York Air Brake Co. et al. (C. C.) 131 Fed. 607, Tilghman v. Proctor, 125 U. S. 136, 148, 8 Sup. Ct. 894, 31 L. Ed. 664, Beach v. Hatch (C. C.) 153 Fed. 763, and Peerless Brick Mach. Co. v. Miracle P. S. Co. (C. C.) 181 Fed. 526.

Section 4921, Rev. Stat. (Comp. St. 1913, § 9467), provides:

" * * * And upon a decree being rendered in any such case for an infringement, the complainant shall be entitled to recover, in addition to the profits to be accounted for by the defendant, the damages the complainant has sustained thereby; and the court shall assess the same or cause the same to be assessed under its direction."

The decree follows the language of the statute, and does not in terms alter or enlarge its provisions. We may assume that in the final decree on the accounting the court will observe the construction placed upon the statute by the decisions of the federal courts. We find nothing in the language of the decree itself which justifies us in modifying its terms.

The decree is affirmed.

CROSS PAPER FEEDER CO. v. UNITED PRINTING MACHINERY CO.

(District Court, D. Massachusetts. February 2, 1915.)

No. 543.

1. PATENTS ☞328—INFRINGEMENT—PAPER-FEEDING MECHANISM.

The Briggs patent, No. 609,954, relating to mechanism for feeding sheets of paper, one at a time, into a printing press, claim 10, which covers in combination with the feed-table a comb-wheel to advance the top sheet of a pile to the feeding-rolls, and a presser-foot to prevent the underlying sheets from being dragged forward during the action of the feeding-rolls, such devices being raised and lowered alternately, is not limited to a construction by which such movements are simultaneous, but is entitled to a broader construction as to the time of the respective movements. As so construed, *held* infringed.

2. PATENTS ☞328—INFRINGEMENT—PAPER-FEEDING MECHANISM.

The White patent, No. 659,907, for a sheet-feeding mechanism for printing presses, for throwing the feeding and separating devices out of action, which is controlled by the action of the sheets, *held* infringed.

3. PATENTS ☞202—SUIT FOR INFRINGEMENT AGAINST ASSIGNOR—ESTOPPEL.

The assignor of a patent is estopped to say that it is void for anticipation, or want of novelty or utility; and while he may, in a suit against him for its infringement, show the state of the art to limit its scope, he may not introduce evidence ostensibly for that purpose, but which in fact tends to show that the patent is invalid.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 281-289; Dec. Dig. ☞202.]

In Equity. Suit by the Cross Paper Feeder Company against the United Printing Machinery Company. On final hearing. Decree for complainant.

Benjamin Phillips, George E. Stebbins, and Alfred H. Hildreth, all of Boston, Mass., for plaintiff.

J. Sidney Stone, of Boston, Mass., and Edmonds & Peck, of New York City, for defendant.

HALE, District Judge. This suit in equity is brought for the infringement of two letters patent—the Briggs patent, No. 609,954, granted August 30, 1898, and the White patent, No. 659,907, granted October 16, 1900. The complainant acquired these patents from the defendant by assignment dated August 16, 1911.

The present suit relates to the subject of paper-feeding machines, or sheet feeders for feeding sheets of paper in rapid succession, and one at a time, into printing presses. The offending device is alleged to be a paper-feeding machine embodying the principles of both patents at issue.

[1] Claim 10 of the Briggs patent is put in issue. This claim is directed to the comb-wheel, the presser-foot, and mechanism for alternating raising and lowering. The claim is as follows:

"10. The combination with the feed-table of a comb-wheel, mechanism whereby said wheel is alternately lowered upon the bank of paper and raised therefrom, a presser-foot, and mechanism whereby said foot is lowered to hold the bank of paper when the comb-wheel is elevated, and raised to release the top sheet when the comb-wheel is lowered, substantially as set forth."

☞ For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

It will be seen that the elements of this claim are: (1) The feed-table; (2) a comb-wheel; (3) mechanism whereby the wheel is alternately lowered upon the bank of paper and raised therefrom; (4) a presser-foot; (5) mechanism whereby the presser-foot is lowered to hold the bank of paper when the comb-wheel is elevated, and raised to release the top sheet when the comb-wheel is lowered.

In this suit, paper-feeding machines of the continuous type are brought before the court. In this continuous type of machine two requirements are found: First, that a single sheet shall be separated from the supply; and, second, that such sheet shall be fed into the printing press at exactly the right time in the operation of the press. In the machines before the court, the comb-wheel is the characteristic element of the sheet-separating mechanism. This wheel consists of a rotating wheel having anti-friction rolls at its periphery, which are brought in contact with the pile of paper, and which act to comb out, or fan out, the sheets of paper, advancing the topmost sheet the greatest distance, and advancing each successive and underlying sheet a successively lesser distance. These comb-wheels are rotating continuously, and are thrown into and out of action by being lowered upon and raised from the bank of paper.

The specification starts out with this description:

"This invention relates to sheet paper feeders of that class in which the pile or bank of sheets is feathered or combed out and the sheets are fed successively from the top of the pile by one or more rotary comb-wheels. The rotary movement of these wheels, when it is intermittent, has been started and stopped by electrical devices; and the comb-wheels have been lowered upon and raised from the bank of sheets by electrical devices. One of the objects of my invention is to provide a sheet-separating mechanism of this character which is controlled solely by mechanical means."

It will be seen that the device relates to providing mechanical means for what has formerly been done by electrical devices. The comb-wheel operates mechanically to separate and advance the top sheet to a predetermined position, from whence it will be fed into the printing press at the proper time. The feeding devices consist in general of an upper feed roll, and a lower feed roll, one of which is constantly rotated; in fact, both may be constantly rotated. They are held apart until the proper time for the forwarding of the sheet to the printing press. At this time the rolls are brought together, to seize and forward the sheet of paper which has previously been separated and advanced by the comb-wheel from the bank of paper to a predetermined position, with its front edge between the forwarding rolls. The comb-wheel and the forwarding rolls are arranged to operate alternately; the comb-wheel combs out the top sheet until it is in proper position between the forwarding rolls; then this comb-wheel is raised from the bank of paper and goes out of action, leaving the sheet, with its front edge between the separated forwarding rolls; the rolls are then brought together, to forward the sheet into the press, while the comb-wheel is elevated and out of action. After the forwarding rolls have completed this operation, the top forwarding roller is raised and the comb-wheel is lowered upon the bank of paper, to comb out the next sheet, in preparation for its being forwarded into the ma-

chine. It will be seen that the forwarding rolls are separated, and so are inoperative, at the time the comb-wheel is lowered upon the paper and in action, and that, when the forwarding rolls are brought together and are in action, the comb-wheel is raised from the paper and out of action. The action of the presser-foot is explained by the complainant substantially as follows: In order to prevent the top sheet, when it is forwarded into the press, from drawing along with it by friction the second sheet, and perhaps other underlying sheets, the machine is provided with a presser-foot, or tail-clamp, as it is sometimes called, which is arranged to press upon the bank of paper in the rear of the top sheet when the comb-wheel is in its raised position, and thus hold the second and underlying sheets securely in position, and prevent the pile from being displaced, while the top sheet is being carried off the pile by the forwarding rolls. The presser-foot is intended to operate substantially with the feed-rolls and alternately with the comb-wheel; the presser-foot being in action when the forwarding rolls are operating, and the comb-wheel is raised and out of action, and being raised, out of action, when the forwarding rolls are separated and out of action and the comb-wheel is lowered and in action. This combination of comb-wheel and presser-foot forms the subject-matter of the single claim at issue. It is pointed out, too, that in the mechanism illustrated in the Briggs patent, the devices for raising and lowering alternately the comb-wheel and presser-foot are largely the same. One range of movement, however, actuates the comb-wheel, and another range of movement actuates the presser-foot; so that, while it is one mechanism which raises and lowers the comb-wheel, and also lowers and raises the presser-foot, it is a different portion of the movement which effects one result from that which effects the other result, namely, it is a different portion of the movement of the shifting arm which raises and lowers the comb-wheel from that which raises and lowers the presser-foot. While the arm is raising and lowering the comb-wheel, it has no effect upon the presser-foot; and while it is raising and lowering the presser-foot, it has no effect upon the comb-wheel. And it is pointed out, too, that in the construction illustrated in the Briggs patent both the comb-wheel and the presser-foot have a double function: The first function of the comb-wheel is to comb; the first function of the presser-foot is to press. The second and subordinate function of the comb-wheel is to act as an abutment in connection with the raising and lowering of the presser-foot; the second and subordinate function of the presser-foot is to act as an abutment in connection with the raising and lowering of the comb-wheel; and these abutment functions are entirely distinct from the combing and pressing functions of these parts, these latter functions being the only functions involved in claim 10.

Mr. Livermore, the complainant's expert, points out:

"The period of action for the comb-wheels should be during the period of inaction for the forwarding devices; and the period of action for the tail-clamp should be during the period of action of the forwarding devices. Thus the periods of action of the comb-wheels and tail-clamp alternate with one another; the period of action for the comb-wheels being when the tail-clamp

is raised from the bank and out of action, while the period of action for the tail-clamp is while the comb-wheels are raised and out of action. It is immaterial whether one of these devices comes into action at the same instant that the other goes out of action, or a little before, or a little after. For practical purposes, it is necessary only that the action of the comb-wheels should be terminated before the action of the forwarding devices begins, and that the action of the tail-clamp should begin before the action of the forwarding operation."

The specification makes it clear that the presser-foot is for the purpose of holding the pile of sheets from displacement while the top sheet is being carried off from the pile by the feed-rollers.

It is contended that there is no limitation in the claim in suit which requires the presser-foot to be lowered the instant the comb-wheel is lifted, and not to be raised until the instant the comb-wheel is lowered; that the language of the claim shows the intention of the inventor not to limit himself to the exact and particular timing of the specific form of devices illustrated in the patent—the language being intended to cover any combination of comb-wheel and presser-foot alternately raised from and lowered upon the bank of paper, the presser-foot resting upon the paper at the proper time when the comb-wheel is in a raised position to prevent displacement of the pile when the top sheet is being carried away by the forwarding rolls, and being raised to release the paper when the comb-wheel is in a lowered position to permit the comb-wheel to comb out the advancing top sheet; that the claim recites, as separate elements, the mechanism for raising and lowering the comb-wheel, and the mechanism for raising and lowering the presser-foot; that this tends to show the intent of the patentee to cover the combination of alternately raising and lowering the comb-wheel and presser-foot, even when both comb-wheel and presser-foot are raised and lowered by entirely separate mechanisms, although in the specific construction illustrated in the drawings both mechanisms are embodied in the same device; and that, when viewed in the light of the specification, claim 10 was intended to broadly cover the combination of comb-wheel and presser-foot, alternately raised from and lowered upon the bank of paper, the presser-foot resting upon the bank of paper at the time when the comb-wheel is in a raised position, to prevent displacement of the pile of sheets when the top sheet is being carried away by the forwarding rollers, the presser-foot being raised, to release the paper, when the comb-wheel is in lowered position, to permit the comb-wheel to comb out and advance the top sheet. The learned counsel for the complainant urges, too, that prior to the purchase of the patents by the complainant, before the assignment of them to the complainant, the attorneys for the defendant correctly represented that the claim was a broad one; at that time taking the same view of the scope of the patent which is now taken by the complainant.

The contention of the defendant is that claim 10 is not a broad claim; that it must be limited to a combination of the feed-table and the comb-wheel, to mechanism whereby the wheel is alternately lowered upon the bank of paper and raised therefrom, to a presser-foot, and mechanism whereby the foot is lowered to hold the bank of paper *before* the

comb-wheel is lifted, and raised to release the top sheet *after* the comb-wheel is lowered, substantially as set forth.

The defendant contends that the distinctive characteristic of the patented device is in the construction, location, and resulting capacity of both comb-wheel and presser-foot to operate side by side, in joint and co-operative relationship in accomplishing their respective functions; that the capacity of the comb-wheel and presser-foot to thus act, in a direct and pistonlike fashion, side by side, upon the margin of the sheets, remote from the following rollers, is novel, though not of any practical utility; and that such action is assumed throughout the specification, and is distinctly pointed out in claim 9 of the patent although that claim is not involved in this controversy. The defendant points out that the prior art shows all the elements utilized by Briggs to have been structurally and functionally old and well known. I do not find it necessary, in passing upon this patent, to consider in detail the several patents cited in the prior art as limiting the scope of the claim. No one of the patents brought to my attention shows the broad construction of an alternately raised and lowered comb-wheel and presser-foot shown in the claim at issue. I think the patentability of the claim rests broadly on this combination, and is in no way dependent upon the form of the elements. I find nothing in the prior art which defeats the broad claim contended for by the complainant.

In the matter of infringement, the defendant insists that the Briggs invention must be construed and limited to the specific devices shown; that the comb-wheel and the presser-foot must be elevated and lowered by substantially the same mechanism, both being substantially adjacent to the other, and both bearing upon the same portion of the bank of paper; that the claim must be limited also by interpretation to an alternate movement at intervals which occur regularly, such movements being of equal duration, the bank of paper affording an abutment whereon both comb-wheel and presser-foot must rest while shifting the comb-wheel and presser-foot alternately into an operative position; that, although this feature is not expressly included in the language of claim 10, it is to be inferred from the whole claim, and especially that it must result by implication from the final words "as substantially set forth."

An examination of the defendant's machine shows that it has a continuously rotating comb-wheel, consisting of a wheel provided with a plurality of anti-friction rollers mounted on its periphery; it has mechanism whereby the wheel is alternately lowered upon the bank of paper and raised therefrom; it has a presser-foot; it has mechanism whereby the foot is lowered to hold the bank of paper when the comb-wheel is lifted, and raised to release the top sheet when the comb-wheel is lowered.

It is principally with regard to this last-named element that the defendant bases its contention of non-infringement of claim 10. The learned counsel for the defendant maintains that, although the defendant's machine has mechanism for alternately raising and lowering the presser-foot, the foot is not lowered "when the comb-wheel is elevated," and is not raised "when the comb-wheel is lowered." He in-

sists that the timing of the movements of the presser-foot in the defendant's machine is not as defined in the claim, and that therefore the machine does not infringe the claim at issue.

The complainant maintains that the mechanism in the defendant's machine comes distinctly within claim 10. It will be seen that the defendant's expert, Mr. Jarvis, says substantially that the presser-foot is lowered and rests upon the paper only when the comb-wheel is raised and out of contact with the paper, and is raised and out of contact with the paper during the entire period when the comb-wheel is lowered and rests upon the paper; and the complainant points out that it is obvious that claim 10 cannot be limited to the simultaneous lowering of the presser-foot and elevating of the comb-wheel, and of the simultaneous raising of the presser-foot and lowering of the comb-wheel. Such construction of the claim would exclude the specific mechanism shown in the Briggs patent, for in that mechanism the movements of the presser-foot and comb-wheel are successive, and not simultaneous; and there is nothing in the claim which requires any particular order of movement.

In his affidavit, Mr. Jarvis says:

"Simultaneous engagement of both wheel and foot with the bank of sheets in the cycle of operations is absolutely essential to the working of the Briggs feeder; and in the fifth element of claim 10 the phrases 'when the comb-wheel is elevated' should properly read 'BEFORE the comb-wheel is elevated,' and 'when the comb-wheel is lowered' should properly read 'AFTER the comb-wheel is lowered.' Therefore claim 10, to embody an operative structure, should read:

"10. The combination with the feed-table, of a comb-wheel, mechanism whereby said wheel is alternately lowered upon the bank of paper and raised therefrom, a presser-foot, and mechanism whereby said foot is lowered to hold the bank of paper *before* the comb-wheel is elevated, and raised to release the top sheet *after* the comb-wheel is lowered, substantially as set forth."

"The foregoing describes an operative sheet feeder as shown and described in the Briggs patent."

Claim 10, however, does not employ the language urged by Mr. Jarvis; and I think this tends to show that the inventor intended not to limit his claim to any such timing of the parts.

I think the claim at issue is entitled to a broader interpretation than that contended for by the defendant. I find nothing in the claim which requires the specific succession of alternate movements of the presser-foot and comb-wheel. The particular order of the presser-foot is incidental to the specific construction of the presser-foot and comb-wheel, and their location side by side, so that each may serve as an abutment for raising and lowering the other. It is not essential that the presser-foot and comb-wheel should be side by side; in fact, in the complainant's operating machine, such adjacency is not shown. In regard to the essential function of these parts of the claim, the combing function of the comb-wheel and the pressing function of the presser-foot, I think it is true, as Mr. Livermore has pointed out, that it is of no importance whether the one device is raised from the bank of paper shortly before or shortly after the other is lowered upon it. The material thing is that the presser-foot shall be raised to release the top sheet when the comb-wheel rests on the bank of paper.

and is performing its combing operation, and that the presser-foot shall rest on the bank of paper in the rear of the top sheet, to hold the bank from displacement while the top sheet is being carried away by the forwarding rollers; this action taking place while the comb-wheel is held in its raised position.

Comparing the specification of this patent with that of the Garner patent, I find that, in the Briggs specification, by means of the presser-foot pressure is applied to the pile in the rear of the top sheet when the comb-wheels are raised, thereby preventing the pile of sheets from being displaced while the top sheet is being carried off from the pile by the feed-rollers.

In the Garner patent, which defendant relies on, the defendant's expert, Mr. Jarvis, says:

"The cycle of operations of the combing-roll and clamp with reference to their respective lowering to and lifting from the bank of sheets, coupled with means for feeding forward the bank as a whole 'just before the combing-wheels act,' is accurately described in the amendments. * * * The pile drag serves to tighten or compress the bank of sheets, while the combing wheels act on the top sheets; whereas the clamp devices serve to hold rigidly in position all the sheets constituting the bank except the top sheet, which is being forwarded by the withdrawing devices."

It is clear that substantially the same purpose is pointed out in the two specifications.

With reference to the timing of the two devices, I find that the Briggs patent shows an instant in which both the comb-wheel and the presser-foot are simultaneously *on* the bank of paper; in the defendant's machine there is an instant when both the comb-wheel and the presser-foot are simultaneously *off* the bank of paper. The function of the presser-foot is the same in both machines.

I am of the opinion that the defendant's machine is not materially different from the Briggs machine. I find nothing in the file wrapper which requires discussion.

I am of the opinion that the defendant's machine infringes claim 10 of the Briggs patent. Having come to this conclusion, it is not necessary to consider the question of estoppel raised by the complainant.

[2] With reference to the White patent, it is contended that defendant's machine infringes claims 1, 2, 3, 4, 6, 9, 21, 22, and 23. Claim 1 reads as follows:

"1. In a sheet feeder, the combination of a sheet-feeding device, means for throwing said device into action, a latching device for holding said feeding device in action, and mechanical devices for controlling said latching device by the sheet."

These elements are involved in this claim:

- (1) A sheet-feeding device.
- (2) Means for throwing the device into action.
- (3) A latching device for holding the feeding device in action.
- (4) Mechanical devices for controlling the latching device by a sheet.

In the specific mechanism presented, these details are pointed out by the complainant as constituting the four elements named in the claim:

(1) The sheet-feeding device is a comb-wheel.

(2) The means for throwing the device into action consists of a cam, a cam roll and slide, and connections between the slide and the comb-wheel shaft, including the rock shaft and toggle arms, which, when actuated by the cam, lower the comb-wheel upon the bank of paper where it rests under the action of gravity.

(3) A latching device for holding the feeding device in action is a lever, and the devices and connections between the lever and the arm, including a stop lever, shaft, rod, and rock-shaft.

(4) The mechanical devices for controlling the latching devices by the sheet consist of a trip lever, the lower end of which is in position to be engaged and actuated by the front edge of the sheet, thus to release, or trip, the arm.

This claim is intended to cover broadly the combination of these four elements. Other claims in issue present different details. I think the questions before the court may be discussed with reference to claim 1. The specification shows the inventor's object "to provide simple and efficient mechanical devices for throwing the feeding and separating devices out of action, which mechanism is controlled by the action of the sheets." The patentee refers to another patent "where electrical devices are employed for throwing the combing devices out of action." The specification points out that these electrical devices are liable to derangement, but that in the present invention "the action of the combers, or other separating or feeding devices, is controlled by purely mechanical devices which do not easily get out of order."

[3] Several patents are cited by the defendant, in the prior art, tending to limit the scope of the claims in issue in the White patent. I find that no one of them discloses the broad combination of comb-wheel, latch, and mechanical tripping device. The only exception to this is found in the Imray British patent. In respect to this patent the complainant says, if it discloses an operative machine, and if the wheel is a comb-wheel, it anticipates clearly every claim in the White patent. The defendant denies this, and says it merely *limits* the White patent. It will be found that the Imray patent shows the combination of comb-wheel, latch, and mechanical tripping devices. It appears to me to have in it all that is patentable in the White patent.

It is well settled that the assignor of a patent is estopped to say that his patent is void for want of novelty or utility, or because anticipated by prior inventions. He may deny infringement; he may show the state of the art, to limit the scope of the patent which he has assigned; but he cannot introduce testimony invalidating the assigned patent. *Noonan v. Chester Park Athletic Club*, 99 Fed. 90, 39 C. C. A. 426; *Smith v. Ridgely*, 103 Fed. 876, 43 C. C. A. 365; *Adee v. Thomas* (C. C.) 41 Fed. 342. It is settled, too, that the inventor who has assigned the patent for his invention cannot be permitted, in a suit against him for its infringement, to introduce evidence for the ostensible purpose of so narrowing the scope of the patent as to avoid infringement, but which in fact tends to show that it is invalid for want of novelty. *Alvin Mfg. Co. v. Scharling* (C. C.) 100 Fed. 87.

In the case at bar the defendant, the assignor of the White patent in suit, is, I think, estopped to say that this patent is anticipated by the Imray patent.

The defendant contends that it does not infringe the White patent, because in defendant's feeder the latch performs no function in holding the comb-wheel in action, and that this is the essential and persistent element in each of the claims in issue. The learned counsel for the defendant contends that the defendant's latch serves solely to hold, and afterwards to release, a pawl to engage the ratcheted swinging arm *after* the comb-wheel has performed its function, thereby putting other mechanism into relative contact with the comb-wheel mechanism by which, through the continuing operation of the feeder as a whole, the comb-wheel is lifted out of operative contact with the sheets. He urges that gravity alone keeps the comb-wheel in action in the defendant's feeder, while in the White device gravity plus a positive latching device holds the comber in action; that the White patent inserts a strained spring in the feeder, *always* acting to throw the comb-wheel out of action; while the defendant's feeder omits any such latching device for holding the comb-wheel in action. He insists, then, that in the defendant's device the third specific element is omitted, namely, "a latching device for holding the feeding device in action."

The complainant contends that the White patent clearly does not intend to limit the method of throwing the comb-wheel out of action to means of a directly acting spring; that such means are found in the defendant's machine in the lifting foot, the spring-pressed pawl, and the mechanism interposed between these two parts; that this throwing-out mechanism is ready to operate as soon as restraint on the pawl is removed; that it is immaterial, so far as infringement is concerned, that in the machine of the White patent the comb-wheel is thrown out of operation by the action of a previously compressed spring, while in the defendant's machine the power required to raise the comb-wheel is applied after the latch has been tripped; that in each case the comb-wheel is automatically raised by power derived from the machine. The defendant's machine is quite complicated. At the hearing I found the aid of the experts to be of great interest and of value in examination of the machines. I have not entered into a detailed description of the machines. I do not find this necessary, in order to decide the precise issue raised in this controversy. The defendant's machine appears to be like that of the White patent, in that the comb-wheel rests on the bank of paper by gravity, and is free to be lifted off the paper at all times. I do not find in either machine that there is any positive holding or pressing of the comb-wheel against the bank of paper to maintain it in action. I find in both machines devices which naturally tend to throw the comb-wheel out of action, and that these devices are restrained and held from operating by means of a latching device. In the defendant's machine the tripping of the latch throws into operation certain devices which, through the movement of the machine, raise the comb-wheel out of action. In the White machine the tripping of the latch releases a spring which, by means of mechanism connected with it, at once raises the comb-wheel. I cannot

see that this difference is vital. Nothing in the claim in issue limits the means of throwing the comb-wheel out of action to those of a directly acting spring. It will be seen that some of the claims of the White patent refer to a spring. Claim 1 does not make such reference. It seems clear that the inventor does not intend to limit himself to a spring.

Giving the claims in issue the interpretation to which I think they are entitled, I find that the defendant's machine infringes the claims in issue of the White patent.

I find, then, that claim 10 of the Briggs patent is valid and infringed.

I find that claims 1, 2, 3, 4, 6, 9, 21, 22, and 23 of the White patent are valid and infringed.

Let a decree be drawn accordingly. The complainant recovers its costs.

UNITED PRINTING MACHINERY CO. v. CROSS PAPER FEEDER CO.

(District Court, D. Massachusetts. February 2, 1915.)

No. 569.

PATENTS ~~©~~202—ASSIGNMENT—EFFECT AS ESTOPPEL.

The owner of a patent cannot sell and assign his rights thereunder to another, and by means of a suit for infringement of an older and broader patent, subsequently acquired by him and covering the same invention, deprive his assignee of the full benefit of what he purchased.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 281-289; Dec. Dig. ~~©~~202.]

In Equity. Suit by the United Printing Machinery Company against the Cross Paper Feeder Company. On final hearing. Decree for defendant.

J. Sidney Stone, of Boston, Mass., for plaintiff.

Alfred H. Hildreth, of Boston, Mass., for defendant.

HALE, District Judge. This is a suit in equity, brought for the infringement of the Philpott & Briggs United States letters patent No. 626,631, granted June 6, 1899, the application for which was filed in the Patent Office October 6, 1896. The patent is for a paper-feeding machine.

In paper-feeding machines of the continuous feeder type, the subject-matter of the invention is the employment of a pressure-roller device, bearing against the sheets, as they pass from the supply-table to the feed-table.

Claims 1 and 2 of the patent are claimed by the complainant to be infringed by the defendant. These claims are as follows:

"1. The combination with the feed-table, the supply-table, and the feed-wheels arranged at one end of the supply-table and adapted to feed the sheets from the supply-table to the feed-table, of a pressure-roller which bears against the sheets as they pass from the supply-table to the feed-table, a rocking support in which said roller is mounted, a gear-wheel mounted concentric with said roller, an intermeshing gear-wheel mounted concentric with

the pivot of said rocking support, and a driving mechanism whereby said intermeshing gear-wheel is driven from the shaft of said feed-wheels, substantially as set forth.

"2. The combination with the lower feed-table, the upper supply-table, and the feed-wheels arranged on a shaft at one end of the supply-table and adapted to feed the sheets from the upper to the lower table, of pressure-rollers bearing against the sheets as the latter pass over the feed-rollers, and mounted on a transverse shaft, rock-arms provided with bearings in which the pressure-roller shaft is journaled and hung upon a supporting-rod, a chain belt passing around sprocket-wheels mounted, respectively, on the feed-wheel shaft and the supporting-rod, and intermeshing gear-wheels secured, respectively, to the pressure-roller shaft and the sprocket-wheel mounted on the supporting-rod, substantially as set forth."

The defense relied upon by the defendant is that the complainant is estopped to prosecute this suit by reason of the fact that it had previously sold to the defendant the patent covering the same mechanism now alleged to infringe the patent in suit, subsequently acquired by the complainant.

On August 16, 1911, the complainant sold to the defendant the Briggs patent, No. 609,954, the White patent, No. 659,907, and the Briggs & Cross patent, No. 613,793.

The testimony shows that the price paid was \$50,000. The amount paid, however, may be immaterial as to anything in issue in this case. By the terms of the assignment, the complainant in this case sold to the defendant "the entire right, title, and interest in and to the invention therein described and claimed." It covenanted that it was the lawful owner of the letters patent, and that the patent was free and clear, except for certain specified licenses. It released the Cross Company and all purchasers of its machines from all claims and demands which have accrued, or which might accrue, on account of the infringement of letters patent, or any of them, by the Cross Paper Feeder Company.

The defendant's machine—the alleged offending machine—as constructed both at the time of the assignment and at the present time, embodies the invention defined in claim 7 of the Briggs & Cross patent, No. 613,793. The claim under which the machine is constructed is as follows:

"7. The combination with the lower feed-table, the upper supply-table, and the feed-wheels mounted on a shaft and adapted to feed the sheets from the supply to the feed-table, of pressure-rollers bearing against the sheets opposite the feed-wheels and mounted on a shaft, rock-arms rigidly secured to a rock-shaft and provided with bearings in which the shaft of the pressure-rollers is journaled, and driving mechanism whereby the pressure-rollers are driven from the shaft of the feed-wheels, substantially as set forth."

It appears in testimony that on May 19, 1914, the Cross Paper Feeder Company brought suit against the United Printing Machinery Company, alleging infringement of the Briggs patent, No. 609,954, and the White patent, No. 659,907. This suit is numbered 543 in this court, and has already been heard and decided by the court. 220 Fed. 313. In July, 1914, the United Printing Machinery Company purchased the Philpott & Briggs patent, No. 626,631, in the open market, and brought suit upon it.

It will be seen that claim 1 of the patent in suit is of a somewhat broader character than claim 7 under which the defendant's machine is built; but it will be found that the invention defined in claim 7, and embodied in the defendant's machine, shows the same invention as that described in the claims of the patent in suit. It was this invention of which the complainant covenanted it was the lawful owner, and that it had a good right to convey, and that the invention was free from all incumbrances. It was this mechanism which constituted one of the inventions sold by the complainant to the defendant. The complainant now seeks to prevent the defendant from using this mechanism. In order to prevent its use, it sets up an after-acquired patent of broader scope covering the same structure.

The defendant says that, after the complainant has sold to it the right to use this invention and improvement, and while still retaining the consideration for the same, it ought not to be allowed to restrain the defendant from using that improvement; it ought not to be permitted to set up a broader patent on the main invention, and thereby prevent the defendant from using the improvement sold to it by the complainant.

In Walker on Patents, § 313, it is said:

"Where a person sells a patented machine to another without having any interest in or under the patent, he will be estopped from prosecuting his vendee for infringement on the basis of any after acquired title. And where a person sells a patent which employs an invention which infringes a prior patent, the person selling is estopped from bringing an action against his grantee for that infringement; and that estoppel operates as a license, not only as against the seller, but also as against owners in common with him of the prior patent."

Robinson on Patents, § 787, states the principle.

This equitable principle seems to be also sustained by authority. A patentee cannot sell his rights to another, and buy or obtain control of an older patent, and, through such older patent, dispossess his assignee of the full benefit of what he purchased. *Faulks v. Kamp* (C. C.) 3 Fed. 898; *Curran v. Burdsall* (D. C.) 20 Fed. 835.

Few cases can be found touching the precise question. The learned counsel for the complainant contends that the decisions of the Supreme Court do not sustain this doctrine; but he has cited no cases to sustain his contention.

I find no equity in a bill in which the complainant seeks substantially to keep what it has sold, and to prevent the defendant from having what it has bought. I am forced to the conclusion that there is no equity in the bill.

The bill is dismissed, with costs for the defendant.

IRVING-PITT MFG. CO. v. TWINLOCK CO. (McMILLAN BOOK CO., Intervener).

(District Court, S. D. New York. December 5, 1914.)

No. 4-147.

1. PATENTS ☞290—SUIT FOR INFRINGEMENT—PARTIES.

Where, pending a suit for infringement against a dealer in the alleged infringing article, complainant acquires all of the property and rights of defendant, the manufacturer of such article may, on intervention, ask that the suit be dismissed for want of adversary parties, or it may assume the defense, in which case the suit will be tried on its merits, notwithstanding the absence of the original defendant.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 470-472; Dec. Dig. ☞290.]

2. PATENTS ☞328—VALIDITY AND INFRINGEMENT—LOOSE-LEAF BINDER.

The Pitt patent, No. 778,070, for an improvement in loose-leaf binders, held not anticipated, valid, and infringed as to claims 1 to 9, inclusive, and not infringed as to claim 10.

In Equity. Suit by the Irving-Pitt Manufacturing Company against the Twinlock Company, in which the McMillan Book Company intervened as defendant. On final hearing. Decree for complainant against intervener only.

John C. Pennie, of New York City, for complainant.

William W. Dodge, of Washington, D. C., for defendant.

ROSE, District Judge. The complainant is the owner of letters patent No. 778,070, issued December 20, 1904, to William P. Pitt, for improvement in loose-leaf binders. It originally brought suit against the Twinlock Company for alleged infringement of the patent, consisting in the selling by defendant of loose-leaf books manufactured by McMillan Book Company. The New York agent of the Twinlock Company (hereinafter for brevity called "Twinlock") employed competent patent attorneys and also notified the McMillan Book Company (hereinafter referred to as "McMillan"). The headquarters of the Twinlock were in Cincinnati. Its officers apparently did not care enough for the right to sell the McMillan books to make a fight for the privilege. They accordingly offered to submit to an injunction, provided that it should not be required to account to the complainant or pay any costs. The then parties agreed on the form of the decree, which, as usual, adjudged the patent good and valid and that the Twinlock had infringed, that there should be no accounting for damages, and that no costs should be awarded to either party.

Such a decree should have contained a statement that it was entered *by consent*. Doubtless if it had actually been presented to the judge for signature, he would of his own motion have made such insertion. It is quite common for decrees agreed upon under such circumstances to be submitted, without saying on their face that they are *by consent*. The court, however, before signing them, should always be careful to require that statement to be inserted. The fact that the parties did not themselves put it in does not, to my mind,

☞ For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

show that they had any improper purpose in view. It has never been presented to the court for signature, because on the 23d of May, 1910, McMillan asked for leave to intervene to defend the suit. Over complainant's objection such permission was granted.

When the McMillan filed its answer, it charged that the suit as originally brought against the Twinlock was fraudulent and collusive, and the result of a conspiracy between the complainant and the Twinlock to injure the McMillan. Complainant moved that such allegations should be stricken out of the answer as scandalous and impertinent. Judge Noyes, before whom this motion was heard, was not, however, so satisfied of its total irrelevancy as to think it his duty to expunge it; but he distinctly refrained "from expressing any opinion upon the question whether the allegations, if substantiated, would constitute in themselves a defense to the suit or require its dismissal." This order was entered on the 7th of January, 1911. For two years thereafter nothing was done.

The McMillan then gave notice to the complainant that it proposed to take proofs on its behalf. Thereupon the complainant sought to have its case dismissed, setting forth as a reason for so doing that it found that the patent, when issued, had been issued to the Irving-Pitt Manufacturing Company, a partnership, and not to the Irving-Pitt Manufacturing Company, a corporation, which had brought the suit. The copartnership, it is true, had intended to assign all its property to the corporation; but complainant was doubtful whether it could prove that a sufficient assignment of the legal title to the patent had been made. The McMillan opposed the dismissal of the suit, and in order to prevent it stipulated that for the purpose of this case it should be taken as admitted that the title of the complainant was sufficient.

[1] All the proofs having now been taken, McMillan insists that the bill should be dismissed because of what, in its view, was the collusive character of the original suit. There is no sufficient evidence that there was any collusion in its institution, and I do not believe that there was. Courts will not hear a suit to which there are not at least two parties genuinely antagonistic to each other. I think complainant is justified in its claim that when this suit was brought there were two such parties, and that they were still such, even at the time at which the agreement for a consent decree was entered into. A number of months after the intervention of the McMillan, the Twinlock had a disastrous fire. It subsequently sold out the tangible salvage from it, together with its American patents and the good will of its domestic business, to the complainant. No decree against the Twinlock had then been made, and thereafter no decree in favor of the complainant and against the Twinlock could have been properly entered.

But before the complainant acquired any of the property rights of the Twinlock, McMillan had come into the suit. It was then in the position to do either one of two things: It could, as the intervenor did in *Wood Paper Co. v. Heft*, 8 Wall. 333, 19 L. Ed. 379, ask that the case should be dismissed because there were no longer two parties before the court; or it could say:

"Any decree which the complainant may get against the Twinlock will prejudice my interest. It is my goods that complainant says infringe its patent. I am ready to meet that issue, and I want to. This case offers as good an opportunity as any other to do so. I will come in and defend this action on its merit."

That is the position it did take. It forced the fighting. It resisted complainant's motion to dismiss, and proceeded to take testimony. Having elected to do so, it must abide the result. The cases which it cites to the contrary are not in point. They merely recognize that it had the right to take the first alternative above stated, if it had chosen to do so. Courts of equity require complainants to have clean hands, but they are not criminal courts. They abhor forfeitures. They cannot forfeit complainant's patent, or even its right to prevent the McMillan from infringing it, merely because complainant may have sought to get a decree against Twinlock of which some unfair use might possibly have been made in subsequent litigation with McMillan.

But, as already said, I do not find that complainant's hands were soiled when it came into court, or that they have since acquired anything more than the ordinary grime of litigation. McMillan commented upon the obvious failure of the complainant to press its case with vigor and energy. Such failure might have given the defendant a good reason to move for a dismissal for want of prosecution. It did not see fit to do so. What actually happened may suggest to the court the prudence of scrutinizing complainant's proofs and arguments with something more than ordinary care. It is not perceived that in the present state of the record complainant's tardiness has any other significance. The case must therefore be decided on its merits.

McMillan set up the defense of invalidity and noninfringement. The invention is for an improvement in loose-leaf books provided with a cover and hooks or rings for securing the loose leaves. The inventor was far from the first comer into this general field. Many patents for various forms of such books, or of devices to form a part of them, had preceded his. As under such circumstances is to be expected, the McMillan finds most or all of the separate elements of complainant's combination in the prior art. That, however, is unimportant, if in fact complainant has made a new and useful combination of some of these elements and in doing so has exercised what is (for want of better term) called inventive genius.

The patent says the invention has two objects: (1) To provide means whereby the hooks may be readily opened and closed by simply drawing their free ends apart or pressing them together, so that loose leaves may be readily attached, or removed when desired; and (2) to arrange the several parts of the device in such manner that they may be readily secured to the back of the cover and to each other without the use of rings or other permanent fastenings, so that, when necessary, they may be readily detached from each other and the cover to make repairs.

These results he has obtained by combining three elements: (1) A spring plate of some resilient metal, slightly curved, somewhat like the back of a book. It has its outer longitudinal edges turned in in such

a way as to form grooves into which the edges of the plates forming the second element may be placed. (2) Two hook plates, as the patentee calls them. Each of these plates supports a plurality of hooks or segments of rings so located that, when the two hook plates are placed in position, the segments when brought together will fit into each other. One of these plates has on its inner longitudinal edge a V-shaped groove, and the other a V-shaped tongue, which will fit into the groove in the other. These hook plates are of such width that when in position they are subject to a springlike pressure of the back plate. (3) A retaining plate, shaped very much like the back plate. It, like the latter, is usually, though not necessarily, somewhat curved. Its upper longitudinal edges are turned in, so that it may be fitted over the back plate and hold the hook plates and the back plate together.

When it is desired to equip a cover with such a device, the back plate is laid in position on the inner cover of the book. The two hook plates are put in, so that the V-shaped tongue fits into the V-shaped groove. A strip of cloth, with proper spaces for the hooks, is put over them, and then the back plate, which has slots cut in it to enable it to be put over the hooks, is put on. The edges of the cloth are pasted or otherwise secured to the cover. The device is then ready for use. Ordinarily the rings are in a closed position. They may be opened by the fingers, which are required to exercise force enough to overcome the spring pressure of the back plate, which may sometimes be increased by a similar springlike action of the retaining plate. As the rings are opened the inner edges of the hook plate, held together as they are, constitute a hinge or toggle. As the rings open, the inner edges of these plates rise upward until their further progress is arrested by the retaining plate. In that position the pressure of the spring plate holds them firmly until the fingers, by moving the rings toward each other, reverse the operation.

The patent says that the novel features of the invention reside in a pair of interlocking plates, which carry the hooks and hold them in an opened or closed position, a spring plate which reliably holds the hook plate from accidental movement when the hooks are in an open or closed position, and a retaining plate which holds the hook plate and spring plate together.

It will serve no useful purpose to review any of the many patents which the McMillan puts in evidence. Suffice it to say that I do not find in any of them any anticipation of the combination which is described and claimed in the patent in suit. It is useful and has gone into large use. It has in practice superseded the various devices which were on the market when it was offered to the public. A good deal of its success may be due, as the McMillan says it is, to the skill and energy with which its sale has been pushed, and to the fact that similar qualities have not been at the command of its competitors. Nevertheless, it has merits sufficient to account for its popularity. It weighs little. It has few parts. It cannot easily get out of order. It is sightly in appearance.

The patent has 10 claims. Nine of these relate to the construction of the metallic parts of the device. The tenth is for the combination claimed in the first nine, with the added element of a strip of cloth

arranged with its central portion interposed between the spring plate and the retaining plate, and adapted to be secured at its opposite side to the cover. On no sustainable theory of the construction and operation of the McMillan devices do they infringe this claim. It is true that those devices are fastened to the cover of a book by a strip of cloth, and that such strip is inserted between two of their plates; but it is not inserted, as the patent says it shall be, between the back plate and the retaining plate, but is placed between what corresponds to the back plate of the patented device and another plate or strip which McMillan fastens on the back of such back plate.

The complainant's expert says that this additional plate or strip is also a retaining plate. It unquestionably retains some things, as, for example, the strip of cloth in question; but it does not keep the back plate and the hook carrying plates together, which is the primary function of the retaining plate of complainant's patent. That work in defendant's devices is done by a plate which is the precise equivalent of the retaining plate of the patented device; but the strip of cloth does not pass between the back plate and this retaining plate. It is very old to fasten one thing to another by a strip of cloth. Complainant has no right to monopolize any other way of doing this than that claimed in his patent. The range of equivalence is very narrow. McMillan does not infringe the tenth claim of the patent in suit.

The first claim is for the combination of—

"a plurality of interlocking hook-carrying plates adapted to hold the hooks in an open or closed position, a spring plate engaging the hook plates and adapted to secure them from accidental movement when the hooks are in an open or closed position, and means for reliably holding the hook plates and the spring plate together."

It is not necessary to consider particularly claims 2 to 9. If claim 1 is valid and infringed, so are they.

Two different devices, made and marketed by McMillan, are alleged by complainant to infringe. Each of them has a retaining plate. Each of them has what appears to be a back plate. McMillan says, however, that this back plate is not such as that described in the patent in suit, in that it is not a spring plate and does not in any wise perform the functions thereof. According to the McMillan's contention, its back plate is simply a holding or retaining plate, and serves no other purpose. How far this contention is well founded will be presently considered. The eye can readily detect certain differences between the hook plates of complainant's patent and the hook-carrying members of either of McMillan's combinations. In one of these there are hook plates; but each of them is slotted in such fashion that there is a narrow strip of metal between the slot and that one of its longitudinal edges which comes in contact with the companion plate.

McMillan says that, although these hook plates are fitted into the back plate, the springlike action which holds the hooks in their open or in their closed position, as the case may be, is given by that narrow strip of metal in the hook plates themselves which lies between the slots and their longitudinal edges. In the other form of device McMillan, instead of two hook plates, uses three wires. On each of

these wires are C-springs mounted in such fashion that the spring on each outer wire presses against and coacts with a spring on a central wire. These springs admittedly give the hingelike action of complainant's device; but according to the McMillan they, and they alone, furnish also all the spring action by which its device is made operative.

Complainant says that, even if so much be granted, each of the devices infringes upon its patent. It claims that, whether the springlike action is the result of the slot in the one device or of the C-spring in the other, they each work in an equivalent way, by the use of equivalent means, to produce the same result as that described in complainant's patent. This contention cannot be sustained. Complainant did not claim to have discovered that in books of this character springlike action of this kind might be useful. That was well known before his day. Whether he could have worded his claims more broadly than he did is a question not before this court. In every one of his claims he has the spring plate as one of his essential elements, and separate hook-carrying plates as another. The claims of complainant's patent cannot be read upon any device which does not contain such spring plates.

Complainant says that even so the McMillan devices infringe, because in each of them there is a spring plate which holds the hook plates and exerts upon them the characteristic springlike pressure. Whether the complainant is right in this connection is a sharply contested question of fact. The McMillan says it makes its plate out of stiffer and less resilient metal than that used by the complainant. Any possible springlike capabilities that such a back plate may have are further reduced by putting upon its back another metal plate or strip which, as before explained, serves to hold the cloth which fastens the device to the cover. It admits that there is a springlike action in each of its devices, but says that in one of them such action is produced by the slotted edges, and in the other by the C-springs, and by those edges and springs alone.

Complainant points out that the McMillan says in effect that it uses a back plate; that this back plate would very well work as a spring, but that it takes pains to keep it from doing so, and thus goes to quite an appreciable amount of trouble and expense to supply the springlike action in another way, all of which would be altogether unnecessary if the back plate were allowed to do its natural work. That may be true. I think it is. But the complainant has the sole right in a combination of this character to use the back plate as a spring plate. It has appropriated the straight and easy road to the desired goal; but, if it has not validly claimed a more precipitous and less convenient bypath, the McMillan may take the latter, if it will.

The real question in the case is whether the McMillan back plate is not also a spring plate. Its hook plates in either form, whether of wires or slotted plates, are the equivalent of the hook plates of the patent in suit, the claims of which may be read upon them. The evidence shows, I think, that either McMillan's slots or McMillan's C-springs will give sufficient spring action. But it also shows that its back plates operate as spring plates, and would do the work without the use of either the slots or the C-springs. It is not entitled to use

complainant's combination, even although it has added something to it, so long as the former continues to operate as complainant intended it should. In other words, McMillan cannot use complainant's spring at all. Whether it also uses another is immaterial. Nor does the fact, if it be such, that McMillan uses but a small part of the power which it might get from complainant's form of spring, acquit it from the charge of infringement, provided it does use some of that power, as the evidence satisfies me that it at least sometimes does.

[2] It follows that the complainant is entitled to a decree that its patent is valid, and that each of the two McMillan devices infringes the first nine claims (but that neither infringes the tenth claim) thereof, and for an injunction and accounting against the McMillan, which must pay costs incurred since the date of its intervention. There can be no decree against the Twinlock.

INDIVIDUAL DRINKING CUP CO. v. UNITED STATES DRINKING CUP CO.

(District Court, D. New Jersey. September 11, 1914.)

1. PATENTS ~~172~~—SCOPE—DIFFERENT FORMS OF DEVICE.

A patentee is deemed to claim every form in which his invention may be copied, unless he manifests an intention to disclaim some of those forms, or where form and substance are inseparable.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 247; Dec. Dig. ~~172~~.]

2. PATENTS ~~35~~—EVIDENCE OF INVENTION—COMMERCIAL SUCCESS.

That the device of a patent is the only practical one which supplies a recognized want and has gone into general and extensive use is sufficient to turn the scale in favor of invention when it is in doubt.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 39; Dec. Dig. ~~35~~.]

3. PATENTS ~~328~~—VALIDITY AND INFRINGEMENT—HOLDER FOR INDIVIDUAL DRINKING CUPS.

The Luellen patent, No. 1,043,854, for a device for storing and dispensing individual drinking cups, was not anticipated and discloses invention; also held infringed.

In Equity. Suit by the Individual Drinking Cup Company against the United States Drinking Cup Company. On final hearing. Decree for complainant.

Clifford E. Dunn, of New York City, for complainant.

Howard H. Williams, of New York City, for defendant.

HAIGHT, District Judge. The bill in this case seeks to enjoin an alleged infringement of United States letters patent No. 1,043,854, granted to Lawrence W. Luellen, and dated November 12, 1912. The subject-matter of the patent is a device for storing and dispensing individual drinking cups in a simple and sanitary manner. Its object, broadly stated, is to provide a substitute for the public drinking cup.

It had been recognized for a number of years that the public drinking cup was a menace to health, and that something was needed to

take its place. The difficulty had been to find an adequate substitute; some means whereby an inexpensive cup (which after one use could be discarded) could be dispensed to the public easily, simply, and in an entirely sanitary manner. It is unquestionable that the device of the patent in suit, if it did not wholly solve the problem, at least went a long way towards doing so. When it was put upon the market it was very generally accepted, and now has a large and extensive use. It is also clear that before this device was placed upon the market no adequate or satisfactory device had been found.

The defendant contends both that its device does not infringe the patent and that the latter is invalid. The contention regarding non-infringement is based entirely on the theory that the drawings of the patent in suit indicate that the nest of cups is to be inserted in the dispensing chamber at the top thereof, and that the defendant's device permits the insertion of these cups at a point adjacent to the opening at the bottom. This contention is without merit. The exhibits of the complainant's device are constructed, so far as the place for inserting the nested cups is concerned, the same as defendant's device. The claims of the patent do not limit or describe where the nested cups are to be inserted in the dispensing or receiving chamber, and in fact the specifications state that many modifications and changes may be made from the forms specifically shown and described therein. This feature of the device is of little importance. The main feature is the means whereby the nest of cups is retained in the receiving chamber, and which permits a part of one cup at all times to project from the chamber, so as to be easily withdrawn, and at the same time keeps the rim, which touches the lips, free from any contamination.

[1] The defendant's device clearly embodies the features set forth in the claims of the patent. The same elements, co-operating in the same way, are present in both. There is at the most but a slight and unimportant change in form, which in no way changes the functions or mode of operation. This does not avert infringement, as it is well settled that an inventor, in contemplation of law, is deemed to claim every form in which his invention may be copied, unless he manifests an intention to disclaim some of those forms, or where form and substance are inseparable. *Winans v. Denmead*, 15 How. 330, 14 L. Ed. 717. The patentee of the patent in suit has specifically disavowed any such intention.

The main contention of the defendant is that the patent is invalid, because, in view of the prior art, it lacks invention. Eight patents were offered in evidence to support this contention. Of these, however, only three need be considered. The others do not seem to be seriously relied upon. They in no sense can be considered as anticipating any of the claims of the patent. In fact, it is difficult to see why they were introduced. Some of them, namely, the Van Sant, Ford, and Sorg patents, serve, however, to show that the necessity of a device for dispensing individual drinking cups has been recognized since 1890. The only patents which need be discussed (and for that matter they only are dwelt upon by counsel) are the Dean patent, No. 466,298, granted in 1891, for a "magazine holder for cartridges," the Wilson and Neely patent, No. 570,113, granted in 1896,

for a "cork cabinet," and the Peirce patent, No. 494,346, granted in 1893, for a "cup holding and *lifting* attachment for public drinking places."

All of these patents were before the board of examiners in chief when the patent in suit was granted, and were discussed by them. While the Peirce patent was designed to dispense individual drinking cups, through the form of a stack of nested cups in a receiving or retaining chamber, it did not operate on a principle at all similar to that of the patent in suit. As expressed in the title of the patent, it was for a "*lifting*" device. The cups are forced upwards in the chamber by means of pulleys attached to a block placed under the nest of cups. The pulleys are operated by means of a pulley rod and a handle, so that when one desired a cup he would pull up the handle, which would, through the pulleys and block, force the nested cups so that the bottom of at least one cup could be grasped for removal. In the patent in suit the cups are successively placed in position for removal by force of gravity, and retained in that position by the peculiar construction of the tube opening.

By a forced construction, the language contained in certain of the claims of the patent in suit may be broad enough to describe a device such as that covered by the Peirce patent. The third claim of the patent in suit, however, clearly cannot be covered by the Peirce patent, for it provides for "a delivery opening at the *lower* end thereof, through which said cups are adapted successively to project." The receiving chamber in the Peirce patent had its delivery opening at the upper end.

The Dean patent was designed for holding and dispensing cartridges. It contained a dispensing chamber, to be made of "leather, duck, canvas, or analogous material," and a metallic tube at the lower end thereof, made in such a way as to engage the flange of the cartridge and at the same time possible of being flexed, so as to permit the withdrawal of the lowermost cartridge. As it is withdrawn, the next cartridge is designed to then fall in place, ready for delivery; but it is prevented from leaving the dispensing tube or pouch, until withdrawn, because of the means provided in the tube to engage the flange of the cartridge. It is quite evident that the principle of this device and that of the patent in suit, while in a broad sense similar, is in an important particular opposite. The one operates on the principle of being flexed by the object to be withdrawn, while the other permits withdrawal by reason of the flexibility of the object to be withdrawn.

The Wilson & Neely patent covered a cork cabinet. One of the elements of the combination is a set of tubes secured to the door of the cabinet. The tubes contain corks, placed one above the other, the lowermost projecting beyond the end of the tube, so that it may be grasped for removal. Upon withdrawal of the lowermost cork the next comes into position to be withdrawn. The end of the tube is "crimped," so that the larger end of the cork is engaged by it, while the smaller end projects beyond. By reason of the flexibility of the corks they can be withdrawn. This is quite similar in principle to the patent in suit, but it is not designed to handle such fragile objects

as paper cups, which seem to acquire the necessary resisting strength from the nesting feature.

Assuming that either of these devices, by alterations, could have been made to perform the same function and could be put to the same use as the device of the complainant's patent (which is all that the defendant contends), the question is whether their adaptation to the new use involves invention or ordinary mechanical skill. The rule applicable, as stated by Mr. Justice Brown in *Potts v. Creager*, 155 U. S. 597, 15 Sup. Ct. 194, 39 L. Ed. 275, is as follows:

"If the new use be so nearly analogous to the former one that the applicability of the device to its new use would occur to a person of ordinary mechanical skill, it is only a case of double use; but if the relations between them be remote, and especially if the use of the old device produce a new result, it may at least involve an exercise of the inventive faculty."

[2] It is entirely clear that the respective uses to which the Wilson & Neely and Dean devices were designed to be put are not analogous to that of the patent in suit. The relations between them are remote. A new and valuable result has been produced. The device of the patent in suit has gone into general and extensive use and displaced other devices for dispensing individual drinking cups, and for that matter is the only practicable substitute for the public drinking cup which has yet been found, thereby supplying a recognized want. These considerations are sufficient to turn the scale in favor of invention, when it is in doubt. *Potts v. Creager*, *supra*; *O'Rourke Engineering, etc., Co. v. McMullen*, 160 Fed. 939, 88 C. C. A. 115 (C. C. A. 2nd Cir.); *Steiner & Voegly Hardware Co. v. Tabor Sash Co.*, 178 Fed. 841 (C. C. N. J.); *Protector Last Co. v. Pell*, 204 Fed. 453 (D. C. N. J.). The device is simple, but this very feature was necessary to make it satisfactory and accomplish its general purpose; i. e., supplant the public cup.

Although the evidence shows that the necessity for a means of providing and dispensing individual drinking cups in a sanitary manner has been evident for a long time, and although the Dean patent was granted in 1891, and the Wilson & Neely patent in 1896, it had never occurred to any one before the patentee of the patent in suit to apply the principle of either of those patents to that of dispensing individual drinking cups. This very fact was said in *Hobbs v. Beach*, 180 U. S. 392, 21 Sup. Ct. 409, 45 L. Ed. 586, to be evidence that the man who discovered the possibility of the adaptation to the new use was gifted with the prescience of an inventor. See, also, *Westmoreland Specialty Co. v. Hogan*, 167 Fed. 327, 93 C. C. A. 31 (C. C. A. 3d Cir.).

[3] The invention of the present patentee consisted, not in changing the devices of the Dean and Wilson patents to perform the function of the patent in suit, but rather in the idea that it could be done. *Hobbs v. Beach*, *supra*, 180 U. S. 393, 21 Sup. Ct. 409, 45 L. Ed. 586; *Potts v. Creager*, *supra*, 155 U. S. 607, 15 Sup. Ct. 194, 39 L. Ed. 275. My conclusion, therefore, is that the patent in suit involved invention and is valid.

There will be a decree for the complainant.

INDIVIDUAL DRINKING CUP CO. v. OSMUN-COOK CO.

(District Court, D. New Jersey. January 29, 1915.)

No. 838.

1. PATENTS ☞328—VALIDITY AND INFRINGEMENT—HOLDER FOR INDIVIDUAL DRINKING CUPS.

The Luellen patent, No. 1,043,854, for a device for storing and dispensing individual drinking cups, was not anticipated and discloses invention; also *held* infringed.

2. PATENTS ☞183—ASSIGNMENT—EFFECT OF ASSIGNMENT OF PENDING APPLICATION.

It is not essential that an assignment of a pending application for a patent should contain a request that the patent issue to the assignee, in order that it should automatically vest the legal title thereto in the assignee when issued.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 259-262; Dec. Dig. ☞183.]

3. PATENTS ☞183—ASSIGNMENT OF APPLICATION—CONSTRUCTION AND EFFECT.

An instrument by which an inventor assigns a pending application for a patent, and any patent which "may be" granted thereon must be construed as intended to pass, not only the assignor's inchoate right, but also the full legal and equitable title to the patent when issued and to the invention covered thereby.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 259-262; Dec. Dig. ☞183.]

4. PATENTS ☞303—SUIT FOR INFRINGEMENT—PRELIMINARY INJUNCTION.

Where the questions raised by the defendant in an infringement suit depend on the construction of prior patents or on written documents relating to title, they may properly be determined on a motion for preliminary injunction.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 496-498, 502, 503; Dec. Dig. ☞303.]

In Equity. Suit by the Individual Drinking Cup Company against the Osmun-Cook Company for infringement of letters patent No. 1,043,854, for device for holding and distributing individual drinking cups, granted to Lawrence W. Luellen November 12, 1912. On motion for preliminary injunction. Granted.

Clifford E. Dunn, of New York City, for plaintiff.

Albert H. Walker, of New York City, for defendant.

HAIGHT, District Judge. [1] The validity of the patent in suit has been sustained by this court in a suit instituted by the present plaintiff against the United States Drinking Cup Company, decided in September, 1914, 220 Fed. 331. Preliminary injunctions against the infringement of it have also been issued in the middle district of Pennsylvania in suits instituted by the present plaintiff against Bernard B. Megargee and the Public Service Company, respectively. The decrees in both of those cases were entered on December 4, 1914. In neither case, however, was a defense interposed. The case in this district was contested, and the decision upholding the validity of the patent was rendered after final hearing. The patent, as well as the

☞ For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

prior art, then before the court, is fully described in the memorandum filed in that case. The defendant is engaged in selling the alleged infringing device. It contends that the plaintiff's patent is invalid for want of invention, that the device which it sells does not infringe, and that the plaintiff's title to the patent is defective.

It is urged primarily that the court should refuse a preliminary injunction, because the sales made by the defendant of the alleged infringing device have been and will be so few that they cannot appreciably injure the plaintiff, and because the application is not made in good faith, but for the purpose of procuring a decree which can be used to intimidate others who might otherwise purchase the alleged infringing device for sale or otherwise. It is claimed that if the plaintiff were acting in good faith the suit should have been brought against the manufacturer, the Public Service Cup Company. Although the sales made by the defendant have been few up to the present time, this can scarcely be considered a good reason for refusing the plaintiff the relief to which it would otherwise be entitled. It surely does not lie in the mouth of defendant's counsel to accuse the plaintiff of bad faith in bringing suit against the present defendant rather than against the manufacturer, when it is considered that a short time before this suit was instituted the plaintiff brought an action in this court against the Public Service Cup Company and the predecessor in business of the present defendant, based on the same infringing device as is now before the court. Counsel for the present defendant appeared in that case in response to the order to show cause why a preliminary injunction should not issue, and claimed that, as the Public Service Cup Company was a corporation of another state, the suit could not be maintained against it, because this court could not secure jurisdiction. For that reason the effort to secure a preliminary injunction in that suit was abandoned. If there had been a desire to have had the questions at issue in this case settled in a suit between the present plaintiff and the manufacturer of the infringing device, the latter could have readily submitted to the jurisdiction of this court in that case.

Certain patents which were not before this court in the United States Drinking Cup Company Case are now offered in support of the contention that the plaintiff's patent is invalid for want of invention. They consist of three British patents and four United States patents. Of these only two, a British patent to Lawrence, No. 14,501, granted in 1888, and an American patent to Stafford, No. 739,232, granted in 1903, were considered in the argument of counsel. The others have, however, been examined, and may be disposed of with the remark that it is difficult to see their relevancy, or why they were offered. The Stafford patent exhibits a mailing tube for use in mailing papers, drawings, etc. It is designed to be made of "cardboard or other preferred material." At one end a flange is formed by bending inwardly the edge of the cylinder or tube. The purpose of the flange is to engage the cup, in which one end of the article to be mailed is inserted, and thus close that end of the cylinder. At the other end of the tube there is attached a flexible covering, stated in the specification as "preferably consisting of a strip of paper or other fabric pasted or otherwise secured

to the outside of the cylinder and projecting beyond the edge thereof." This is designed to be folded at that end of the cylinder and thus close the same there. It is urged that this cylinder, constructed of proper material, would perform the same functions, in the same way, as the device of the patent in suit. It is evident, however, that the use to which this was designed to be put is not analogous to that of the patent in suit. The relations between them are remote. A new result has been produced by the device of plaintiff's patent. So far as double use is concerned (which seems to be the basis of defendant's contention regarding the effect of the Stafford patent), what was said in the memorandum filed in the United States Drinking Cup Company Case regarding invention in the patent in suit, in view of the prior state of the art, applies with equal force here. In fact, the prior art introduced in that suit would seem to be more relevant to this question than that introduced in the present suit.

The British patent to Lawrence exhibits a complicated machine for dispensing individual cups and liquids. It is designed, primarily, as a coin-controlled apparatus. Aside from this feature, the cups could be dispensed only by the manipulation of a handle or lever. It is thus evident that it is designed to work on an entirely different principle than the device of the patent in suit. It is true that by making many changes, such as removing all of the mechanism described in the patent, eliminating altogether part of the means provided for holding the cups in position, and substituting a cylinder for retaining the cups, this machine could be made to perform the same function, in the same way, as the Luelen machine. But, in my judgment, it would require more than mechanical skill to have perceived that this could have been done, and to have thought of doing it, and this is none the less so because the patentee is presumed to have had before him the Stafford patent, and all the other prior art which has been exhibited in this case and that against the United States Drinking Cup Company. Nothing has been developed, therefore, in this case, at least as to the majority of the claims of the patent, which would lead me to change the judgment expressed in United States Drinking Cup Case on the question of invention.

On the question of infringement, it is urged that the primary patent in the art is the British patent to Lawrence, that the plaintiff's patent is secondary, and that therefore, because of the narrow range of equivalents which must thus be allowed, the device sold by the defendant does not infringe. The specifications of the plaintiff's patent describe an apparatus in which the means used for retaining and dispensing the cups is rigid and fixed, and which permits the cups to be withdrawn through the flexing of the latter. All of the claims, except the fifth, however, are not so limited. In the defendant's apparatus, when a cup is withdrawn, the means provided for retaining and dispensing the cups yields or flexes rather than the cups. This feature, it is claimed, avoids infringement, if the plaintiff's patent is a secondary one. Whether it is considered that the patent in suit is primary or secondary, in the sense above mentioned, seems immaterial. It was held in the Paper Bag Patent Case, 210 U. S. 405, 415, 28 Sup. Ct.

748, 52 L. Ed. 1122, that in either secondary or primary patents the range of equivalents depends upon and varies with the degree of the invention. The invention in this case is a device whereby a number of nested cups are retained in a receiving chamber, free from dust or other contamination, and which permits a part of one cup at all times to project from the chamber so as to be easily withdrawn by the hand, and at the same time keeps the rim thereof, which touches the lips, and the other cups, inside of the receiving chamber and free from contamination. The invention seems to be as broad as most, if not all, of the claims.

The only similarity between this device and the Lawrence device is that they both dispense cups, right side up, one at a time, while retaining the others within the distributing chamber. The principles upon which they respectively operate, as well as the means by which they respectively accomplish the dispensing, are essentially different. In the Lawrence patent, this is accomplished through certain mechanism controlled by a lever or handle, while in the patent in suit it is accomplished without resort to any mechanism, but simply by the manner and form in which the "retaining means" is made. Luellen was the first to do this, and it is undeniable that a great step in advance was thereby made. The alleged infringing device operates on the same principle as that of the patent; the only difference being that before mentioned. Luellen did not confine himself to the specific means described in his specification, but was explicit in his declaration that there might be many modifications and changes from the forms described. A very similar difference in devices was presented in the Paper Bag Patent Case, *supra*, and it was held that there was an infringement. In the Megargee suit the means which were used consisted of flexible rubber gaskets, and in the Public Service Company suit flexible springs, like those of the defendant's device, were employed. Both of these devices were held by Judge Witmer to infringe the plaintiff's patent.

It seems, therefore, entirely clear that the retaining means of the defendant's device is but an equivalent of that of the patent in suit, and that it therefore infringes.

[2] The main contention regarding the plaintiff's lack of title is that the instrument by which it claims to have acquired title from the patentee did not purport to assign the "invention," but only the "application" for the patent. Before discussing this question, however, it seems necessary to consider another, which, although not raised by the parties, is intimately connected with it, and should, I think, receive some attention, because of some difference of opinion among the authorities regarding it. The instrument of assignment upon which the plaintiff bases his title, in so far as the patent in suit is concerned, was executed before the patent issued. It contains no request that the patent issue to the assignee. The patent was issued to the inventor, but the plaintiff claims that the full legal and equitable title to the patent vested automatically in the assignee immediately upon the grant of the patent. Assuming that the language used in the assignment is sufficient to convey the invention and the inchoate right to the patent,

it is entirely clear that this contention is correct, provided the failure to have inserted a request that the patent issued to the assignee does not alter the situation. *Gayler v. Wilder*, 10 How. 477, 13 L. Ed. 504; *Hendrie v. Sayles*, 98 U. S. 546, 25 L. Ed. 176. That such a request be contained in such an assignment has been held essential in order to automatically pass to the assignee the legal title to the patent when the latter is issued. *Harrison v. Morton*, 83 Md. 477, 35 Atl. 99. The same statement is found in Mr. Walker's work on Patents (4th Ed., p. 235). His only authority, however, is *Harrison v. Morton*. There is also an expression in the opinion of Justice Blatchford in *Wright v. Randel* (C. C.) 8 Fed. 591, susceptible of bearing the same meaning. In *United States Stamping Co. v. Jewett* (C. C.) 7 Fed. 869, the same judge, in interpreting the opinion of the Supreme Court in *Gayler v. Wilder*, *supra*, used this expression:

"As the assignment was intended to operate upon the perfect legal title which the inventor then had a right to obtain, because it requested that the patent might issue to the assignee, there was no sound reason for restraining the assignment to the inchoate interest and requiring a further transfer of the patent."

As opposed to these authorities are the decisions of Judge Noyes, in *Hildreth v. Auerbach*, 200 Fed. 972 (D. C., S. D. N. Y., 1912), and of Judge Kohlsaat, in *Wende v. Horine*, 191 Fed. 620 (C. C., N. D. Ill., 1911). In both of those cases the question was directly raised, and it was held not to be essential to the vesting of a legal title automatically in the assignee upon the granting of the patent that the assignment should contain a request that the patent issue to the assignee. The confusion which has arisen seems to be due to the interpretation placed upon the opinion of Chief Justice Taney in *Gayler v. Wilder*, *supra*, and particularly because (10 How. page 493, 13 L. Ed. 504) of the following sentence: "The assignment requests that the patent may issue to the assignee." An attempt to show that the interpretation adopted by the first cited authorities is not correct seems unnecessary, both because the reasoning of Judge Noyes in *Hildreth v. Auerbach*, *supra*, seems to me eminently satisfactory and sound, and because, as said by Judge Kohlsaat in *Wende v. Horine*, *supra*, the decision of the Supreme Court in *Railroad Co. v. Trimble*, 10 Wall. 367, 19 L. Ed. 948, seems to be irreconcilable with any such interpretation.

[3] It remains to consider, therefore, whether the language used in the instrument of assignment to describe what was thereby transferred was sufficient to convey to the plaintiff the legal title to the patent, when the latter was granted. The assignment of an invention is a contract, and like all other contracts is to be construed so as to carry out the intention of the parties. *Nicolson Pavement Co. v. Jenkins*, 14 Wall. 452, 20 L. Ed. 777; *Hendrie v. Sayles*, *supra*. An inventor of a new and useful improvement is vested with an inchoate right to its exclusive use, which he may perfect and make absolute by proceeding in the manner which the law requires, and when it appears by the language of an assignment, executed before the patent is granted, that the assignment was intended to operate upon the perfect legal title which the inventor then had a lawful right to obtain,

as well as upon the imperfect and inchoate interest which he actually possessed, the instrument will convey to the assignee the legal title to the patent, when the latter is granted. *Gayler v. Wilder*, supra. It is necessary to examine the assignment in question in the light of these principles. It assigned certain existing patents and a large number of applications for patents, which were then pending in the Patent Office, included in which was the application upon which the letters patent in suit were granted. In the granting clause, after reciting the various patents and applications assigned, appears the following:

"And any and all *issues*, reissues, and extensions of said letters patent, and applications for letters patent, and each of them; also in and for the United States of America any and all inventions and improvements in said letters patent, and each of them described; also any and all rights of action and claims existing at the date hereof under said letters patent, and each of them, for past infringement thereof."

And in the habendum clause, which immediately follows, appears this:

"Said applications, inventions, improvements, and letters patent, and each of them, to be held and enjoyed by said Individual Drinking Cup Company, its successors and assigns, to the full end of the term or terms for which said letters patent, and each of them, are or *may be* granted, respectively, and any and all reissues and extensions thereof, as fully and entirely as the same would have been held and enjoyed by the undersigned, if this assignment had not been made."

Then follows a covenant that the assignor is the owner—
"of each and all of the inventions, improvements, rights, claims and letters patent, and applications for letters patent, hereby sold and assigned."

While he does not, in so many words, assign the invention and improvements described and embraced in the application for letters patent, I think it unquestionable that the intention of the parties was that the same were to be conveyed by that instrument. The words "any and all issues" cannot refer to letters patent already existing, because they had already been issued, and reissues and extensions were separately mentioned. They must refer to "the issues" of patents on applications then pending. Also, in the clause following, to the effect that the "applications, inventions, improvements, and letters patent" were to be held by the assignee to the full end of the term for which "said letters patent and each of them are or *may be* granted," the word "are" refers to the existing letters patent, but the words "may be granted," to be given any effect when read in connection with the words following, must refer to such patents as might be granted on existing applications; for reissues and extensions are also provided for in that clause.

I think it is therefore clear that the instrument assigned patents to be granted on the applications then pending and named in the instrument of assignment. When he conveyed the patent to be granted, how can it be said that he did not convey the invention upon which the patent would be based? In addition, the assignor had an inchoate right to the monopoly, which he could secure only through the application and the patent. When he conveyed the application and the

patents to be granted thereon, it seems that it must be held, within the rule above stated, that the assignment was intended to operate upon the legal title which the inventor then had a lawful right to obtain, as well as the imperfect and inchoate interest which he actually possessed. I think, therefore, that the instrument in question automatically conveyed the legal title to the patent when it was granted. It also appears that the parties have placed a practical construction upon this instrument by treating it as having conveyed the legal title to the patent in suit. While such a construction, where the meaning is clear, can be given no consideration, still, where there is doubt as to the proper construction of the instrument, it is entitled to great consideration, and is sometimes considered controlling.

Those who question the title in this case are infringers; neither the parties to the instrument, nor any one claiming under either of them, dispute the effect which the plaintiff claims should be given to the instrument of assignment. The other instruments affecting the patent I do not think need be considered here. It is sufficient to say that, so far as the proofs show, both the legal and equitable title to the invention were in the inventor at the time he executed the assignment to the plaintiff in this case.

My conclusion therefore is that the legal title to the patent is in the plaintiff, and it may therefore maintain this action.

[4] It is urged on behalf of the defendant that because of the questions which have arisen in this case a preliminary injunction should not be awarded, but that the decision of these questions, particularly that of title, should be deferred until a final hearing. The rule which has governed the courts on this point is thus expressed by Judge Hough in *Vacuum Cleaner Co. v. Waldorf-Astoria Hotel Co.* (C. C.) 198 Fed. 865, as follows:

"Complainant cites and relies upon the Circuit Court decisions of which *Fuller v. Gilmore* (C. C.) 121 Fed. 129, is the best known. With the doctrine of these cases I fully agree, for it would seem that, where the matters in controversy are confined to an examination of the prior art as revealed in other patents, to the construction of some claim or claims of the patent in suit, or the decisions of questions of title depending upon the meaning of written documents, no reason exists for not deciding the matters in controversy on affidavits and an examination of uncontested documents, instead of requiring the parties to present exactly the same matter to the court in lengthy and expensive fashion."

The patent in this case has already been adjudicated. The new evidence affecting its validity can be considered on an application of this kind as thoroughly and satisfactorily as on final hearing, as can also the question of infringement; and the decision of questions affecting the title depends upon the meaning of written instruments which are before the court. There is therefore no good reason for deferring a decision.

The complainant will be awarded a preliminary injunction in the usual form.

ANATOMIK FOOTWEAR CO. v. COWARD.

(District Court, S. D. New York. December 4, 1914.)

No. 5-14.

PATENTS 328—ANTICIPATION—ANATOMICAL FOOTWEAR.

The Cole patent, No. 812,920, for anatomical footwear, held void for anticipation by a prior printed publication.

In Equity. Suit by the Anatomik Footwear Company against James S. Coward. On final hearing. Decree for defendant.

James H. Griffin, of New York City, for complainant.

Louis W. Southgate, of New York City, for defendant.

ROSE, District Judge. The complainant is the owner of letters patent No. 812,920, issued February 20, 1906, to Harlan P. Cole, assignor to Nettie D. Cole. It says the defendant has infringed thereon. The patent states that the invention relates to anatomical footwear of all kinds, and has for its object the prevention and cure of the disabilities and deformities known to surgeons as talipes valgus, talipes varus, weak foot, flat foot, etc. Its primary object is said to be the provision of footwear of any kind so constructed as to support the parts liable to displacement through straining or weakening of muscles, thus preventing the turning of the ankle or the rotation of the foot inward or outward upon its long axis. It says that:

"In ordinary footwear the sole is curved inwardly to form the shank in such a way that no support is afforded to the foot where such support is most needed—just beneath and immediately anterior to the ankle—and the heel is located back of these points, so that it affords no support to that part of the foot receiving the weight of the body."

Further objects of the invention are said to be:

(1) The "provision of a sole constructed on lines adapted to sustain the normal position of the foot and stiffened or reinforced under one lateral half, if desired"; (2) the "provision of a heel of such shape that the center of gravity or the weight of the body conducted through the leg to the foot will fall within the base thereof, so that it will be impossible for the ankle to turn or the foot to revolve about its longitudinal axis"; and (3) the "provision of footwear of symmetrical shape which will not apparently differ in appearance to the casual observer from the common kinds in universal use, but which will not only prevent the troubles above set forth, but will effect a cure of chronic cases."

It is stated that changes may be made in the shape of the sole, and also in that of the heel, in the patented footwear, without departure from the invention, which is not limited to the exemplifications given. Furthermore, the construction may be such that the foot may be supported in ways different from that shown, and still be within the purview of the invention.

There are two claims:

1. Footwear having a sole laterally extended on one side and a heel also laterally extended on one side to conform to the extension of the sole, said heel being forwardly extended on one side beneath the shank, whereby the weight of the body is thrown within the space occupied by the lateral exten-

sion of the sole and the forward and lateral extension of the heel, and turning of the ankle is prevented.

"2. Footwear having a heel extended laterally beyond the normal sole to sustain the foot and extended forwardly on the inner side over the shank, whereby the line of weight of the body is thrown within the space occupied by said heel, and rocking of the foot on its longitudinal axis is prevented."

It will be noted that the language of these claims makes their construction difficult. Nothing can be read upon the first claim that does not prevent the turning of the ankle, and nothing can be read on the second that does not prevent the rocking of the foot on its longitudinal axis. The first claim is not infringed, unless the sole and the heel are so extended that the weight of the body is thrown within the space occupied by the lateral extension of the sole and the forward and lateral extension of the heel. The first claim is not restricted to any particular forward extension of the heel. Any forward extension, however limited, can apparently come within its terms, provided there is such a lateral extension of the heel and the sole as to throw the weight of the body within either the space occupied by the extension of the heel in one or the other direction or the lateral extension of the sole.

The patent recommends that the sole should be as wide as the natural foot, but the claims are not restricted to such construction. Apparently, in order to hold that any device infringes either of the claims, it is necessary to decide that such device in point of fact prevents the turning of the ankle or the rocking of the foot on its longitudinal axis. This is an unusual kind of question to submit to a court, which, though by courtesy assumed to be learned in the law, is not supposed by anybody to be an authority on anatomy. A judge who in all seriousness feels that he is utterly incompetent to pass upon such a question may be reluctant to decide that such construction of footwear either will or will not do all that the patent says it will. In the one case, if he is wrong, he may do a great deal of harm to the patentee. In the other, his erroneous opinion may be used to advertise something as valuable, which really is worthless.

Dr. Hills Cole, the president of the complainant and a witness for it, gave as part of the presentation of complainant's case a lecture illustrated by magic lantern slides. In answer to a question asked him at that time, he said that medical and surgical opinion as to the theory upon which the invention is based was not unanimous. A number of medical gentlemen of most excellent standing testified in support of complainant's contention, yet none of them ever claimed to state what is the opinion of the profession generally on the question. The patent claims, if otherwise sustainable, could have been sustained without passing on this anatomical problem at all, had they simply described a particular form of shoes, and had such shoes been useful in the sense that an appreciable number of people found them more comfortable and therefore liked them.

The difficulties raised by the wording of these claims is not merely theoretical. It manifests itself in the examination of witnesses and in the arguments of counsel. A shoe with the lateral and forwardly extending heel does not in complainant's view anticipate, unless such extension was in itself sufficient to keep the ankle from turning or

the foot from rocking. Even where there is a great enough extension of the heel or of the sole to keep both ankle and foot firm, yet it does not in complainant's view embody its invention, if there is something else in the construction of the shoe which in the opinion of complainant's witnesses or counsel would neutralize the effect upon the foot and ankle otherwise to be obtained from such heel and sole. A sole which is not laterally extended very much is said to infringe, because it is claimed to extend enough to keep the ankle from turning. The function of the device is thus made a part of the claim. Whatever other doubts there may be about the meaning of these claims, and as to whether defendant has infringed them, it is obvious that they cannot be sustained, if prior to the date of the alleged invention any printed publication stated that the forward and lateral extension of the heel and the lateral extension of the sole prevented or tended to prevent the turning of the ankle or the rocking of the foot.

In 1898, more than five years before application was made for the patent in suit, Dr. H. P. H. Galloway, of Toronto, Canada, published an article in a scientific journal in which he recommended a particular construction of boot, and in so doing said:

"In general, the last upon which this boot is built differs from an ordinary last chiefly in having a straighter inner boarder, in greater width, and especially in having a very broad and flat sole. The heel of the boot is much lower and larger than usual, and its inner side widens out laterally as it approaches the floor, while its inner boarder is not only built up higher than the outer, but is continued farther forward beneath the shank. The inner side of the sole just beyond the shank is correspondingly raised and projected inward."

This appears to be a clear description and anticipation of the fundamental conception of the patent in suit. The complainant denies that this article discloses its invention, because it says that Dr. Galloway was not willing to rely solely upon these extensions, but recommended the doing of some other things which, in the view of the complainant's witnesses, would neutralize the effect of the longer and broader heel and the broader sole. These other things relate to additional means of support, which in certain cases he recommends for the foot. But complainant's patent distinctly says that the construction may be such that the foot may be supported in other ways different from that shown, and still be within the purview of the invention, and it also says that the sole may be stiffened and reinforced, to afford greater rigidity and sustaining power, if desired.

There is no question that this article of Dr. Galloway was published before the making of the invention of the patent in suit. In plain language it describes what the complainant does, and recommends it for precisely the purposes to which complainant puts it. It is not, in my view, necessary to go into any other question in this case. That various people, before the patentee, knew that broader and longer heels and broader and flatter soles were useful for the purposes described in complainant's patent appears to have been established. As old shoes are not usually preserved, there is more or less room for controversy as to the precise facts with reference to each of the several prior uses which the defendant sets up. There are various patents, as, for exam-

ple, to Tillotson, No. 207,370, August 27, 1878, and the design patent to Kohn, No. 31,330, August 1, 1899, which appears to anticipate or describe the essential features of the patented device. On the other hand, it is true that such shoes as those made by the complainant and shown in its patent were rare before it put them on the market. If used at all, they were constructed for people who had unusual trouble with their feet; but then it is precisely for the prevention and cure of just such trouble that the patentee's invention was intended. However, as in my opinion that invention was described in Dr. Galloway's publication, more has already been said on the subject than is necessary.

The bill will be dismissed, with costs.

McMILLAN BOOK CO. v. IRVING-PITT MFG. CO.

(District Court, S. D. New York. November 20, 1914.)

No. 7-27.

PATENTS  328—INVENTION—LOOSE-LEAF BINDER.

The Lawson patent, No. 744,369, for a loose-leaf binder, *held* void for lack of invention.

In Equity. Suit by the McMillan Book Company against the Irving-Pitt Manufacturing Company. On final hearing. Decree for defendant.

William W. Dodge, of Washington, D. C., for complainant.
John C. Pennie, of New York City, for defendant.

ROSE, District Judge. The complainant alleges that it is the owner of letters patent No. 744,369, issued November 17, 1903, to one Albert Lawson, and that the defendant infringes the first and fifth claims thereof. The defendant denies that the complainant has acquired sufficient title to the letters patent in question to maintain this proceeding.

The patentee, Lawson, died owning the patent. He left a will by which his property was devised to his widow for life, with remainder to other persons. The assignment under which complainant claims is from the executor. The defendant alleges that proper authority to make this sale was not obtained from the probate court in Missouri, from whom the executor received his letters testamentary. It was stated at the bar that defendant had since acquired the interests of some of the remaindermen in the patent in suit. In view of the conclusions which have been arrived at on other branches of the case, it becomes unnecessary to determine whether the defendant's contention as to the defect in complainant's title is or is not well founded.

The patentee states that:

"Broadly considered, the invention consists of a sheet-holding frame comprising leaves and prongs formed integrally therewith, as distinguished from such frames as heretofore made in which the prongs are in the manufacture of the sheet-holding frames made separate from the leaves and afterwards connected thereto."

In short, he says his invention consisted in making something in one piece which had formerly been made in two or more. Ordinarily there is nothing patentable in that. Of course, if the making in one piece achieves a substantially different result from that otherwise obtainable, and is a result theretofore recognized as desirable, it may be that inventive genius has been exercised. There is no sufficient evidence in this record that any different result has been attained. The one-piece binder may, and very probably does, do the work better than a binder in which the hooks are separately manufactured; but any superiority in this respect is of degree only, and apparently of no very great degree at that.

The first claim of complainant's patent, which is:

"A sheet-holding member for temporary binders, comprising a leaf, and a prong of tubular form integral with said leaf, substantially as set forth"

—is therefore invalid, it not being questioned that prongs of the tubular form were old.

The fifth claim is:

"The combination of a pair of leaves constituting the bases of a sheet-holding frame, and curved sheet receiving prongs integral with said leaves, said prongs extending at their bases approximately at right angles to the planes of said leaves."

Defendant denies the prongs in its device do extend at approximately right angles to the leaves. I do not think that they do. In any event, it does not appear what particular merit there is in giving such angular extension. The patent does not tell us. It doubtless may be a convenient and useful method of making them; but, in view of the forms of rings and prongs used for analogous purposes before the date of the patent in suit, it does not seem there could possibly be any invention in so constructing them.

It should be stated that the patent was never heard of until after this suit was brought. It never aided anybody to do anything. The defendant at this bar owned another patent, and has instituted a suit against the present complainant for an alleged infringement of it. In the course of preparing for its defense, complainant in this case found the Lawson patent, and at once set about buying it. When it had obtained it, or such interest in it as under the circumstances shown in this record the Lawson executor could give, it brought this suit.

There are patents which appear so simple as to suggest strongly that their alleged discoveries must always have been obvious. Nevertheless they supply a want which had long been felt, and they go at once into extensive use. When it so happens, it may well be held that what after the event appeared plain was really not so simple as it seemed. There is nothing to suggest, however, that Lawson found out anything which anybody ever had wanted to know. The subsequent history of his device confirms the impression suggested by the reading of his patent.

The bill of complaint will be dismissed, with cost to the defendant.

GENERAL ELECTRIC CO. v. BEST ELECTRIC CO. et al.

(District Court, S. D. New York. November 24, 1914.)

No. 12-15.

PATENTS **288**—**SUIT FOR INFRINGEMENT—JURISDICTION OF NONRESIDENT DEFENDANT—“REGULAR AND ESTABLISHED PLACE OF BUSINESS.”**

A nonresident corporation, having its principal place of business in another state, does not have a “regular and established place of business” in the Southern district of New York, within the meaning of Judicial Code (Act March 3, 1911, c. 231) § 48, 36 Stat. 1100 (Comp. St. 1913, § 1030), so as to subject it to a suit for infringement therein, because it has a sales agent, who maintains an office in New York City at his own expense, and who merely takes orders for goods on commission, which are accepted and filled by the corporation at its principal office, where it also makes all collections.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 460-466; Dec. Dig. **288**.]

In Equity. Suit by the General Electric Company against the Best Electric Company and others. On motion by defendants to quash service. Motion granted.

S. O. Edmonds, of New York City, for complainant.

James W. Prendergast, of New York City, for defendants.

ROSE, District Judge. This is a suit for the infringement of a patent. The defendant is a corporation of Delaware, which has its factory, and in every other than a strictly legal sense, its principal place of business, in Pittsburgh, in the Western district of Pennsylvania. Process has been served upon one who has the exclusive agency for selling its goods in this district. It has appeared specially to object to the jurisdiction and to move to quash the service of process.

The sales agent is paid a commission of $7\frac{1}{2}$ per cent. on the amount of sales made by him or any one else within this district and other territory. He is the agent for other manufacturers or dealers. He pays his own office rent, and does not display upon that office any sign indicating it is the place of business of the defendant. It keeps no stock of any kind in this district. Its agent does not do anything more than solicit orders. He is not authorized to accept them, nor to receive payment for them. All goods are shipped from its Pittsburgh office and factory, and all payments are regularly made there. On one or two occasions, when some one has wanted defendant's goods in a hurry, or when for other reasons the agent did not choose to order the goods from the factory, he went out and personally bought the goods from a New York jobber and sold them to his customer. It is very doubtful, under these circumstances, whether the defendant is doing business in this district, either generally or specially, in such sense as would render it liable to suit herein by the complainant residing here, and when the jurisdiction of this court was invoked on the ground of diverse citizenship only. Green v. Chicago, Burlington & Quincy R. Co., 204 U. S. 530, 27 Sup. Ct. 595, 51 L. Ed. 916; St. Louis & South-

western R. Co. v. Alexander, 227 U. S. 218, 33 Sup. Ct. 245, 57 L. Ed. 486.

But in this case jurisdiction, if it exists, depends upon section 48 of the Judicial Code, under which a nonresident defendant cannot be sued in any district unless it has a *regular and established place of business therein*. Those words imply something more than a mere doing of business in the district. I do not think the statement in its advertising literature that it had offices in all the principal cities, without specifying any office in any city, suffices to make the office at which its sales agent chooses to make his personal headquarters its regular and established place of business. Nor does the fact that it referred prospective customers to him in any wise necessarily change the situation. Its sales agent chose for his own purposes to have an office in the business section of the city and pay the rent therefor out of his own pocket. If he had chosen to dispense with such an office, he might have transacted such business at his own private residence without in any way breaking any contract that he had with the defendant. It is obviously better that a long and expensive litigation shall be conducted before some court whose jurisdiction is not open to the possibility of successful challenge.

The defendant's motion to quash the service of process and return of the marshal for the Southern district of New York will therefore be granted, with costs.

LEHIGH & WILKESBARRE COAL CO. v. HARTFORD & NEW YORK TRANSP. CO.

(District Court, S. D. New York. December 14, 1914.)

NAVIGABLE WATERS \Leftrightarrow 24—OBSTRUCTION BY WRECK—LIABILITY OF OWNER—DUTY TO MARK.

Under Act March 3, 1899, c. 425, § 15, 30 Stat. 1152 (Comp. St. 1913, § 9920), which provides that "whenever a vessel * * * is wrecked and sunk in a navigable channel, * * * it shall be the duty of the owner * * * to immediately mark it with a buoy or beacon during the day and a lighted lantern at night and to maintain such marks until the sunken craft is removed or abandoned," the owner of a sunken vessel which has not been abandoned is not relieved from liability for injury to another vessel by reason of misplacement of the marking buoy, by the fact that at such owner's request the buoy was placed by officials of the lighthouse department of the United States.

[Ed. Note.—For other cases, see Navigable Waters, Cent. Dig. § 66; Dec. Dig. \Leftrightarrow 24.]

In Admiralty. Suit by the Lehigh & Wilkesbarre Coal Company against the Hartford & New York Transportation Company. Decree for libelant.

James T. Kilbreth, of New York City, for libelant.

Haight, Sandford & Smith, of New York City (Henry M. Hewitt and W. Parker Sedgwick, Jr., both of New York City, of counsel), for respondent.

MAYER, District Judge. Having already disposed of the case in so far as the facts are concerned, decision was reserved upon a single question. That question is whether on the facts and the law the responsibility for marking the wreck was shifted by respondent from itself to the government or its officials. For the purposes of this opinion, the following facts may be stated:

On June 3, 1913, Barge 22, owned by respondent, was run into by the steamship Eddie. She subsequently sank to the northward of Red Buoy 14, marking the extreme eastern side of the channel, running along the anchorage ground off Red Hook. The tug Sachem, which had Barge 22 in tow at the time of the collision, stood over the wreck to warn passing vessels until she was relieved by the tug G. H. Dalzell, sent by respondent; the latter vessel remaining on duty until, after consultation with the captain of the Dalzell, a wreck buoy was placed by Captain Karragir, an officer in the service of the Lighthouse Department of the United States.

The United States officials had come to the scene in the lighthouse tender Tulip in response to a notification from the manager of respondent and a request by him that the Lighthouse Board buoy the wreck. After the buoy had been placed the Dalzell went away, and it was not until June 7th that the wrecking equipment of a wrecking company appeared at the place of the wreck and began the work of raising the sunken barge. The delay in this regard was due to the fact that respondent had called for bids from wrecking companies and did not award the contract until June 6th. On June 6th, however, a barge in tow of the tug Plymouth, belonging to libelant, collided with the sunken barge, at that time the sole indication near the wreck being the wreck buoy.

On further consideration I find nothing to change my conclusion that the Plymouth was prudently navigated, that the wreck buoy was improperly located, and that the accident happened because of negligence in that regard. It was at all times the intention of respondent to raise the wreck, and that was subsequently done, and the wreck was not at any time abandoned by respondent. The work done by the Lighthouse Department officials was at the request of respondent, and, as I understand, the government is paid for such work under such circumstances. Presumably the authority under which the wreck buoy was furnished and placed is derived from the act of March 2, 1868 (15 Stat. at Large, 249), which reads as follows:

"That the lighthouse board be, and they are hereby authorized, when, in their judgment, it is deemed necessary, to place a light vessel, or other suitable warning of danger, on or over any wreck or temporary obstruction to the entrance of any harbor, or in the channel or fairway of any bay or sound."

Long after this act was passed, Congress enacted the act of March 3, 1899 (30 Stat. at Large, 1152). Sections 19 and 20 of that act set forth the procedure in cases where there has been an abandonment of the sunken craft, or where the government takes over the control of sunken craft because of obstruction or danger to navigation. Section 15 defines the duty and responsibility of owners of sunken craft as follows:

"Sec. 15. That it shall not be lawful to tie up or anchor vessels or other craft in navigable channels in such a manner as to prevent or obstruct the passage of other vessels or craft; or to voluntarily or carelessly sink, or permit or cause to be sunk, vessels or other craft in navigable channels; or to float loose timber and logs, or to float what is known as sack rafts of timber and logs in streams or channels actually navigated by steamboats in such manner as to obstruct, impede, or endanger navigation. And whenever a vessel, raft, or other craft is wrecked and sunk in a navigable channel, accidentally or otherwise, it shall be the duty of the owner of such sunken craft to immediately mark it with a buoy or beacon during the day and a lighted lantern at night, and to maintain such marks until the sunken craft is removed or abandoned, and the neglect or failure of the said owner so to do shall be unlawful; and it shall be the duty of the owner of such sunken craft to commence the immediate removal of the same, and prosecute such removal diligently, and failure to do so shall be considered as an abandonment of such craft, and subject the same to removal by the United States as hereinafter provided for."

The importance of this legislation is obvious, and the tendency of the courts has been to hold owners strictly to the requirement of the statute. Thus, in the leading case of *The Anna M. Fahy*, 153 Fed. 868, 83 C. C. A. 48, the Circuit Court of Appeals for the Second Circuit held that the duty cast upon the owner cannot be delegated, and the general trend of the decisions under this statute may be gathered from *The Macy*, 170 Fed. 930, 96 C. C. A. 146; *People's Coal Co. v. Second Pool Coal Co.* (D. C.) 181 Fed. 609, affirmed *Second Pool Coal Co. v. People's Coal Co.*, 188 Fed. 892, 110 C. C. A. 526; *The Mary S. Lewis* (D. C.) 126 Fed. 848.

Apparently there is not any reported case where the facts are as here; i. e., where the government officials have marked the wreck in response to the request of the owner, although the owner has retained control at all times. The case of *McCaulley v. City of Philadelphia*, 119 Fed. 580, 56 C. C. A. 100, is not in point, because there the War Department had taken charge of the removal of a sunken wreck under authority of an act of Congress.

Two English cases are cited in support of respondent's proposition that the duty may be delegated or transferred by the owner to the United States. In *The S. S. Utopia*, [1893] Appeal Cases, 492, it appears that the port authority undertook the duty of indicating the position of the wreck. In that case the Utopia had been sunk by collision with her majesty's ship Anson, in Gibraltar Bay, on March 17, 1891. From the 17th to the 23d of March, the wreck was lighted by her owners. The acting captain of the port of Gibraltar then complained to the manager for the owners of the Utopia that the lights were not sufficient and were not properly looked after, and gave an order to one Adair, a boarding officer, to have a hulk moored in the vicinity of the wreck in order to warn vessels in accordance with the Board of Trade Instructions. Adair agreed with the owner of a hulk that she should be placed near the wreck in the position and exhibiting the lights described in these instructions, and on the 23d of March the hulk was accordingly anchored and the expense thereof was defrayed by the port authority. It is clear, and so the court holds, that the port authority at Gibraltar had, for the time being, taken away from the owners the duty of lighting the wreck, and had caused that

work to be done as he (the port authority) deemed proper, and thus had relieved the owners of responsibility. It will be seen, therefore, that on facts The Utopia is radically different from the case at bar.

In The Douglas (1882) 7 Probate Division, 151, the facts are much nearer those in the case at bar. If it were not for the act of 1899, that case might be regarded as of much service to the contention of respondent, although I confess that I am not in sympathy with the opinion of the eminent Lord Chief Justice who wrote for reversal. Under the Removal of Wrecks Act 1877, it seems that the harbor master "may" remove any vessel that is sunk and "may" light or buoy her until removal. Cotton, L. J., held that under this act it was the duty of the harbor master to put up lights and remove the obstruction. In effect, he concluded that "may" meant "must." But Lord Coleridge and Brett, L. J., held on the facts that the owners of the wreck should be absolved from responsibility. The facts, briefly stated, were that the Douglas had been sunk in a collision, and her master, having been thrown into the water, was taken in a boat to near Gravesend. A tug called the Endeavour went to Gravesend, where the mate of the Douglas instructed the captain of the Endeavour to go to the harbor master and request him to take care of the wreck. The harbor master said he would do this, and his answer was reported to the mate of the Douglas; but, before any lights were fixed to the wreck, the Mary Nixon struck against the sunken Douglas and sustained the injury in respect of which the action was brought. Lord Coleridge held that on these facts the harbor master undertook to do the duty which he had authority to perform under the statute, and that the mate of the Douglas had fair ground for supposing that he would perform it, and under these circumstances he was of opinion that there was no ground for finding that the master and the mate of the Douglas were guilty of actionable negligence.

If this authority were to be followed, I am frank to say that it would be difficult to distinguish it from the case at bar, were we dealing only with the act of 1868. But it must be assumed that, if there were any exception intended in the act of 1899, such exception would have been written into the statute. The act of 1899 is so phrased that the duty of the owner is expressed in unmistakable terms, and if it was contemplated that the volunteer conduct of officials of the United States would relieve the owners of a vessel not abandoned of the responsibility placed upon them, that intention could have readily been expressed. The fact that it was not expressed in a statute which deals so comprehensively with this general subject-matter is, I think, conclusive upon the proposition that the duty of an owner under this statute cannot be delegated to the United States any more than it can be to a private person.

While occasionally an owner, acting in good faith and intelligently, may, because of the mistaken judgment of a government official, be subjected to hardship, yet in the long run safety of navigation will be better assured and the rights of owners of vessels, injured without fault on their part, better safeguarded, by a strict construction of this statute, rather than by loose construction which will open up new

avenues of escape, more especially as there cannot be any recovery against the government for the misplacing of a buoy by a government official. *Flushing Ferry Co. v. United States*, 6 Ct. Cl. 1, 7.

I conclude that the libelant is entitled to a decree.

Ex parte WONG WING.

(District Court, D. Massachusetts. August 5, 1914.)

No. 771.

1. HABEAS CORPUS ☞85—DEPORTATION OF ALIENS—WEIGHT AND SUFFICIENCY OF EVIDENCE.

On habeas corpus by a Chinese person, held for deportation under a judgment or order for the deportation of a person who subsequently escaped from custody, evidence *held* to show by a preponderance thereof that the petitioner and the defendant named in such judgment was the same person.

[Ed. Note.—For other cases, see *Habeas Corpus*, Cent. Dig. §§ 77, 78; Dec. Dig. ☞85.]

2. ALIENS ☞32—DEPORTATION—JUDGMENT OF DEPORTATION—TIME OF ENFORCEMENT—“CIVIL PROCEEDING.”

Where a Chinese person, ordered deported by a judgment of a United States commissioner and an order based thereon, escaped from custody and was not recaptured for nearly ten years, he could then be deported under such judgment and order, notwithstanding a state law under which executions in civil cases expire unless renewed in one year, since, while deportation proceedings are “civil” in their nature, the judgment and order were the equivalent of a warrant in a criminal case, and their validity was not limited by the state law.

[Ed. Note.—For other cases, see *Aliens*, Cent. Dig. §§ 84, 92, 93–95; Dec. Dig. ☞32.]

For other definitions, see *Words and Phrases*, First and Second Series, Civil Action.]

3. ALIENS ☞32—DEPORTATION—WAIVER, ESTOPPEL, OR ELECTION OF REMEDIES.

A Chinese person, ordered deported by a judgment of a United States commissioner, escaped from custody. He was thereafter arrested under another name as being unlawfully within the United States, and after a hearing before a commissioner, who excluded the prior judgment for lack of evidence connecting it with the defendant, discharged defendant, and found that he was lawfully within the United States. Thereupon the defendant was rearrested under the first judgment. *Held*, that there was no waiver or election of remedies by the United States, or estoppel against it, that prevented it from deporting defendant under the first judgment, as a waiver or an election of remedies depends upon an actual or imputed intent by a party, who has taken a certain course of action to abandon all other inconsistent positions, and there was nothing inconsistent in the different positions of the United States, which at all times contended that defendant was unlawfully in the country and subject to deportation, and the inconsistent judgment rendered in a different proceeding did not estop the United States from enforcing the outstanding and valid judgment, especially as the principles of estoppel or waiver should be cautiously applied against rights asserted by the public.

[Ed. Note.—For other cases, see *Aliens*, Cent. Dig. §§ 84, 92, 93–95; Dec. Dig. ☞32.]

4. ALIENS ☞32—DEPORTATION PROCEEDINGS—“JUDGMENT.”

The decisions of the United States commissioners in proceedings to deport aliens are “judgments.”

[Ed. Note.—For other cases, see Aliens, Cent. Dig. §§ 84, 92, 93–95; Dec. Dig. ☞32.

For other definitions, see Words and Phrases, First and Second Series, Judgment.]

Petition by Wong Wing for a writ of habeas corpus. Petition dismissed, and prisoner remanded.

William H. Lewis, of Boston, Mass., for petitioner.

Asa P. French, U. S. Atty., and James S. Allen, Jr., Asst. U. S. Atty., both of Boston, Mass.

MORTON, District Judge. The petitioner is a Chinese person who has been arrested and is held for deportation under a “judgment” or order of deportation made by Fred W. Dudley, United States commissioner for the Northern district of New York, dated May 19, 1903. The defendant named in said judgment was Chung Ming. The petitioner says that he is not Chung Ming, but is Wong Wing, a different person. The respondent contends that Chung Ming and Wong Wing are the same person. The case was heard before me in open court, and several witnesses testified for each party.

Chung Ming, after having been arrested on the Dudley judgment, escaped from the custody of a United States marshal at Providence, R. I., on June 19, 1903, while being transported for deportation, and was not recaptured. On March 13, 1913, the petitioner was arrested under the name Wong Wing on proceedings instituted in this district on the charge of being a Chinese laborer unlawfully in the United States. Act July 5, 1884, c. 220, § 1, 23 Stat. 117, amending Act May 6, 1882, c. 126, § 12, 22 Stat. 61 (Comp. St. 1913, § 4299). The matter was heard before United States Commissioner Hayes. At the time of the proceedings before Commissioner Hayes, the United States officials in charge of them had contended that Wong Wing and Chung Ming were the same person, and offered the Dudley judgment and order in evidence. It was excluded by the commissioner for lack of evidence connecting it with the defendant. He did not undertake to decide whether Wong Wing was Chung Ming, and on the evidence before him found that Wong Wing was a Chinese merchant lawfully within the United States and ordered his discharge. No appeal was or could be taken from this decision. Thereafter the petitioner was rearrested on the Dudley judgment, and these proceedings were instituted to obtain his discharge.

Three principal questions are presented: (1) Whether Wong Wing, the petitioner, is the Chung Ming against whom the Dudley judgment was rendered; (2) if so, whether that judgment is still in force; (3) whether the Hayes judgment in favor of Wong Wing bars the United States from proceedings to deport under the Dudley judgment, assuming the latter judgment to be against the same man and to be still in force.

[1] As to (1): The photograph annexed to the Dudley judgment is that of Chung Ming, and the description of Chung Ming therein contained is accurate as far as it goes. All of the identifying marks mentioned in this description and shown in this photograph, with possibly one exception, are found on the petitioner. Some of these marks are of decidedly unusual character. There are no significant differences between Chung Ming and the petitioner. There was uncontradicted evidence by competent experts that the petitioner is the person whose photograph is annexed to the Dudley judgment. There was a significant absence of satisfactory evidence concerning the petitioner's whereabouts in and prior to 1903. He testified that he had lived in this country since he was 8 years old, but he appeared unable to understand very simple English questions which I put to him; and his testimony was given almost entirely through an interpreter. Upon all the evidence I am satisfied, by a fair preponderance of the evidence, and I find, that Wong Wing and Chung Ming, alias Chin Ming, are the same person.

[2] As to (2): It is contended by the petitioner that deportation proceedings are civil in their nature, which is undoubtedly well established (*Li Sing v. United States*, 180 U. S. 486, 21 Sup. Ct. 449, 45 L. Ed. 634; *Fong Yue Ting v. United States*, 149 U. S. 698, 13 Sup. Ct. 1016, 37 L. Ed. 905); that the warrant of deportation is equivalent to an execution on a judgment in a civil case; that by the law of New York such executions expired, unless renewed by an alias, in one year after their date; and that therefore the Dudley judgment has expired, and is no longer of any force or effect. But it seems to me that this is pressing the analogy between deportation proceedings, which are almost *sui generis*, and actions at law, altogether too far. No United States statute and no decision bearing on the point has come to my attention. I do not think orders of deportation made by the United States immigration authorities ought to be governed in this respect by the law of the state in which they happen to be made. It seems to me that the Dudley judgment of deportation and the order based upon it are, as to the matters now before the court, the equivalent of a warrant in a criminal case, that their validity is not limited by the New York law relating to executions in civil cases, and that they are still in full force and effect against the petitioner.

[3, 4] As to (3): If, as I have found, the petitioner and Chung Ming are the same person, there was, at the time when deportation proceedings were instituted against the petitioner by the United States in this district in 1913, an outstanding judgment of deportation against him on which he might have been arrested and deported. Instead of proceeding directly upon that judgment, the United States officers chose to institute new proceedings, the result of which was an adjudication in the petitioner's favor that he was lawfully in the United States. It is contended by the petitioner that the United States, having elected, with full knowledge of the Dudley judgment, not to rely solely upon it, but to proceed *de novo* against him, and having lost, cannot now assert the former judgment, and that the respondent's

answer in these proceedings setting up the Dudley judgment (therein called a "warrant and order"), is sufficiently met by the Hayes judgment in the petitioner's favor, which, it is said, conclusively establishes his right to remain in the United States. The decisions of the United States commissioners were judgments. *Grin v. Shine*, 187 U. S. 181, 187, 23 Sup. Ct. 98, 47 L. Ed. 130. It is plain that the second judgment in no way affected the validity of the first judgment. In other words, Commissioner Hayes had no authority to revise or correct the judgment entered by Commissioner Dudley; and he has not undertaken to do so. If the validity of the Dudley judgment has been affected, it must be because of the action of the United States in instituting new proceedings with knowledge that the Dudley judgment was in existence. The principles invoked seem to be those of waiver, election of remedies, or estoppel. No case has been found which throws much light on the matter. As to waiver and election of remedies, these depend upon an actual or imputed intent by a party who has taken a certain course of action to abandon all other inconsistent positions. There would seem to be nothing inconsistent between the position of the United States before Commissioner Hayes and its present position. At both times, it contended that the petitioner was unlawfully in the United States and was subject to deportation. If the petitioner had in fact escaped from a United States marshal while being transported for deportation, he was unlawfully in the United States and was subject to deportation, both because he had no right to be in the United States, and because he had been ordered deported. I do not think that the United States, by proceeding against him upon the first ground, ought to be held to have waived or lost its rights to proceed against him on the second. Nor do I think that the United States is estopped by the decision of Commissioner Hayes from further proceedings against the petitioner. The judgment on which the United States now relies long antedates that of Commissioner Hayes. It does not seem to me that a party is estopped from enforcing an outstanding and valid judgment by reason of a later inconsistent judgment rendered in different proceedings, and I think that the principles of estoppel or waiver should be applied with especial caution against rights asserted by the public.

In accordance with the foregoing opinion and findings of fact, I have dealt with the petitioner's requests for findings and rulings, a copy of which is hereto annexed, as follows: I have denied the first, third, fourth, fifth, sixth, and seventh. As to the first, I do not think that there is any presumption as therein stated; but I rule that the burden of proof is upon the respondent to establish by a fair preponderance of the evidence that the petitioner is Chung Ming, and that this burden has been sustained. I give the second, twelfth, thirteenth, and fourteenth requests, my view being that any evidence tending to show that the petitioner was unlawfully in the United States might have been presented at the hearing before Commissioner Hayes. At the hearing before me the petitioner waived in open court all questions relating to the insufficiency of the returns upon the writs or

warrants, and as to Kammerlohr's authority to serve process in this district. The ninth, tenth, and eleventh requests are therefore waived.

The result is that the petitioner is lawfully held for deportation, and is not entitled to be discharged. Petition dismissed; prisoner remanded.

CULLEN v. REED et al.

(District Court, D. Montana. January 30, 1915.)

No. 42.

MORTGAGES ~~168~~ — BONA FIDE PURCHASERS — NOTICE — STATUTORY PROVISIONS.

Act Mont. Feb. 17, 1913 (Laws 1913, c. 27), providing that every mortgage of real property acknowledged and recorded is good and valid as against subsequent purchasers from the time it is so recorded until eight years after the maturity of the entire debt or obligation secured thereby, and no longer, unless the mortgagee shall file an affidavit stating certain facts, and that upon the filing thereof the mortgage shall be valid against all persons for a further period of eight years, when read in connection with the prior law relative to recording mortgages and harmonized therewith, merely limits the duration of record notice of the lien of recorded mortgages, and, though "subsequent purchasers" is not qualified by "in good faith," the failure of a mortgagee to file the required affidavit did not affect the lien as against a subsequent purchaser, who purchased with actual notice of the mortgage and during the time that the record of the mortgage was constructive notice.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 383-385; Dec. Dig. ~~168~~.]

In Equity. Suit by W. E. Cullen, Jr., against Henry J. Reed and others. Decree for plaintiff.

Day & Mapes, of Helena, Mont., for plaintiff.

H. G. & S. H. McIntire, of Helena, Mont., for defendant Dolenty.

BOURQUIN, District Judge. A mortgage foreclosure, commenced September 26, 1914, in which a defendant, purchaser of part of the land, contends the lien thereon has expired as against her. It appears the debt secured matured after recordation and on June 15, 1904. Defendant's purchase was by deed of general warranty, "except as against" said mortgage, made and recorded on October 16, 1911. At all the times aforesaid it was and now is of the statute recordation law of the state, save to the extent modified by an act hereinafter referred to, that grants, including mortgages, may be made and recorded, and from the time filed for record are constructive notice; that, though unrecorded, they are valid as to the parties and those having notice; that they are conclusive against the grantor and "every one subsequently claiming under him, except a purchaser or incumbrancer who in good faith and for a valuable consideration acquires a title or lien by an instrument that is first duly recorded"; that they are "void against any subsequent purchaser or incumbrancer * * * in good faith and for a valuable consideration whose conveyance is first duly

recorded"; and that liens are extinguished by lapse of the time in which an action can be brought upon the debt secured. Sections 4621, 4643, 4683, 4684, 4687, 5728, R. C. Montana.

February 17, 1913, a state legislative act, entitled "An act defining the duration of liens of mortgages upon real estate and the manner of the extension thereof," became effective. See Laws Mont. 13th Sess. p. 27. Section 1 provides that every such mortgage, recorded "as provided by the laws of this state, is thereupon good and valid as against the creditors of the mortgagor or owner of the land mortgaged, or subsequent purchasers or incumbrancers, from the time it is so recorded until eight years after the maturity of the entire debt or obligation secured thereby and no longer, unless the mortgagee, his * * * representatives, successors, or assigns, shall within sixty days after the expiration of said eight years file" in the recorder's office what may be termed a good faith affidavit like unto those usual in chattel mortgage law, whereupon "the said mortgage shall be valid against all persons for a further period of eight years." Section 2 provides that all acts and parts of acts inconsistent therewith are repealed.

None such affidavit was filed herein. Defendant contends that the words "subsequent purchasers" in said act, being without qualification therein, import a purchaser at any time and regardless of good faith and valuable consideration, and that, even though she purchased while the mortgage was of record and within eight years of the maturity of the debt secured, failure to thereafter file the affidavit provided by said act caused the validity of the mortgage to cease as against her. Plaintiff contends that the benefit of said act extends to those only who purchase subsequent to the eight-year period and as to whom the record of the mortgage is no longer constructive notice.

Said act is of a special nature, and must be read in connection with the prior law and harmonized therewith, in so far as its language will permit and is reasonable, to effectuate a consistent legislative policy and arrive at the legislative intent. The prior law provides for the creation of mortgage liens, their quality, effect, extent, and duration, recorded and unrecorded, and like recordation laws in general, for the purpose of protecting subsequent bona fide purchasers against prior and secret conveyances and liens, thereby merely giving statutory expression to the equity rule in the matter of subsequent bona fide purchasers, and effect thereto where equity might refuse to act.

The act of February 17, 1913, seems designed for the like purpose in real mortgage law that somewhat like statutes are in chattel mortgage law, viz., to limit the otherwise unlimited duration of the record of mortgages and the liens dependent thereon, and to provide for their continued duration by a "good faith" affidavit filed, to limit the record search necessary by subsequent purchasers, and to limit the length of time the record is constructive notice. This act is in substance much the same as the analogous chattel mortgage law of the state. See sections 5762, 5763, R. C.

By the great weight of authority, and so is it upon principle, it is held that in chattel mortgage law the subsequent purchasers, intended to be protected by the "good faith" affidavit required, are only those

who purchase after the record ceases to be constructive notice, after failure to timely file the affidavit, and who purchase in good faith and for a valuable consideration. Only those are within the policy of recordation laws. They alone may be damaged without such protection. For all who purchase while the record is notice can protect themselves, are assumed to have notice of the mortgage, and to pay only the value of the property less the debt secured.

That the act of February 17, 1913, is of like object and intent is indicated by its title, of more than usual importance that in this state the Constitution requires that no such bill shall be passed containing more than one subject, which shall be clearly expressed in its title. The act neither provides for the creation of mortgage liens, nor gives to them validity as to third persons, the prior law doing that, but merely limits the duration of record notice of the lien of *recorded* mortgages. If the intent is not as hereinbefore indicated, an unrecorded mortgage in many contingencies would be superior to a recorded one, unless it be successfully contended that by reason of the act the prior law as to unrecorded mortgages is inconsistent and repealed, and such mortgages now without any validity as to third persons. That the act does not qualify "subsequent purchasers" by "in good faith," etc., does not necessarily invoke the literal and extreme construction contended for by defendant. Not defining subsequent purchasers, their description must be found in the prior law in pari materia, with which the act must be read, and of which it becomes a part. In view of all the circumstances, this construction of the act is most reasonable, harmonious, consistent with its language and with the long-settled policy of the state otherwise reversed, and by implication (for the repealing clause is of no other legal effect) repeals the prior law for inconsistency only to the extent that the latter gave to the record of mortgages and the liens dependent thereon unlimited duration.

A somewhat similar statute of Louisiana received a like construction by the Supreme Court (Patterson's Case, 8 Wall. 292, 19 L. Ed. 415), thereafter contra (Pickett's Case, 149 U. S. 530, 13 Sup. Ct. 998, 37 L. Ed. 829) to conform to state construction that record and reinscription were necessary, not only for constructive notice, but to give a mortgage any validity against any third persons. Defendant Dolenty having purchased while the record of plaintiff's mortgage was constructive notice, to say nothing of the actual notice she had, she is not a subsequent purchaser within Act Feb. 17, 1913, and plaintiff is entitled to foreclose to the extent necessary the mortgage upon the land Dolenty purchased.

An appropriate decree will be entered.

HILL v. WHALEN & MARTELL, Inc.

(District Court, S. D. New York. December 3, 1914.)

No. 9-319.

1. COPYRIGHTS ~~67~~—INFRINGEMENT—CARTOON.

The copyright of the cartoons of imaginary characters named "Mutt and Jeff," the dramatic rights to which were licensed to complainant, is infringed by a dramatic performance in which there are two characters named "Nutt and Giff," who were costumed to represent the cartoon characters, who gave many direct quotations from the cartoons, and who were intended to be understood, and were understood, to be the same characters.

[Ed. Note.—For other cases, see Copyrights, Cent. Dig. § 64; Dec. Dig. ~~67~~.]

2. COPYRIGHTS ~~53~~—INFRINGEMENT—PARODY.

A copyrighted work is subject to fair criticism, either serious or humorous, and for that purpose may be pictured or quoted, without infringing the copyright.

[Ed. Note.—For other cases, see Copyrights, Cent. Dig. § 51; Dec. Dig. ~~53~~.]

3. COPYRIGHTS ~~53~~—INFRINGEMENT—PARODY.

One test to determine whether a parody is a mere criticism or a reproduction is whether the parody given is such as will materially reduce the demand for the original by partially satisfying that demand.

[Ed. Note.—For other cases, see Copyrights, Cent. Dig. § 51; Dec. Dig. ~~53~~.]

In Equity. Suit by Gus Hill against Whalen & Martell, Incorporated, to restrain the infringement of a copyright. Injunction granted.

John J. Sullivan, of New York City, for complainant.

Robert H. Elder, of New York City, for defendant.

ROSE, District Judge. [1] The complainant in this case is the exclusive licensee of the dramatic rights of copyrighted cartoons which purport to show the features of two imaginary individuals to whom the artist has given the names of "Mutt" and "Jeff." These dramatic rights are of great value. Mr. Bishop, the artist and author of the cartoons, has from them within a period of three years received between \$60,000 and \$70,000 in royalties.

The defendant arranged a dramatic performance, which he called "In Cartoonland," and in which he introduced as characters of considerable prominence two personages, to whom he gave the names of "Nutt" and "Giff." They were "Mutt" and "Jeff." Everybody so understood, and it was intended that everybody should so understand. They were costumed and made up with that end in view. The language used by them contained some important direct quotations from the more striking catchwords which had become familiar as the utterances of one or the other of these imaginary beings. The rest of the words put in their mouths were in substantial harmony with the characters given them by the original artist. The defendant says that his representation of them was a mere parody or burlesque of the original, and was so intended.

[2] A copyrighted work is subject to fair criticism, serious or humorous. So far as is necessary to that end, quotations may be made from it, and it may be described by words, representations, pictures, or suggestions. It is not always easy to say where the line should be drawn between the use which for such purposes is permitted and that which is forbidden.

[3] One test which, when applicable, would seem to be ordinarily decisive, is whether or not so much as has been reproduced as will materially reduce the demand for the original. If it has, the rights of the owner of the copyright have been injuriously affected. A word of explanation will be here necessary. The reduction in demand, to be a ground of complaint, must result from the partial satisfaction of that demand by the alleged infringing production. A criticism of the original work, which lessened its money value by showing that it was not worth seeing or hearing, could not give any right of action for infringement of copyright.

In this case, I am satisfied that the representation of defendant's "In Cartoonland" was calculated to injuriously affect, and that to a substantial degree it did so affect, the value of complainant's copyright. Those who saw "Nutt" and "Giff" would have less keen a desire to see "Mutt" and "Jeff." Having seen the former, they would be more likely to spend the next dime or quarter they had available for such purpose on a show other than the authorized dramatization of the latter. A good many of them would probably think that they had already seen those characters. They would not be far wrong in so thinking. The next time they would prefer to see something else.

The complainant is therefore entitled to an injunction, and under all the circumstances I think to a decree for \$750 and costs.

STALLO v. WAGNER.

(District Court, S. D. New York. November 17, 1914.)

No. 11-138.

1. BANKS AND BANKING ~~287~~—NATIONAL BANKS—RECEIVERS—ACTIONS ON CLAIMS—EVIDENCE.

In a suit by a depositor to charge the receiver of a national bank with the proceeds of certain notes and drafts delivered to it by complainant, evidence *held* to show that the instruments were given for the accommodation of the president of the bank, so that the amounts were not proper charges against the bank, but against the president individually.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 1089-1104, 1126, 1127; Dec. Dig. ~~287~~.]

2. BANKS AND BANKING ~~287~~—NATIONAL BANKS—RECEIVERS—ACTIONS ON CLAIMS—EVIDENCE.

In a suit by a depositor in an insolvent national bank to charge the receiver with amounts transferred by the president of the bank from complainant's account to other accounts, evidence *held* to show that the transfers so made were authorized by the depositor, notwithstanding his denial.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 1089-1104, 1126, 1127; Dec. Dig. ~~287~~.]

8. BANKS AND BANKING ☞287—NATIONAL BANKS—RECEIVERS—ACTIONS ON CLAIMS—EVIDENCE.

Evidence held insufficient to charge the receiver of an insolvent national bank with the proceeds of the sale of certain bonds, which complainant delivered to the president of the bank, taking his individual receipt therefor.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 1089-1104, 1126, 1127; Dec. Dig. ☞287.]

4. BANKS AND BANKING ☞262—ACTS OF PRESIDENT—AGENCY.

Where a national bank depositor gave the president of the bank bonds to be sold and the proceeds deposited, and also checks for the amount to be realized from the sale, which were to be applied by the president to certain payments, the president was the agent of the depositor, and not of the bank, in making the application of the proceeds, and the bank is not liable for a misapplication thereof.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 1001-1006; Dec. Dig. ☞262.]

5. BANKS AND BANKING ☞287—LIABILITY TO DEPOSITOR—LACHES OF DEPOSITOR.

Where a depositor in a national bank received and receipted for a statement from the bank, with accompanying vouchers which showed that the bank, with whose president the depositor was closely associated in many business transactions, had without authority diverted funds from his account to another account under circumstances which practically amounted to theft by the president, but the depositor made no complaint to any one except to the president and the cashier, who was under the president's control, and to them he merely stated that he desired to have his affairs with the bank, including that item, straightened out, the depositor cannot, after the bank has become insolvent through the acts of its president, enforce a claim for that amount against the receiver.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 1089-1104, 1126, 1127; Dec. Dig. ☞287.]

6. BANKS AND BANKING ☞287—LIABILITY TO DEPOSITORS—MISAPPLICATION OF CHECK.

Where a depositor had a bank discount his note with the understanding that he would pay the money out of the proceeds of some stock in a few days, but on the same day learned that the stock would not be available and gave to the president of the bank a check for the amount of the note, which the president diverted to his own use, and the amount of the check was debited against the depositor's account, but he was not credited with the amount of the note, a statement of the account from the bank would not necessarily put him on notice that the money had been diverted, and he could therefore either recover from the receiver of the bank the possession of the note or be decreed a creditor for the amount of the check.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 1089-1104, 1126, 1127; Dec. Dig. ☞287.]

In Equity. Suit by Edmund K. Stallo against Petro W. Wagner, as receiver of the Mt. Vernon National Bank. Decree rendered for complainant for a portion of the amount demanded.

Rockwood & Haldane and Nash Rockwood, all of New York City, for complainant.

Stuart G. Gibboney, of New York City, for defendant.

ROSE, District Judge. On March 11, 1911, the Mt. Vernon National Bank was closed by order of the Comptroller of Currency. He

☞ For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

subsequently put it in the hands of a receiver. It is insolvent. The complainant was a depositor in the bank, and at times a borrower from it. He made his first deposit on the 2d of October, 1909, and his last on the 7th of January, 1911, at which latter date his balance, according to the books of the bank and his passbook had been reduced to \$36.69. There were no further transactions between them. Between October 2, 1909, and January 18, 1911, his passbook was balanced *eight* times. On at least six of these occasions he (or his authorized agent for the purpose) signed and returned to the bank one of its regular blanks acknowledging the delivery to him of a specified number of vouchers and his passbook, showing a named balance. Each of these receipts also stated:

"Unless notified to the contrary within ten days, balance as shown will be considered correct, and the vouchers genuine."

On November 3, 1910, a full statement of his transactions with the bank after the last of the receipts and down to the 1st of that month was at the request of his agent furnished him. In his complaint in this case, he says that in arriving at the balance appearing upon the bank's books and his passbook, he was charged with sums that were not proper debits against him, and that the bank failed to credit him with moneys deposited by him with it, and if the account were properly stated between them the bank would owe him \$74.-788.11 more. He brings this proceeding to establish his right to such additional amount. With a like object, he instituted a suit against the receiver in the Supreme Court of the State of New York. That case was removed to this court. Judge Mayer held that by the passbook and the receipts signed by him an account had been stated between him and the bank. He did not, on the ground of fraud and mistake, seek to surcharge and falsify such account. The case was therefore dismissed, without prejudice, however, to the complainant's right to bring a new suit, in which such charges of fraud and mistake should be distinctly made. The present proceeding followed.

The complainant knew little of the bank, and probably cared less. It does not appear that he was ever in it in the course of his life. He saw it only once, and that from the outside. He remembers that on one occasion on a Sunday he made a social visit to Mt. Vernon; otherwise, he does not recall ever having been in the place before or since. Before the failure of the bank he never sent any of his employés there. He made his deposits, sometimes by mailing them to the bank, and sometimes by handing them in New York to its president or cashier. When he became a depositor in the bank, one Jennings was its president. He now naturally enough seeks to persuade himself that the bank is responsible to him for what Jennings did to his hurt. He must have been in this frame of mind when he testified that he did not know Jennings until he became a depositor in the bank, thereby suggesting that the acquaintance between them was the result, and not the cause, of his relations to the bank. Beyond all question the reverse was the case. No other reason than his friendship with Jennings has been suggested to explain why he should have become a customer in a bank with which he had otherwise no con-

nctions, and which was located in a place which neither himself nor his employés could conveniently visit.

It appears that his account with the bank was opened out of the proceeds of a note discounted by the bank on October 2, 1909, for one Mayhen for \$3,000, three-fourths of which was put to Mayhen's credit, and one-fourth of which was put to the credit of Stallo. Stallo had two days before, on September 30th, in anticipation of this discount and deposit, drawn a check for \$750 to the order of Mayhen, which was paid by the bank. Just why the transaction should have taken this peculiar and complicated turn does not appear. But it is certain that Stallo must have consulted Jennings about it before it was put through. Moreover, the evidence leaves no doubt that Stallo had previously to that time become interested in some of the large ventures in which, as will be afterwards shown, he and Jennings were both concerned, and into which he says Jennings induced him to go. It is rather significant of the untrustworthiness of his memory that he should have made the statement he did with reference to the date of his acquaintance with Jennings, and also that he should absolutely have forgotten, as he testified he has, all of the circumstances connected with this first deposit and this first of his checks upon the bank, unusual, peculiar, and apparently unnecessary as they appear to have been.

At and before the time he became a depositor in the bank, Jennings and he were warm friends, and they remained so at least until the latter part of 1910. They were intimate business associates in a number of matters of quite considerable pecuniary importance. Jennings, for legitimate and it may be for illegitimate purposes as well, wished him to be a depositor in the bank. Stallo was at about that time a considerable borrower, and he was therefore quite willing to open an account at a bank, which, however inconveniently located in relation to his residence and place of business, had a president whom he had reason to believe would look favorably upon such loans as he might solicit.

Jennings held more than one-third of the stock of the bank. He had for practical purposes absolute control of it. Much of the stock not standing in his own name belonged to persons who had confidence in him, or who sustained such relations to him that they were ready to do with reference to the bank whatever he wished done. The cashier appears to have been under his domination. He was a lawyer, and a man of strong and masterful will. In his financial schemes he was bold and venturesome. He became interested in various projects which demanded for their successful conduct resources much larger than he could legitimately command. He had the opportunity to use the bank's money. The temptation to ward off the failure of his enterprises by using the bank's funds proved too strong for him. When the crash came, as under such circumstances it usually does come, his dishonesty became manifest.

Stallo is also a member of the bar. How great his financial resources were does not appear. They were at all events in his judgment sufficient to justify him in participating on a considerable scale with Jennings in some of the latter's largest ventures. His fa-

ther-in-law, who died in the spring of 1910, was a wealthy man, and Stallo seems to have held during the latter months of his life a rather broad power of attorney from him, and after his death administered upon his estate. This father-in-law (one McDonald by name), through Stallo, also became interested in some of Jennings's schemes. Stallo was not systematic nor businesslike. He was prone to act in informal, if not in absolutely irregular, ways. He had become so involved in some of his ventures that at times it was not easy for him to come by ready money. No one who listened to the two men testify and familiarized himself with the general story of their relations to each other, to the bank, and to the schemes in which they were jointly interested, will be surprised to find that the accounts between them as individuals and with the bank are hopelessly entangled.

The transactions of which Stallo in this suit complains vary in their details. Generally speaking, they may be divided into two classes:

(1) Cases in which checks or drafts drawn by Stallo upon the bank or upon other institutions and deposited with it for collection were not put to his credit on its books. In every one of such cases Jennings says that Stallo sent these checks and drafts to the bank, not for deposit in it, but to be applied in other ways, and that his directions were obeyed. When Stallo was examined as a witness in this case, he admitted that some of the checks and drafts for which he brought this suit were given by him for the accommodation of Jennings. He persists in his denial that he ever authorized Jennings to make any use of the others.

(2) In a number of cases money to his credit in the bank was without written authority from him applied directly or indirectly to Jennings' use, or to the use of concerns in which Jennings was interested. Stallo testifies that he gave verbal permission for one of the transfers which in his complaint he swore was unjustified. The amount involved in this transaction was only \$1,100. He denies that he ever authorized any others. Jennings says he sanctioned all of them. Raymond testified that Stallo told Jennings in his presence to make such transfers whenever they were needed by the enterprises in which he (Stallo) was jointly interested with Jennings. Some of the transfers were, however, unquestionably made for purposes in which he was not concerned. The \$1,100 admittedly authorized was of this class.

It will be well to state briefly the facts with reference to the various items of his claims against the receiver. He numbers these claims from 1 to 10; but, as 5 of them are grouped together as claim 4, there are 14 of them in all. Two of these, namely, claim 3 for \$2,000 and the \$1,100 item or subclaim of claim 4, he now admits were properly charged to his account, thus reducing his claim to \$71,788.11. It will be, nevertheless, worth while to state the facts as to these two withdrawn claims, because they throw light upon the way in which to his knowledge and with his consent Jennings dealt with his account.

Claim 3 relates to \$2,000 of the proceeds of a note of one Barnsdale for \$5,000, which Stallo had the bank discount for him. This note was not paid at maturity, and its face was, of course, properly charged to Stallo. When it was discounted, however, he received credit for only \$3,000 of the proceeds, and the other \$2,000 was credited to Jen-

nings. In his complaint, to which he swore on the 30th day of March of this year, he said, in effect, that he did not authorize the bank to apply this \$2,000 to the use of Jennings. He now very candidly admits that he was mistaken, and that he did tell Jennings to make such transfer.

The first subclaim of his claim 4 was for \$1,100, which on the 13th day of December, 1909, was transferred by the bank from the credit of his account to that of Jennings. This charge he also in his sworn complaint says that he did not authorize. He now frankly says that he did telephone instructions to the bank to credit such sum to Jennings.

It is to be borne in mind that he and Jennings were deeply interested, if not involved, in various transactions which in the end proved to be very much larger than their financial resources. Jennings procured for him accommodations from the bank, and did many other things for him. Stallo never went to the bank at all, and did his business with it through Jennings in New York. Neither Jennings nor Stallo cared anything whatever about the form of any transaction, and were at any special time principally interested in accomplishing the particular object they had in view. It is therefore not surprising that it is always difficult, and oftentimes impossible, to tell when Jennings was acting as agent for the bank, as agent for Stallo, or solely for his own hand.

The claims in which Stallo still persists should be considered somewhat in detail, grouping them, however, with reference to the similarity of their facts, or of the legal principles applicable to such facts, rather than in the order in which they appear in the schedule attached to the bill of complaint.

[1] Claim 1 is for the sum of \$12,500. In his bill Stallo alleges this was the proceeds of three checks, which were not placed to his credit. The history of the transaction through which the checks or their proceeds are traced by the accountants is quite involved. In his sworn complaint, Stallo puts the emphasis of his charge against the bank at a different place than that indicated by his testimony when examined as a witness. The expert accountants on the two sides agreed that, however complicated these transactions were, there was only one \$12,500 not credited to him which ought upon any theory have gone to him. He distinctly and repeatedly testifies that he did, in connection with these transactions, give and intend to give a draft for \$12,500 for the accommodation of Jennings; that is, he drew a draft for \$12,500, not for his own use, but for that of Jennings. Its proceeds were applied to such use. The only claim that he can have is against Jennings.

Claim 8 alleges the failure of the bank to credit him with the proceeds of a note drawn by him to the order of one Gardner for \$12,500. Stallo, however, testifies that this note was also for the accommodation of either Jennings or Gardner. Gardner received, not from the bank, but from Jennings, 15 bonds of the White Plains Development Company to protect him from loss in the transaction. When Gardner, in some of the subsequent renewals of the note, dropped out as indorser, and one Mallory took his place, the bonds came into Stallo's possession. He now, it is true, claims that at the time he supposed he was simply continuing the accommodation which he had

first given Jennings in the Gardner draft mentioned in the course of discussion of claim 1. When the events were much more recent in point of time, he testified at the criminal trial of Jennings that the note now under consideration was given for Jennings' accommodation. He did not then connect it with the earlier transaction. In any event, it is not easy to discern how the bank could be liable for the proceeds of a note given under such circumstances. I am satisfied that Stallo in these transactions was knowingly raising money for the benefit of Jennings, and the money was not put to his (Stallo's) credit, because in point of fact, if it had been so put, he would not have accomplished the purpose for which he gave the note, namely, to aid Jennings.

[2] Claim 2 is for the sum of \$1,000. On December 14, 1909, the bank charged to his account \$1,000 "for our New York draft to the order of Manhattan Securities Company." The Manhattan Securities Company was a concern in which Jennings and Stallo were both largely interested. Stallo at that time was a member of the executive committee of its board of directors. He had already made it large advances. This \$1,000 was duly carried to his credit on its books. The transaction took place in December, 1909, and on March 3, 1910, a debit slip showing the charge and that it was for the money paid the Manhattan Securities Company was included in the vouchers delivered to him.

Claim 4 is a composite claim for the excess of the aggregate of five different items of what he says were unauthorized debits to his account over the total of four items of credit about which he claimed to know nothing. The five items of debit were all made between the 11th and 24th of December, 1909. One of them, for \$1,100, on the 13th of December, 1909, he now admits was by his direction given over the telephone transferred to Jennings. Three others, \$800 on the 14th, \$8,000 on the 15th, and \$390 on the 24th, of the same month, were also transferred from his account to that of Jennings. He testified he never authorized any of them, or knew anything about them, or any of them. The fifth is an item of \$1,500, which on December 11, 1909, was charged to him for New York draft for Edward H. Kearn. Kearn, it seems, was an official of Westchester county whose business it was to collect the tax on a large mortgage which Jennings was having recorded for a corporation in which he was interested, and in which Stallo was not. Stallo says that he knew nothing of the transaction, and never authorized it. Jennings testified that Stallo gave him authority to make all these transfers. His recollection as to the circumstances under which the alleged authority was given, or when it was given, is very vague. I am not prepared to affirm that either he or Stallo are consciously trying to say anything that they do not now think to be true; but I do not believe the testimony of either of them can be relied on, except where it is corroborated by other circumstances or by the testimony of persons with more accurate memories.

The fact that these particular sums of money, as well as the \$1,000 transferred to the credit of the Manhattan Securities Company, had been so transferred, was distinctly stated on certain debit slips which accompanied Stallo's bank book when returned to his office on the 3d

of March, 1910. In the early part of his testimony he sought to give the impression that he had given these debit slips and bank balances a very cursory and careless examination. Later, however, he produced a scrapbook in which he had pasted a statement made up, as he says, not later than the 1st of June, 1910. It is very possible the statement was prepared on or about May 22d of that year. This statement shows that at that time these items of charge had had careful examination and that he knew as much about them as he knows now. This statement is headed, "H. T. Jennings and Mt. Vernon National Bank in Account with Edmund K. Stallo." In it are found items, such as commissions, etc., which were certainly not charges against the bank. The \$1,100 which he now says he had authorized to be transferred to Jennings appears in it in precisely the same way as he included the \$1,000 of claim 3, and the \$800, the \$8,000, the \$390, and the \$1,500 of subclaims 2, 3, 4, and 5 of claim 4. Upon them he charged interest just precisely as he charged interest on the \$1,100. He did not include one of the larger items of \$12,500, about which he had addressed a letter to the bank, and apparently rested satisfied with its reply. He says that he had this memorandum before him when he saw Jennings and Raymond, and he told them he wanted them to go over the account between himself and the bank. He does not claim that he mentioned particular items to them, and says that no convenient time could ever be made by Jennings or Raymond to take the matter up with him.

If, as he now claims, Jennings took these sums without his authority, he knew that fact as well then as he does to-day, or rather, as events were at that time much more recent, he then had a more certain knowledge of the lack of authority than it is possible for him now to have. All else he knew at that time precisely as he does now. So far as these items are concerned, he has learned nothing since. If his present testimony is to be believed, he was then aware that Jennings had at one time taken \$8,000 of his money without his authority. If that was so, then somebody else than Jennings was the person to be notified. Such a charge was and is a charge of downright theft; yet, knowing that Jennings had taken the money, he made no complaint to anybody but Jennings. He said nothing to Raymond, except to state that he would like his assistance in going over his accounts. He remained on the most intimate and personal business relations with Jennings for many months afterwards, and he knew that his agent had signed, and he subsequently himself signed, statements acknowledging that he had received the balanced bank book and the vouchers, and that he would make a complaint within 10 days if he thought any of them were not proper charges against his account. He then elected to treat the transfers which he now says were unauthorized precisely as he treated those which he admits he had expressly sanctioned. It is impossible to believe that he then regarded those charges as unauthorized, in the sense that he did not accept Jennings as his debtor for them, instead of the bank.

It follows, from what has thus far been said, that claim 1 for \$12,500, claim 8 for the like amount, and claim 2 for \$1,000 and the \$6,150 of the aggregate of the excess of the second, third, fourth, and fifth

subclaims of claim 4 over certain credits which Stallo says he does not know why he received, or a total of \$32,150, must be rejected on the facts. No doubtful questions of law are raised by them. It is significant of the untrustworthiness of Stallo's memory in these matters that among these credits about which he claims now to know nothing is the initial deposit of \$750 with which his account was opened, and against which, as already mentioned he had drawn a check before it was actually received by the bank.

[3] In the view I take claim 7 must follow the same course. It is for \$9,500, the estimated value of 10 bonds of the New Orleans, Mobile & Chicago Railroad Company. Jennings gave Stallo a receipt on the 7th of May, 1910, for a note of one Scandrett for \$25,000 and for 36 of such bonds as security therefor. The receipt was signed by Jennings in his individual capacity. There was no mention of the bank in it, except that the note was there payable. Stallo says at the same time he handed Jennings a letter addressed to the bank in which he directed it to use the proceeds of the note in purchase of notes of the Gray Construction Company and of one Greenwood, and to hold the notes so purchased for his account and subject to his direction. No such letter has been found in the files of the bank. During the period covering this date, Stallo copied his letters in a letter-press book. This letter was not so copied. Stallo produces a carbon copy of it, which he says was made at the time the letter was written. Jennings denies having ever seen or heard of such letter. I am not prepared to find that it was ever delivered to Jennings or to the bank, and I am rather of the impression that it was not. Very possibly it may have been prepared, but for some reason Stallo changed his mind and did not send it. So far, however, as concerns his claim for these 10 bonds, the impression produced upon my mind by all the testimony concerning them was that they were in point of fact returned to Stallo, and were apparently by him or his agent subsequently sold. At all events, there is not sufficient evidence in this case in my judgment to charge the bank with these bonds or their value.

[4] Claim 9 is for \$8,139.23. According to Stallo's account, Jennings told him it was necessary to take up 4 notes, being claims against the Gray Construction Company, to the aggregate amount of \$16,250. Stallo was a subscriber for a large amount of the bonds of the Broadway & Forty-Third Street Company, a building belonging to which was being erected by the Gray Construction Company. He had not paid his subscription to the bonds, but the bonds themselves had been pledged with the Gray Construction Company as collateral. Jennings told him that bonds to the amount of \$16,250 had been sold, and that the proceeds should be applied to the payment of certain claims against the Gray Construction Company which it was important to take up. The statement that the bonds had been sold seems to have been true, and Stallo's account was on that day credited with such sum. He drew four checks, aggregating \$16,250, each of them being drawn to the order of the bank, and gave them to Jennings with which to take up the Gray Construction Company's obligations. Two of these checks were so used. One of them, for \$1,000, was not, but was applied by Jennings to his own purposes. The other, for \$7,139.23, was put to the

credit of the McDonald estate, of which Stallo was the administrator. This transaction took place on the 5th day of January, 1911.

His counsel brings out the fact that on the 13th of the preceding July Stallo had drawn a check as administrator on that account for \$23,129.23. It seems that for reasons satisfactory to itself the surety on his administration bond had required that all checks on that account should be countersigned. The check in question had not been countersigned. Nevertheless Jennings, under color of the check, used its amount for other purposes. The check itself, however, was not otherwise carried in the bank's work. The McDonald account, the check not being regularly charged against it, was thus short \$23,-129.23. What knowledge Stallo has as to these proceedings, or what part he took in them, it is now impossible to say. He says he had none. He testifies that Jennings undertook to get the necessary countersignature. It is illustrative of the loose way in which he did business that this administrator's check was drawn out of his personal checkbook. There is another circumstance which may or may not have in this connection some significance. On the same July 13th upon which he drew the administrator's check for \$7,152.10, he gave Jennings a check, which is marked in his checkbook, "for exchange checks." It will be noticed that this sum is very close to the \$7,139.23 of the check of January 6th which Stallo says was misapplied. The two amounts may have no connection, but they help to show how difficult it is to make even a plausible guess as to what was the full and real history of the transactions between these two men.

So far as this claim is concerned, it is unnecessary to try to get at the bottom of their dealings with the administration account and between themselves. In any event, Stallo made Jennings his agent to deposit \$16,250, and gave him checks to take that money out of the bank and use it for purposes which were not purposes of the bank. If Jennings abused the authority thus given him, it would not appear that the bank became liable, although it be assumed that by crediting the money to persons to whom Jennings had made the bank a debtor the bank's indebtedness was thereby reduced. Stallo gave no instructions to the bank as to how the money was to be applied. The case is indistinguishable from that of *Hilliard v. Lyons*, 180 Fed. 685, 103 C. C. A. 651 (C. C. A. 3d Cir.). The claim of Stallo based upon it must therefore be rejected.

Claim 10 is for \$6,000. On the 29th day of July, 1910, Stallo gave the bank a check for \$6,000, drawn to its order upon the Commercial Bank & Trust Company of Laurel, Miss. The check was not paid by the latter bank. When it was returned to the Mt. Vernon Bank, the latter properly enough charged it to his account; but in the first instance it was not credited to him as he claims it should have been. The only question, of course, is whether this check was given to the bank to be put to his account, or was intended by him for some other purpose. In point of fact it was applied to the purchase of or payment for a draft for \$6,000 upon the National Reserve Bank. What was subsequently done with the money he says he does not know. His account of why he gave the check is a confused one. He says it was

not to be credited to his bank account, at least not in the ordinary way. It was to be "carried as a cash item" until an outstanding note of his then held somewhere (he does not know where) should be renewed. He understood that it had been discounted at some other bank. Jennings was to have that note taken up and renewed, if possible. There might be some delay in getting this done. According to Stallo's present idea, the check was given to pay the note, if the holder of it did not renew it. This statement, if it is to be accepted as to its face value, seems to bring this claim also under the ruling of *Hilliard v. Lyons*, *supra*.

Claim 6 is for \$5,898.88. It is connected with the remaining 26 of the 36 bonds already mentioned in discussing claim 7. On the 21st day of May, 1910, the bank placed to the credit of Stallo on its books the sum of \$16,900, the purchase price by it from him of 26 of the bonds at 65. Stallo says that this sale was not authorized by him. It was, however, entered on his passbook, and there appeared when, on the 5th day of July, he personally signed a receipt for the bank book and the vouchers accompanying it. I cannot hold that such sale was in fact improper. Stallo alleges now that the market price of those bonds at that time was considerably above 65, and he himself so testifies. His recollection in matters of this kind cannot be trusted. If there was a free market for the bonds at that time, it would have been easy to establish that fact by satisfactory evidence. The direct claim, however, is for \$5,898.88, a part of the admitted proceeds of the bonds.

[5] The books of the bank show that this sum was transferred on the 21st day of May from the credit of Stallo's account to that of the First National Bank of Oneonta. Stallo now says that he had no relations with that bank, and that such transfer was totally unauthorized, yet it is admitted that on the 5th day of July, 1910, Stallo personally received and receipted for his bank book and the vouchers covering the period between March 3d and June 30th. Among the vouchers so returned to him was one which on its face said: "Debit Edmund K. Stallo a/c cr. 1st Nat. Bk. Oneonta \$5,898.88 paid ^{5/21} 1910." It does not appear that he in any wise at any time before the closing of the bank challenged the propriety of this charge. He includes it among the items which he says he wanted straightened out, and of which he spoke generally to Jennings and Raymond. A good deal more than this was required of him, in view of his relations to Jennings. If he knew that Jennings was taking his money without his authority, he knew Jennings was in effect stealing it. With such knowledge he could not sit by without doing anything to notify the other persons connected with the bank of the criminal conduct of Jennings and Raymond. He may have disliked these charges to his account, but he was not prepared to dispute them to the extent of risking a rupture with Jennings. His relations with the latter were far too close and intimate after this date to suppose that he intended to charge Jennings with what was in fact a theft, and yet as early as the 5th of July, 1910, he knew everything about this charge that he knows now.

It is impossible, because of the unreliability of the testimony of either Jennings or Stallo, to determine precisely what all the facts were. Stallo has not shown any sufficient reason to have the court do for him now what he, with his eyes open, for many months after he was aware of all the facts, declined to do for himself. If he is to be believed, he knew as early as March 3d that Jennings was a thief (or at least was stealing), and so far as the record discloses he was the only person in the world, except Jennings, who did then know it. Had he acted upon the knowledge which he now admits he then had, the stockholders and creditors of the bank might, and probably would, to-day be in a very much better position than they are. He may not now dispute the correctness of a charge which he allowed to stand unquestioned so long. *Morgan v. U. S. Mortgage & Trust Co.*, 208 N. Y. 218, 101 N. E. 871, Ann. Cas. 1914D, 462.

[6] All his claims, except his No. 5 for \$10,000, have thus been eliminated. It is in evidence that on the 3d of May, 1910, he offered to the bank for discount his note for \$10,000, payable on demand. On the same day he drew to the order of the bank a check for \$10,000. The check was never placed to his credit. The proceeds of the note were. The note was not paid at maturity, and was renewed by Stallo. It still remains as a claim against him in the hands of the purchaser of the assets of the bank. Stallo's story is that he wanted to borrow \$10,000 from the bank with which to pay \$10,000 of his subscription to the bonds of the Gray Construction Company, one of the large enterprises in which he and Jennings were interested. He asked Jennings to have the bank loan him the money, and told Jennings that in a few days one Holloway, who was also interested in some of the enterprises of Stallo and Jennings, and who was president of a bank in the South, would release to Stallo some 150 shares of the stock of the Gulf Investment Company apparently belonging to Stallo, and as soon as he got this stock he would be able to pay the loan to the Mt. Vernon National Bank. Jennings thereupon agreed to make the loan, and Stallo gave the note in question. A short time afterward, on the same day, Stallo learned from Holloway that his directors were not ready to release the stock. Stallo thereupon drew the check to take up the note which he had just given, because he understood that Jennings would not consent to lend the money unless the note was certain to be repaid in a few days.

The check was, in point of fact, used in paying \$2,500 each on account of notes of Moran, Robinson, Holloway, and Jennings given for the purchase price of the stock of the First National Bank of Oneonta in the purchase of which Stallo's father-in-law (McDonald), through Stallo, had become a party. If his account of this transaction is correct, his bank book would not necessarily have put him upon notice. The only laches with which he could be charged was in failing to demand the return of the note from Jennings. Jennings says that the check was given by Stallo for the purpose to which it was applied. Taking everything in consideration, I reach the conclusion that this was an occasion upon which Jennings used Stallo's money without Stallo's previous authority. There is not sufficient evidence

that the latter, by accepting entries in his passbook or otherwise, ratified what had in the first instance been unlawfully done.

It follows that the bank or receiver must account to him for \$10,000. If the receiver still holds the Stallo note for \$10,000, the simplest decree would be to require its surrender to him. Under all the circumstances, the receiver should, if he wishes, still have a chance so to do, if he can. The decree should provide that his bill shall be dismissed if within 30 days the note is returned to Stallo, or if within such time to protect him against liability on it, there is delivered to him a bond in the amount of \$15,000, executed by some corporate surety whose underwritings for such amount are under the general rules and practices of this court accepted. If neither of these things are done, he should be decreed a creditor of the bank for the sum of \$10,000, with interest from the 3d day of May, 1910, until such day as in the winding up of the bank interest has been calculated upon the claims of its other creditors, and until such further date as interest may at any time be paid out of the assets of the bank to its general creditors.

Each party should pay his own costs.

In re HAWLEY.

(District Court, S. D. New York. February 5, 1915.)

1. INTERNAL REVENUE ~~19~~—STAMP TAXES—POWER OF ATTORNEY—STATUTES CONSTRUCTION.

Internal Revenue Act 1914 provides that a power of attorney to sell and convey real estate or to rent or lease the same, to receive or collect rents, to sell or transfer any stock, bonds, scrip, or for the collection of any dividends or interest thereon, or "to perform any and all other acts not hereinbefore specified," shall bear an internal revenue stamp of the value of 25 cents. Held that, while such section did not apply to a warrant of attorney authorizing an attorney at law to appear in an action on behalf of the maker, it did apply to powers of attorney generally, distinguished from warrants of attorney, in that they authorized laymen to act as attorneys in fact; and hence a general letter of attorney, authorizing the appointee to act for the signer in bankruptcy proceedings, must be stamped.

[Ed. Note.—For other cases, see Internal Revenue, Cent. Dig. §§ 39-44; Dec. Dig. ~~19~~.]

2. INTERNAL REVENUE ~~4~~—TAXATION—EXEMPTIONS.

The rule that the internal revenue law should be strictly construed in favor of exemption is but a rule of construction, which yields when the intent of the statute is manifest.

[Ed. Note.—For other cases, see Internal Revenue, Cent. Dig. §§ 4, 5; Dec. Dig. ~~4~~.]

3. INTERNAL REVENUE ~~19~~—STAMP TAXES—CERTIFICATES—ORDER APPROVING BOND OF BANKRUPTCY TRUSTEE.

Under Internal Revenue Act 1914, imposing stamp taxes on certificates of any description required by law, not otherwise specified in the act, 10 cents, a certificate which is required to enable some officer of the court to exercise his functions, or to do some act connected with the administration of the government, is exempt, but certificates required of such offi-

cers by private persons are not exempt; and hence a referee in bankruptcy properly refused to certify an order approving the bond of the trustee, unless an internal revenue stamp was attached thereto.

[Ed. Note.—For other cases, see Internal Revenue, Cent. Dig. §§ 39-44; Dec. Dig. 19.]

In Bankruptcy. In the matter of bankruptcy proceedings of Charles A. Hawley, individually and as a member of the firm of Hawley & Alford. Proceedings to review a referee's order refusing to accept a general letter of attorney, and refusing to certify that an order approving the trustee's bond is a correct copy of one on file in his office, unless internal revenue stamps are attached thereto. Affirmed.

H. Snowden Marshall, U. S. Atty., of New York City (Earl B. Barnes, of New York City, of counsel), for collector of internal revenue.

Henry H. Kaufman, of New York City (Daniel P. Hays, of New York City, of counsel), for creditor.

AUGUSTUS N. HAND, District Judge. The referee in bankruptcy has refused to accept a general letter of attorney in the above estate in the usual official form, authorizing the attorney in fact to attend meetings of creditors of the bankrupt and vote thereat for trustee, or for any other proposal or resolution that may be submitted under the act, to accept any composition proposed by the bankrupt, and to receive payment of any dividends or money due under any composition, etc., unless there shall be affixed to such letter of attorney a 25-cent internal revenue stamp. He has likewise refused to certify that an order approving the bond of the trustee is a correct copy of the one on file in his office, unless there is attached to such certificate a 10-cent internal revenue stamp.

The opinion which I am about to express is concurred in by the four judges of this court. We think the decision of the referee was correct in both instances.

[1] I shall first discuss the ruling of the referee in regard to the letter of attorney. A consideration of the War Tax Act of 1862, and amendments, and of the War Tax Act of 1898, from which acts the language of the present law is derived, indicates that it was the intention of Congress to require stamps *in general* upon powers of attorney. The provisions of these acts in relation to stamps upon powers of attorney are as follows:

Act July 1, 1862, c. 119, 12 Stat. 483:

"Power of attorney for the sale or transfer of any stock, bonds, or scrip, or for the collection of any dividends or interest thereon.....	\$.25
"Power of attorney or proxy for voting at any election for officers of any incorporated company or society except religious, charitable, or literary societies, or public cemeteries.....	.10
"Power of attorney to receive or collect rent.....	.25
"Power of attorney to sell and convey real estate, or to rent or lease the same, or to perform any and all other acts not hereinbefore specified	1.00"

☞ For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

The foregoing law was amended in 1864, as appears in (Act June 30, 1864, c. 173) 13 Stat. 300, as follows:

"Power of attorney for the sale or transfer of any stock, bonds, or scrip, or for the collection of any dividends or interest thereon.....	\$.25
"Power of attorney or proxy for voting at any election of officers of any incorporated company or society, except religious, charitable, or literary societies, or public cemeteries.....	.10
"Power of attorney to receive or collect rent.....	.25
"Power of attorney to sell and convey real estate, or to rent or lease the same.....	1.00
"Power of attorney for any other purpose.....	.50"

The act of 1862 was further amended, as appears in Act March 2, 1867, c. 169, § 9, 14 Stat. 475, by inserting the following provision:

"Provided further, that no stamp tax shall be required upon any papers necessary to be used for the collection from the government of claims by soldiers, or their legal representatives of the United States, for pensions, back pay, bounty, or for property lost in the service."

The provisions of the act of June 13, 1898 contained in 30 Stat. 462, c. 448, § 25, Schedule A relating to the matter under consideration, were as follows:

"Power of attorney or proxy for voting at any election for officers of any incorporated company or association, except religious, charitable, or literary societies, or public cemeteries, ten cents.

"Power of attorney to sell and convey real estate, or to rent or lease the same, to receive or collect rent, to sell or transfer any stock, bonds, scrip, or for the collection of any dividends or interest thereon, or to perform any and all other acts not hereinbefore specified, twenty-five cents: Provided, that no stamps shall be required upon any papers necessary to be used for the collection of claims from the United States for pensions, back pay, bounty, or for property lost in the military or naval service."

The provisions of the present act are taken verbatim from the act of 1898.

It will be noticed that the act of 1862, combined in the paragraph which taxed powers of attorney to "sell and convey real estate, or to rent or lease the same," the additional clause, "to perform any and all other acts not hereinbefore specified." These last words, "to perform any and all other acts not hereinbefore specified," are literally the same both in the act of 1862, the act of 1898, and the act of 1914.

The amendment of 1864 to the act of 1862 reduced the amount of tax to be placed upon powers of attorney which were for general purposes not particularly specified in the act from the sum of \$1, at which it had been before fixed, to the sum of 50 cents, and because the tax rate of 50 cents was different from that upon any of the other powers of attorney set forth in the schedule, it became natural, if not necessary, to embody these powers of attorney for general purposes in a separate paragraph. Consequently, the amendment of 1864 resulted in eliminating the words "or to perform any and all other acts not hereinbefore specified" from the last of those classes of powers of attorney taxed under the act of 1862, and creating a new or fifth subdivision, reading as follows:

"Power of attorney for any other purpose, 50 cents."

It is unlikely to suppose that the act as amended in 1864 did not tax everything not expressly exempted which could be fairly denominated a power of attorney, especially as it contained a clause exempting powers of attorney to collect pensions—a class of powers which were not embraced in any other portion of this act than the clause taxing powers of attorney at 50 cents “*for any other purpose*” than those detailed in the previous clauses. I can see no reason for believing that Congress did not have the same intention to tax all powers of attorney unless expressly exempted both in the act of 1862 and the acts of 1898 and 1914. The only reason as I have said for the separate paragraph found in the amendment of 1864 was not because Congress then intended to tax powers of attorney in general, whereas it did not intend to do this under the laws of 1862, 1898, and 1914, but because the rate of taxation of these unclassified powers and powers to sell real estate was not the same under the act of 1864, whereas it was the same under the acts of 1862, 1898, and 1914. In other words, I cannot regard the consolidation of the clause, “or to perform any and all other acts not hereinbefore specified,” with other specific powers in the acts of 1862, 1898, and 1914, as showing any intention that the words “or to perform any and all others acts not hereinbefore specified” were intended to relate only to the specific powers enumerated in the prior clauses.

Counsel for the creditor, who insists that the letter of attorney in the present estate should not be taxed, urges that when the act of 1862 was passed letters of attorney in bankruptcy proceedings could not be presumed to have been in the mind of Congress, because no bankruptcy law was then in force. That, of course, is so; but the clause was broad enough to cover all powers of attorney, and was, therefore, sufficient to cover any powers of attorney that might thereafter be executed.

[2] Counsel for the creditor further urges that the tax law should be construed strictly and “in favor of the exemption,” as was said in the case of *United States v. Isham*, 17 Wall. at page 504, 21 L. Ed. 728. This rule, so far as it is in general applicable, is but a rule of construction, which must, of course, yield where the intent of the statute is manifest.

Counsel for the creditor further calls my attention to the case of *Tolman v. Treat* (C. C.) 106 Fed. 679. In that case Judge Lacombe held that under the act of 1898 the words “to perform any and all other acts not hereinbefore specified” were not sufficient to require a stamp upon what is known as a judgment note, which contained the not unfamiliar provision authorizing any attorney to appear for the maker and confess judgment in case the note should not be paid. Judge Lacombe said that such an instrument did not—

“seem to be a power of attorney, within the meaning of the section relied on. It is what is known as a ‘warrant of attorney,’ and is in fact a retainer, by virtue of which an attorney at law is authorized to appear in court on behalf of a client and take certain steps as attorney in litigation to which the client is a party.”

That case came before the Circuit Court of Appeals of the Second Circuit (which at the time consisted of Judge Wallace and Judge

Townsend), and is reported in *Treat v. Tolman*, 113 Fed. 892, 51 C. C. A. 522, on appeal. Judge Townsend, who wrote the opinion of the court, discussed the clauses of the War Revenue Act of 1898 in question, and said:

"The legislative intent, as disclosed by the special provisions of said schedule, appears to have been to tax those instruments by which one individual authorizes another to act on his behalf, either at meetings of corporations, or in the transaction of certain classes of business relating to real estate or corporate securities. * * * The general clause, 'or to perform any or all other acts not hereinabove specified,' should therefore be interpreted, under the doctrine of 'noscitur a sociis,' to refer to other classes of business of the same general character as those specifically enumerated. All of the acts within the scope of this classification are such as may be performed by any layman as an attorney in fact. The acts authorized under the instrument in question are confined to the exercise by an attorney at law of a court of record of his duties as an officer of the court in the proceedings taken in such court by virtue of his retainer. Such an instrument has always been recognized as a warrant of attorney, or evidence of authority to such attorney to represent the party as such officer of court in such a proceeding. The distinction between powers of attorney and warrants of attorney is clearly set forth in text-books and the decisions of the courts. A power of attorney is an instrument by which the authority of an attorney in fact or private attorney is set forth. By attorney in fact is meant one who is given authority by his principal to do a particular act not of a legal character. A warrant of attorney is an instrument authorizing an attorney at law to appear in an action on behalf of the maker or to confess judgment against him. An attorney at law is employed to appear for parties to actions or other judicial proceedings, and is an officer of the court. * * * It would seem that Congress could not have intended by such general words to impose a tax upon this class of official acts done in the course of judicial proceedings."

I do not think the reasoning of Judge Townsend or Judge Lacombe applies to the case of letters of attorney under the general forms in bankruptcy. Much of the authority conferred by these letters of attorney is very similar to powers of attorney to vote at stockholders' meetings and to collect dividends or interest, which are specifically set forth as taxable under schedule A of the act.

For the foregoing reasons, I am of the opinion that the referee was correct in his decision as to the letter of attorney, and that the 25-cent internal revenue stamp should have been affixed thereto.

[3] The question next arises as to whether a certificate by the referee that the order approving the trustee's bond is a true copy of the one on file in his office must bear an internal revenue stamp. This certificate, if taxable, is rendered so by the following provision of schedule A of the War Tax Law of 1914, which is identical with that of the act of 1898:

"Certificate of any description required by law not otherwise specified in this act, 10 cents."

The clause of the act of 1914 relating to stamp taxes upon certificates, which is in schedule A under the head of "Certificates," is as follows:

"Certificate of profits, or any certificate or memorandum showing an interest in the property or accumulations of any association, company, or corporation, and on all transfers thereof, on each \$100 of face value or fraction thereof, 2 cents.

"Certificate: Any certificate of damage, or otherwise, and all other certificates or documents issued by any port warden, marine surveyor, or other person acting as such, 25 cents.

"Certificate of any description required by law not otherwise specified in this act, 10 cents."

Under the act of 1898, which contained identical provisions with those of the act of 1914, the Attorney General, in an opinion to the Secretary of State, referred to in No. 20,551 Treasury Decisions, advised the department as follows:

"The Treasury Department, through the honorable Commissioner of Internal Revenue, has made a ruling which has been approved by this department that papers and instruments executed, made, or issued by officers of the government of the United States in the discharge of official functions pertaining to the operation of the governmental machinery and for the use or benefit of the United States are exempt from taxes. * * * The same principle would extend to instruments and papers of whatever character (otherwise subject to taxes) executed, made, or issued by officers of the United States for governmental purpose.

"Where, however, certificates or other instruments are issued by any department or officer of the government at the request of private persons solely for private use, a stamp should be affixed. And * * * such stamp should be furnished by the person applying for the certificate or other instrument for whose use or benefit the same is issued and should be affixed before the document is delivered."

By similar reasoning, the Commissioner of Internal Revenue, in Treasury Decision No. 20,387, held that an original certificate of inspection from local inspectors of steam vessels, which remains on file in the collector's office, is exempt from tax on the ground that it is an instrument issued by direction of law through governmental instrumentality for its own use and purposes, and that the two copies of this certificate which the law requires to be exposed under glass where passengers and other persons can see them, certified by the collector of customs, are also exempt for the same reason.

It was held by the Circuit Court of Appeals for the Eighth Circuit, in the case of Stirneman v. Smith, 100 Fed. at page 602, 40 C. C. A. 581, that a notary public, when engaged in taking depositions to be used in evidence before a judicial tribunal, was a judicial officer, and his certificate could not be taxed. Judge Thayer, in his opinion referred to the proviso in the act of 1898, which is incorporated in the act of 1914, as follows:

"Provided, that it is the intent hereby to exempt from the stamp tax imposed by this act such state, county, town or other municipal corporations in the exercise only of functions strictly belonging to them in their ordinary governmental taxing or municipal capacity"

—and said that it could hardly be supposed, where there was explicit exemption from stamp taxes of all documents issued by a state, or other subdivision thereof, in the exercise of its governmental functions, that Congress could have intended to levy taxes upon instruments used by the United States in the exercise of its governmental functions, and expressed the opinion:

"That its purpose was to impose stamp taxes on those instruments only which have their origin in the private transactions of individuals and corporations, or to such instruments and writings as are executed mainly for their benefit, rather than for the benefit of the public."

In the case of *Sackett v. McCaffrey*, 131 Fed. 219, 65 C. C. A. 205, the Circuit Court of Appeals for the Ninth Circuit held that a stamp was required under the law of 1898 upon a certificate of acknowledgment by a notary attached to a declaration of homestead. It was there contended that the notary, in taking the acknowledgment and indorsing his certificate thereon, was exercising a function of the state government of Montana, where the statute providing for the selection of a homestead had been enacted. The court, however, held that the notary in taking the acknowledgment exercised no governmental function, but was authorized to take the acknowledgment, and took it for a private purpose, and that the certificate should have been stamped before being admitted in evidence.

While it may be in some cases difficult to draw the line as to what is and is not a governmental function, I think that where a private individual applies to a judge, referee in bankruptcy, or clerk for a certificate, that a certain instrument is a copy, and it does not appear that it is to be used for any governmental purpose, it is taxable under the provisions of the act.

A certificate which is required to enable some officer of the court to exercise his functions, or to do some act connected with the administration of the government, is under the foregoing reasoning exempt. This would, I think, apply to certified copies of papers necessarily required by receivers; but I think there are comparatively few cases to which the exemption does apply, and the certificate in question is not one of them.

HAWKINS v. BLEAKLEY, State Auditor, et al.

(District Court, S. D. Iowa, Central Division. June 22, 1914.)

No. 12-A.

1. CONSTITUTIONAL LAW \Leftrightarrow 43—JURY \Leftrightarrow 28—FREEDOM TO CONTRACT—DUE PROCESS OF LAW—WAIVER.

The constitutional guaranties of liberty of contract, due process of law, and right of trial by jury can be waived, either expressly or by common consent or acquiescence.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 41; Dec. Dig. \Leftrightarrow 43; Jury, Cent. Dig. §§ 176-196; Dec. Dig. \Leftrightarrow 28.]

2. MASTER AND SERVANT \Leftrightarrow 16½, New, vol. 16 Key-No. Series—WORKMEN'S COMPENSATION ACT—CONSTITUTIONALITY.

Iowa Workmen's Compensation Act (Acts 35th Gen. Assem. c. 147) §§ 1-22, fixing the amount of compensation to be paid by an employer for specific injuries to employés, is constitutional.

3. CONSTITUTIONAL LAW \Leftrightarrow 105—VESTED RIGHTS—INJURIES TO SERVANT—DEFENSES.

The Legislature had power to enact the provisions of that act which deprive an employer who does not elect to come thereunder of the defenses of assumption of risk, contributory negligence, and negligence of fellow servants, since the employer has no vested right in those defenses.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 228-235; Dec. Dig. \Leftrightarrow 105.]

4. MASTER AND SERVANT ~~16½~~, New, vol. 16 Key-No. Series—WORKMEN'S COMPENSATION ACT—CONSTITUTIONALITY—ARBITRATION.

The provisions of Iowa Workmen's Compensation Act, §§ 23-41, for arbitration of disputes under the direction of the industrial commissioner, are constitutional.

5. MASTER AND SERVANT ~~16½~~, New, vol. 16 Key-No. Series—WORKMEN'S COMPENSATION ACT—CONSTITUTIONALITY—INSURANCE.

The insurance provisions of Iowa Workmen's Compensation Act, §§ 42-51, are constitutional.

In Equity. Bill by J. C. Hawkins against John L. Bleakley, State Auditor, and another, for injunction. Defendants' motion to dismiss the case sustained, and bill dismissed with prejudice.

Ryan & Ryan and J. P. Hewitt, all of Des Moines, Iowa, for complainant.

George Cosson, of Des Moines, Iowa, and John Clarkson, of Albia, Iowa, for respondents.

SMITH McPHERSON, District Judge. This is an action by a bill in equity exhibited by complainant against State Auditor Bleakley and State Industrial Commissioner Garst seeking to enjoin the enforcement of chapter 147 of the Laws of the Thirty-Fifth General Assembly of Iowa (1913) known as the Employer's Liability or Workmen's Compensation Law. The complainant, being an employer of labor and within the terms of the statute, contends that the statute is unconstitutional and void. The defendant moves to dismiss the case, equivalent to a demurrer, on the grounds that the bill is without equity and that the statute is valid. I do not care to prepare a formal opinion, and I make known my views as if orally stated.

All thoughtful persons agree that present conditions call for legislative, judicial, or economical relief, one or all. Enterprises such as railroads, street car lines, interurban lines, manufacturing plants of all kinds, with rapidly moving machinery, usually hazardous, with the dangerous invisible electric current of high voltage, the agency of steam, geared with cogwheels, belts, pulleys, and other appliances, are killing and crippling thousands and thousands of persons every year. This is so even when the employés are sober, attentive, and watchful, and is materially increased when such persons, or some of them, are negligent. This means poverty and distress, and is followed by charities, and too often filling the poorhouses and sanitariums. The man with an eye gone, a leg or arm off, or otherwise physically or mentally impaired, has but a limited or no chance in life. This burden sometimes falls upon the injured person alone, sometimes on the wife, children, or parents, and often on the general public by increased taxation. Presidents, Congressmen, legislators, and men of eminence for years have been urging actual reforms in these matters, and the employés have been insisting upon relief. All persons know these things to be so, and the literature and debates for years have been devoted to the query as to the solution and remedy. The courts have not been lagging so much as retrograding in dealing with the subject. The time of the courts is consumed in listening to the harrowing stories, sometimes of

truth and sometimes of perjury. Claim agents are busy from the hours of death or injury in locating and preserving the testimony that the corporation may be protected. The friends and lawyers and agents of the dead and injured are equally industrious. We often see advertisements in the press of "witnesses wanted to the occurrence." We have new words in the dictionary, but the new words "snitches" and "ambulance chasers" are of the simple and well-known language. Verdicts must be for twice the fair amount to be awarded as damages, so as to allow the "contingent fee" or the injured man, his widow, or children, must accept half the sum justly due. And these results are only obtained after years of litigation. Sickness, unavoidably out of town, urgent business in other courts, prolong the litigation. When judgment is at last obtained in favor of the one side or the other, appeals, certiorari, mandamus, and writs of error, one or all, are sought, and then sometimes reversals, and then other delays. Sometimes verdicts are returned, and later on it is ascertained that the testimony was to meet the law of the case. Sometimes the verdicts are returned for only part of the sum that should have been awarded, and sometimes the verdict is followed by getting well so speedily as to be termed almost miraculous. So that, regardless upon which side the greater wrongs occur, a question no one can decide, all ought to concede that which is the truth, that the best the courts can do in many cases is frailty itself. Something like 30 per cent. of the time of the courts is taken with these cases, adding enormously to the expense of the taxpayers. So that if there is to be a remedy for these evils, and that remedy is limited to the courts, reforms more than paper reforms must be brought about. And such real reforms are well-nigh hopeless, if the past 30 years of judicial history is to be a criterion.

To meet the burdens created by death and injury thus brought about, by public taxation, is to argue the question by idle talk. The people are now groaning under taxation.

Damages not easily avoided must go into the cost of production and be borne by the consumers, and those readily avoided in some instances at least should be borne by him or it responsible therefor. But that aids but little because the question as to who is responsible is often a complicated and difficult question and one not easily solved, and often solved by well-nigh a guess.

[1] Nearly every foreign country has attempted to solve it by legislation, and 20 or more of the United States within a few years have enacted statutes for the purpose of affording a remedy. Some of these statutes have been overthrown by the courts, and some have been sustained as valid legislation. The objections usually urged are those against impinging upon the liberty of contract, denying due process of law, and denying the right of trial by jury. The clause in our state Constitution providing that the right of trial by jury shall remain inviolate presents a serious and important question. It is likewise an humorous objection, because a trial by jury is seldom asked or desired by the employer of labor. But waiving the humorous phases, it is both important and necessary to at least briefly consider the constitutional objections. But in doing this I shall not review the great decisions on constitutional law, but will be content by analyzing this

statute. This is sufficient because all agree that the constitutional provisions can be waived. They are forced on no one, if both agree to waive them. And this waiver can be by writing, or verbally done, or done by common consent or acquiescence.

The statute is one of much verbiage and prolixity of 51 lengthy sections. But once and for all it can be stated, and correctly stated, that under this statute every employer and every employé can have his day in court, and can have due process of law, and can have a jury trial if one or all are desired. No one of these constitutional rights is denied. It is true that such can be had with some limitation on what has heretofore existed, which limitations will presently be noted. Whether the parties are denied the fullest scope of the so-called liberty of contract is not longer argued with much seriousness by reason of the decision by the Supreme Court of the United States in the case from this state of Chicago, Burlington & Quincy Railroad v. McGuire, 219 U. S. 549, 31 Sup. Ct. 259, 55 L. Ed. 328.

[2] The first 22 sections of this lengthy statute fix the liability of the employer and the rights of the employé. A scale of compensation is fixed and made certain. Each party can come within the statute or remain outside of the statute. Each party has his election. Many of the states for many years have had statutes fixing the liability with precision in cases of death, and in no instance has any court held such statute invalid. And why a statute cannot fix with certainty the damages to be allowed in case of the loss of an arm, leg, eye, or other injury, is not perceived, and counsel fail to state any legal or constitutional objection thereto.

[3] But it is argued that, if the employer fails to elect to come within the statute and have the case tried and determined as heretofore, the employer cannot urge the defense of assumption of risks by the employé or contributory negligence. And yet each of these defenses first crept into the law by slight recognition and then grew and developed by judicial decisions without the aid of legislation. And it cannot be so that, simply because such became recognized as the law by judicial decisions, they cannot be abridged or denied by legislation. The same is true of the doctrine of fellow servants. That doctrine never was affirmed by legislation except impliedly, and impliedly only because of legislative action denying such a defense as to railroads and some other hazardous employments. All lawyers know that the court-made rule in Iowa, for a long time maintained but against the decided weight of authority, is that the injured person must show that he was without fault or negligence. Most of the appellate courts hold otherwise, holding that it is a defense only. United States courts sitting in Iowa, as well as in all the other states, hold that it is defensive only and requires the defendant to show by a preponderance of testimony that the injured man or deceased contributed to the injury. For a long time many of the states had the rule of comparative negligence, and now in some instances Iowa has such a rule. But in none of these matters is there any vested right for or against any of these defenses or burdens placed upon the plaintiff. They closely belong to or inhere in police regulations for the preservation of life and limb and are within the legislative powers of the state, and in interstate com-

merce matters within the powers of Congress. The decisions of appellate courts, the Supreme Court of the United States included, are recent and well known by the profession. It is true that, if the parties elect to come within the statute, they must do so by notice or by acquiescence. This is attended with some formalities, but that is a question of detail and policy alone belonging to the Legislature and outside the province of the courts to either regulate or condemn.

[4] The next 18 sections of the statute relate to the appointment of a commissioner, an office now held by the defendant Garst. Under his direction arbitrations are brought about. Arbitrations existed at common law, and they are allowable under the Iowa statute. The conclusion and award of an arbitrator can be enforced by judicial proceedings. There is nothing new about all this. And these arbitrations are agreed to under this statute either by specific agreement or by acquiescence.

[5] The remaining nine sections of the statute relate to insurance to cover liabilities for damages. The Chicago, Burlington & Quincy Railroad Company for years had a scheme of insurance which, if resorted to by the injured employé, was a bar to a recovery by an action in court. Finally that scheme was condemned by Iowa legislation, and the statute prohibiting it was sustained by the United States Supreme Court, affirming the Iowa Supreme Court in the McGuire Case, hereinbefore referred to. The insurance scheme was held lawful by the Iowa Supreme Court in a number of cases prior to the adoption of the legislation referred to. And now we have additional legislation allowing the very thing condemned by the prior legislation. And so it is that no constitutional objection can be made to the latest legislation.

Nearly all of the objections to this statute are argued from the standpoint of morals and propriety and policy. As of course those were questions for the Legislature. This statute may have, and no doubt does have, many objectionable features; but that it is a statute with right tendencies I have no doubt. And all such legislation is a matter of growth and development, and in the end when mature, as it ought to be and quite likely will be, beneficial results will be obtained. At all events, this legislation cannot bring forth worse results than we now have as to these matters by court procedure. And still further, and in no event, can courts condemn the mere policy or proprieties of the law. I find no constitutional objections to this measure.

Defendant's motion will be sustained, and the case dismissed, with prejudice.

THE RANDWYCK.

(District Court, D. Maryland. February 3, 1915.)

SHIPPING ~~126~~—LIABILITY OF VESSEL—LOSS OF CARGO THROUGH NEGLIGENT DELIVERY.

A steamship, although entitled by the terms of the bill of lading to deliver a part cargo of kanit in bulk from her deck, undertook for mutual convenience to deliver it overside through a chute on the deck of a scow furnished by the shipper. She sent two men on the scow to trim. When partly loaded the scow listed, then turned over, and all the cargo loaded thereon was lost. The evidence tended to show that the scow did not leak. Held, on the evidence, that the cause of the capsizing was the failure to keep the cargo trimmed properly or with sufficient rapidity as it came aboard, and that the ship was liable for the loss to the shipper.

[Ed. Note.—For other cases, see Shipping, Cent. Dig: §§ 461-464; Dec. Dig. ~~126~~.]

In Admiralty. Suit by the Piedmont-Mt. Airy Guano Company against the steamship Randwyck and the Holland-American Line, owner thereof. Decree for libelant.

Arthur D. Foster, of Baltimore, Md., for libelant.

John B. Deming and W. Thomas Kemp, both of Baltimore, Md., for respondents.

ROSE, District Judge. The Piedmont-Mt. Airy Guano Company is the libelant. It will be called the shipper. The steamship Randwyck belongs to the Holland-American Line. It will be spoken of as the ship. At Rotterdam the shipper delivered to it for transportation to Baltimore 557 bags of potash and 214,172 kilograms of kanit in bulk. By the bill of lading the merchandise in question was to be "delivered from the ship's deck (where the shipowner's responsibility shall cease)." It was further therein provided that the ship should be free from liability arising from fault of stevedores in its service. Upon the arrival of the ship at Baltimore, the shipper, on Friday morning, December 11th, sent a lighter or scow belonging to it alongside the ship. On the early morning of Saturday some 27 bags of potash were put upon the scow. Nothing further was transferred to it until about 9:50 Saturday night. By that time all the rest of the ship's cargo had apparently been discharged. In the next five hours some 150 tons of kanit and 80 additional bags of potash were put upon the scow. At about 3 o'clock on Saturday morning it turned over against the ship with such force that the house which covered nearly the whole of its deck was swept off by the impact. The turning movement continued until the scow floated bottom upwards. The potash and kanit on board were a total loss. It is not disputed that by the injury to the scow and the destruction of the merchandise upon it the shipper was damaged to the amount of \$5,249.18. This sum it seeks to recover from the ship.

For the discharge of the kanit a chute was slung over the ship's side, its lower end passing through the hatch or doorway in the top and side of the scow. The kanit was hoisted out of the ship's hold in

buckets which held about a ton each. These buckets were emptied into the chute, down which their contents ran, and from the lower end of which the kanit fell on the scow's deck. The ship kept two men on the scow to trim the cargo as the chute delivered it. When as great a weight of kanit as it was desirable to place on one portion of the scow had been put upon it, the operation was suspended until the scow was moved by those in charge of the ship to such a position that the chute would discharge through another hatchway.

The shipper says that the accident was the direct result of the negligent manner in which the kanit was transferred from the ship to the scow. It produces on its behalf only one witness, who was present when the scow capsized. He is its employé—a colored man in charge of the scow. He testifies that, when as much weight as he thought could with safety be put on one end of the scow had come aboard of it, he asked to have the scow moved. He was told it would be moved later. He had to ask a second time before the removal was made. He says he called the attention of those on the ship to the fact that the chute was too short, in consequence of which all the kanit fell on that side of the scow nearest the ship. The kanit was damp, and in that condition will not trim itself. He noticed the scow was listing, and that the two trimmers were not able to handle it fast enough for safety. He asked for more men, but the "boss" told him "he didn't have anybody else to put aboard to get her on her feet." The scowman took a lamp and went down below to see if the scow had sprung a leak. He could find no water. He went along one side of the hold of the scow and could find no leak. Before he could go along the other side there was an alarm. He hurried to tell the man on the ship, but before he could get to him the scow had listed nearly on the ship. He hollered "to put some men," and told those on the ship "to stop pouring the stuff on board," but they kept on and the scow turned over.

If the story be true, the liability of the ship would seem to be clear. It might have required the shipper to accept delivery on its deck, but for the mutual convenience of both parties it preferred to deliver on board the lighter. In doing that, as in doing anything else, it was bound to use reasonable care to prevent injury to the property of another. The first section of the Harter Act prevents it from exempting itself from liability for negligent delivery. The ship asserts, however, that the story of the scowman is untrue. The foreman of stevedores says that no complaint was made to him that the chute was too short, and in point of fact it was long enough, that no request for additional trimmers was ever made, and the scow was moved as soon as he was asked to move it. The night superintendent of the Holland-American Line confirms the foreman as to the length of the chute and generally on other points, although, as he was not always on the ship, the weight of his corroboration as to matters other than the length of the chute is not great. The deckman and the winchman testify that they did not hear any such complaint as the scowman said he made.

The ship claims that the scowman's testimony as to what happened is discredited by admissions made by him immediately after the accident. He was questioned by the night superintendent already men-

tioned. Two other persons were present, viz., the foreman of stevedores before referred to and a customhouse inspector. The latter is a disinterested witness. He says:

The night superintendent asked, "What made the scow turn over?" The scowman replied, "I don't know." He was asked, "Was she being loaded properly?" He replied, "Yes, sir." Then followed the question, "Well, was she leaking?" and the answer, "I do not know, sir." To the interrogatory, "What do you think made it turn over?" he replied, "I do not know, sir." Then the superintendent said: "I never like to load a scow unless the scowman is present for that reason. Then if there is any complaint why she is not being loaded right, or anything like that, he can say so."

The only significant thing in this conversation would be the scowman's assent that she was being loaded properly. When the superintendent comes to tell the story of the same conversation, he says:

He asked the scowman, "Captain, was your scow trimmed right?" and received the reply, "Yes, sir." The witness then said, "You must have sprung a leak," and the scowman replied, "It must have been something, because the water was in her; she must have sprung a leak mighty quick."

The foreman of the stevedores gives still another account. He says:

The superintendent asked if the scow was leaking. The scowman said he did not know. He was asked, "Is there any water in it?" He answered, "A little." To the question, "Well, is she leaking?" he said: "I don't know, sir. Well, that is not the first time she turned over. She turned over twice before. The scow can go, but I have got a \$15 overcoat aboard, gone down with her. The scow is level. It could not be trimmed better than it was."

The scowman admits that there was a conversation at which the other three persons were present. According to him, the superintendent asked him why the scow turned over. He replied, "The scow was on an even keel." Then the superintendent said, "She must have sprung a leak," to which the scowman replied, "No." The superintendent thereupon asked, "Then you want to say that we loaded the scow all right; that she was on her feet when she turned over?" to which the scowman answered, "That is a hard matter for me to say." He specifically denies that he said the cargo was trimmed all right.

These different versions of the conversation show how unsafe it is greatly to rely on the recollection of hearers as to the precise things that are said on such occasions. The scowman testifies that he never said that the scow had turned over twice before. It seems to be satisfactorily established that the scow had never turned over before at all. The customhouse inspector, who was present at the conversation, says that the scowman said he did not know she was leaking. The superintendent testifies that he said that "there was water in her; she must have sprung a leak very quick."

In such times of excitement witnesses who put questions and are anxious to have particular answers are exceedingly likely to construe silence or noncommittal replies as assents to their views. On the whole, I am not disposed to think that the scowman said anything at that time which materially, if at all, affects the weight to be given to his testimony in court. He impressed me quite favorably. Yet, in view of the fact that he was contradicted on each of several vital points by two or more witnesses, I should feel constrained, if the evidence stop-

ped there, to hold that the libelant had not established its case by the required preponderance of proof.

But there is other testimony, and that of a very significant nature. The scow overturned. It had been used for some years, and apparently had never met with an accident before. There was nothing in the weather conditions or in any extraneous influences to which it was at the time subjected to account for what happened. It seems to be certain that it capsized either because it sprung a leak or because the cargo was improperly placed upon it. It admittedly was not overloaded. The testimony that it could not have sprung a leak is quite conclusive. On the day upon which it turned over, an experienced marine surveyor and insurance adjuster saw it floating in the dock. He testifies that its hull was so far out of water as to convince him that a great deal of air still remained in it, which would not have been the case had the disaster been caused by a leak. The scow was righted and taken to the shipyard and placed upon a marine railway. It was there surveyed by the witness last mentioned and by another, an equally experienced representative of the ship. They agreed that they could find no leak in her; that the only damage to her was such as naturally resulted from the contact of her upper works with the side of the ship as she turned over.

The ship suggests that some of her seams, which were above water when she was light, might have under these conditions opened; that when a load was placed on her those seams went under water, and that the lighter filled, but that so soon as her timbers and planking became wet they again expanded and closed the seams. Conceivably such a thing may happen. There is not a shadow of evidence that in this case it did. She remained in the shipyard for some three weeks, of course without any cargo on board, and yet it was not found necessary to caulk any of her seams. Under this state of the proof, the probability, if not the possibility, of the accident having been due to any leak would appear to be effectually disproved. The story of the scowman, if true, accounts fully for what happened. There was nothing in his manner or appearance to make me think that it was not true.

It follows that the ship is liable for the damage done the shipper.

Ex parte BUN CHEW.

(District Court, S. D. California, S. D. January 11, 1915.)

1. ALIENS ☞32—DEPORTATION—REVIEW BY COURTS.

The court on habeas corpus has no authority to set aside or invalidate an order of deportation, where the alien has been given a fair hearing by the departmental officials pursuant to its rules, and there has been no manifest abuse of discretion by such officials in arriving at the conclusion that the alien should be deported.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. §§ 84, 92, 93-95; Dec. Dig. ☞32.]

2. ALIENS ☞32—DEPORTATION—SUFFICIENCY OF EVIDENCE.

In a proceeding to deport a Chinese person, who claimed to have resided continuously in the United States for a number of years, and who was in possession of a certificate of residence, evidence *held* so wholly insufficient to show that he entered the United States in violation of law as to render the conclusion of immigration officials that he should be deported a manifest abuse of discretion.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. §§ 84, 92, 93-95; Dec. Dig. ☞32.]

3. ALIENS ☞32—DEPORTATION—COUNTRY TO WHICH ALIEN SHOULD BE DEPORTED.

Under Immigration Act Feb. 20, 1907, c. 1134, 34 Stat. 898 (Comp. St. 1913, § 4269) § 20, providing that any alien entering the United States in violation of law shall be taken into custody and deported to the country whence he came at any time within three years after his entry, a Chinese person entering the United States from Mexico after being temporarily domiciled therein is properly deported to China, the country from which he originally came.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. §§ 84, 92, 93-95; Dec. Dig. ☞32.]

Habeas corpus proceeding by Bun Chew. Petitioner discharged.

Frank Stewart, of Los Angeles, Cal., for petitioner.

Albert Schoonover, U. S. Atty., and H. R. Archbald, Asst. U. S. Atty., of Los Angeles, Cal., for respondents.

BLEDSoE, District Judge. This is a proceeding in habeas corpus to test the validity of an order of deportation issued by the Secretary of Labor, and directing that the petitioner herein be deported to China, the country whence he came originally, because of the fact that said petitioner is unlawfully within the United States, in that he entered in violation of section 36 of the Immigration Act, "thereby entering without inspection."

It is the fact that the petitioner is a subject of China, and not a citizen of the United States; and it is also the fact that at the time of his arrest he was in possession of the certificate required by law to be possessed by Chinese laborers. I have had occasion lately to consider the jurisdiction and functions of the District Court of the United States on habeas corpus in deportation proceedings such as this, and my views and conclusions with respect to the function of the court in the premises are set forth at some length in an opinion lately filed by me in the Matter of Iwata, 219 Fed. 610.

[1] As therein suggested, this court, under the law, has no authority to set aside or invalidate an order of deportation, where the alien has been given a fair hearing by the departmental officials, pursuant to its rules in such cases made and provided, and where there has been no manifest abuse of discretion by such departmental officers in arriving at the conclusion that the alien in question should be deported. *Low Wah Suey v. Backus*, 225 U. S. 460, 32 Sup. Ct. 734, 56 L. Ed. 1165.

[2] Indulging in every intendment in favor of the validity of the order involved herein, I can come to no other conclusion than that the immigration officers were guilty of a manifest abuse of discretion in concluding, upon the evidence adduced before them and incorporated into the record herein, that the alien had entered the United States in violation of section 36 of the Immigration Act.

The evidence shows without any question or claim of doubt that the alien first came to this country a good many years ago, and that when arrested he was possessed of a certificate of residence dated in 1894. By his own admission he made a short visit to China about 14 or 15 years ago, which would be about 1900. His evidence and that of others in corroboration thereof was to the effect that he had resided since that time in and about Hanford and Visalia, in this state, and that he had at no time departed from the United States during this last-mentioned period; that at the suggestion of his brother, about the beginning of this year, he had gone down to Phoenix, Ariz., had remained there some few days, and thereafter journeyed on foot to Tucson, Ariz., at which place he entered a freight car, and some time thereafter (the precise time not being shown by the record, but presumably a short time prior to the inception of the deportation proceeding) he was discovered in the freight car and removed therefrom.

There is nowhere in the entire proceeding any evidence which squints at the discovery or observation of the alien at any place along or close to the border of the United States. There is no testimony of any sort coming from any person that he crossed such border into the United States. The only feature or fact in the record which may be said to offer the slightest suggestion that the alien, having at one time been in a foreign country, to wit, Mexico, must therefore perforce have subsequently entered the United States, centers about two statements incorporated into the record, purporting to come from two more or less distinguished citizens of the republic of Mexico. These statements, apparently signed, although not sworn to, and dated the latter part of March, 1914, affirm on the honor of their respective makers substantially that said citizens were well acquainted with a certain individual, whose name was to them unknown, but who they aver was the identical individual whose photograph was shown to them, which photograph bore upon the back thereof the words "Bun Chew," the name of the petitioner herein; that the aforesaid individual lived in Agua Prieta, Mexico, "for about two years, and until about three years ago, engaged in a Chinese restaurant."

There is no evidence in the case serving in any form or fashion to identify Bun Chew, the petitioner herein, as the man whose photograph was shown to these citizens of Mexico, and no evidence or cir-

cumstances from which it could be inferred that, even if the photograph of the individual thus exhibited was that of a "Bun Chew," such individual was the same Bun Chew as is now by the Department of Labor sought to be deported to China. It is common knowledge that many different Chinese are known by the very same name; therefore, in my judgment, there can be in an instance of this sort no presumption of identity of person because of identity of name. So, also, as above suggested, the fact that the record fails to disclose or even give a hint that this was in truth a photograph of the alien here in question takes from the statements of the individuals mentioned whatever force such statements were probably intended to carry, and all the probative force which would, under proper circumstances, be accorded to them by the court.

Unless it can be said that the orders of the department of Labor in deportation proceedings, apparently acting within the scope of their authority, are to be held conclusive and impregnable to attack in a proceeding of this sort, irrespective of the want and absence of evidence and facts tending to support the conclusions reached by the Department, this petitioner herein should be awarded his liberty, and absolved, not only from the stigma placed upon him, but also from the unjust interference with his freedom of action.

True it is that there are some evasions, and perhaps contradictions, in the testimony of the alien and of those called in his behalf; but these become of no consequence in the face of a total failure of proof with respect to the sole unlawful act charged against him.

[3] Complaint is also made in that he was ordered deported to China, the country whence he came originally; the contention being that, under the claim of the government that he came to the United States last from Mexico, in the event of his deportation at all he should be deported to that country, that being the country "whence he came." Section 20 of the Immigration Act. With respect to this, however, it is clear to me that the phrase above quoted refers to the country from which the alien originally came, and not to some other country from which, he being temporarily domiciled therein, he came immediately to the United States.

The warrant of deportation in this case being in excess of the jurisdiction of the Department of Labor, it is insufficient authority whereby to detain or deport the alien in question, and he is therefore entitled at this time to his discharge from such custody and detention.

It is so ordered.

VUJIC et al. v. YOUNGSTOWN SHEET & TUBE CO.

(District Court, N. D. Ohio, E. D. June 19, 1914.)

No. 8863.

AMBASSADORS AND CONSULS ~~CO~~—POWERS AND DUTIES—RIGHT TO RECEIVE MONEYS DUE UNDER WORKMEN'S COMPENSATION ACT.

Under the Austro-Hungarian constitution, consular regulations, and laws, a consul of that country is, within his district, the standing, fully authorized, and qualified personal and immediate representative for all purposes of a citizen of his country, residing at home, having any interest to be cared for within the consular district, and without a specific power of attorney he is entitled to receive moneys due citizens and residents of his country under the Workmen's Insurance Act of Ohio (Act June 15, 1911 [102 Ohio Laws, p. 524]), unless the party called upon to make payment has received notice that the persons entitled to payment have specifically and unmistakably selected, through a power of attorney, some other representative.

[Ed. Note.—For other cases, see Ambassadors and Consuls, Cent. Dig. §§ 12-15; Dec. Dig. ~~CO~~5.]

At Law. Action by Nevena Vujic and others against the Youngstown Sheet & Tube Company. Judgment for plaintiffs.

Reed, Eichelberger & Nord, of Cleveland, Ohio, for plaintiffs.
Hine, Kennedy & Manchester, of Youngstown, Ohio, for defendant.

KILLITS, District Judge. Dusan Vujic, a citizen of Austria-Hungary, was killed while in the employ of the defendant, leaving Nevena, his wife, and Victomir, his infant son, his next of kin, who remain in the old country. The decedent lost his life under circumstances which entitle the next of kin to the benefit of the provisions of the Workmen's Insurance Act of Ohio; the defendant having paid to the Industrial Commission of the state of Ohio the insurance premium in that behalf as provided by law.

Suit was brought by Ernest Ludwig, consul for Austria-Hungary, as the official representative and next friend of the beneficiaries. By answer it is admitted that the beneficiaries are entitled to receive compensation under the law of the state and that that amounts to the sum of \$2,984.78. But the question is raised whether the consul is qualified to receive the payment of this sum by way of discharge of the obligation, without receiving from the beneficiaries a proper special authorization therefor.

The extent of the right of consuls in this country to intervene respecting the estates of deceased citizens of their respective countries, and to take part in the administration thereof, has been definitely established by the decision of the Supreme Court in the case of *Rocca v. Thompson*, 223 U. S. 317, 32 Sup. Ct. 207, 56 L. Ed. 453, and it is unnecessary to consider other decisions which are collated and commented upon in that. The Attorney General of Ohio has rendered an opinion to the Industrial Commission adverse to the right of this particular consul, Mr. Ludwig, to acquit the commission in circumstances

similar to those at bar, without special authorization from the beneficiaries residing abroad, and in that opinion, so far as it goes, and upon the facts on which it is based, we are inclined to concur.

The Ohio law is so drawn as to require for safety the distributive shares of beneficiaries to be paid directly to the beneficiaries, or to such unquestionable representatives of them, that there will be the least opportunity for a diversion of the compensation from the specific application designed by the statute. It is obvious, as suggested in the Attorney General's opinion, that the analogy between the question of taking care of the administration of a deceased national's estate by the consul of his country and the right of the consul to receive distribution of an estate is not very close. The Attorney General and this court join in recognizing, however, the convenience and the certainty of distribution through officers of unquestioned integrity of the compensation to beneficiaries which would follow if existing circumstances warranted the claim of the consul.

Examining all the cases and the discussions therein contained (for citation of which we refer to the opinion in *Rocca v. Thompson, supra*, except that the case of *In re Holmberg's Estate* [D. C.] 193 Fed. 260, is not therein considered) and reflecting on the demands of international comity, as well as the texts of treaties, we have considered that involved in this question was a determination as far as possible of the exact functions of the Austro-Hungarian consul respecting his relation to people of his country residing at home, to determine whether or not the law clothes him with the same character of conclusive personal representation that would ensue if he were specifically clothed for this particular case with power through a power of attorney executed by the beneficiaries; for it is conceded by the defendant, the Youngstown Sheet & Tube Company, and by the Attorney General in his opinion, that payment could safely be made by the Industrial Commission to the consul on a specific power of attorney.

In the old case of *The Bello Corrunes*, 6 Wheat. 152, 5 L. Ed. 229, cited by the Attorney General pertinently to the point that, upon the facts discussed in his opinion, there was no authority in the consul to act without specific authority in the receipt of distributive shares, the Supreme Court, on pages 168-169 of the opinion, say that the long and universal usage in this country has sanctioned the exercise of the right of a consul to intervene to protect the interests of nationals in this country, and that it is impossible that any evil or any inconvenience can flow from such practice. In *Rocca v. Thompson* so much of the authority of *The Bello Corrunes* has been modified, as we consider these cases, to the end that where some peculiar state law is in the way, such as the act of California, providing for a public administrator, the consular right must lose its preference. However, the court in its opinion in *The Bello Corrunes* says:

"Whether the powers of the vice consul shall, in any instance, extend to the right to receive, in his national character, the proceeds of property libeled and transferred into the registry of a court, is a question resting on other principles. In the absence of specific powers given him by competent authority, such a right would certainly not be recognized."

Has the Austro-Hungarian consul specific powers pertinent to the question before the court given him by competent authority? There have been stipulated into this record for this court's information translations of and a compendium of the provisions of the Austro-Hungarian constitution, the consular regulations of the dual monarchy, and the laws thereof bearing upon the matter before the court. Without quoting from these laws we make this summary of their provisions:

All diplomatic and commercial representation abroad is under the control of a ministry of foreign affairs, having complete representative authority for both the kingdom and the empire; that the consuls are charged specifically with the duty of representing the interests in the districts to which such consuls are accredited of all citizens of the dual monarchy residing in the home country, and to take charge of any money and valuables of any kind whenever necessary and incidental to their intervention in the estates of citizens of their country, and specifically to collect and dispose of distributive shares of estates and balances due in the settlement of the affairs of their nationals in the countries to which they are accredited.

The provisions of these laws and regulations are so ample, and drawn to cover such a variety of circumstances, that they leave the court no other alternative than to assume that the consul of the dual monarchy within his district is the standing, fully authorized, and qualified personal and immediate representative, for all purposes, of a citizen of his country, residing at home, having any interest to be cared for within the consular district, and that this authority is so complete and so unmistakable that a specific power of attorney from a home-residing citizen of his country, for whom he assumes to act here, is neither necessary to strengthen it nor capable of adding any additional force; that this power should be recognized in precisely such cases as that before us, unless, prior to an acceptance of it, the party called upon to recognize it should have received notice that the principal had specifically and unmistakably selected, through a power of attorney, some other representative.

We are of the opinion, therefore, that for the Industrial Commission of Ohio to pay over to Mr. Ludwig, as Austro-Hungarian consul, the amount agreed to be due the widow and infant son of Dusan Vujic, deceased, there is not only clear authority of law, but that so to do would meet every requirement of the Ohio law under consideration, and that the consul should be recognized in this instance as a representative of Nevena Vujic and Victomir Vujic, clothed with as full power and authority in the premises as if he had indeed their particular powers of attorney.

WALKER v. UNITED STATES LIGHT & HEATING CO.

(District Court, S. D. New York. February 4, 1915.)

CORPORATIONS ☞557—RECEIVERS—APPOINTMENT—DIFFERENT DISTRICTS—DEFENSES.

Where receivers had been appointed for a corporation in the Western district of New York, where the corporation had its domicile and most of its property, in a suit by a trust company, which was not a judgment creditor, acting for all the corporation's creditors, in which the corporation admitted its inability to pay its debts and raised no objection that complainant was not a judgment creditor, it could not successfully raise such objection in a similar suit in the Southern district of New York by another simple contract creditor to have the same persons appointed receivers in that district, in order to collect claims of the corporation located there.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2227, 2228, 2230-2236; Dec. Dig. ☞557.]

In Equity. Suit by Guy M. Walker against the United States Light & Heating Company. On application for appointment of receivers. Granted.

Bonynge & Bonynge, of New York City (Harold S. Deming, of New York City, of counsel), for complainant.

Dos Passos Bros., of New York City (Louis S. Posner, of New York City, of counsel), for defendant.

AUGUSTUS N. HAND, District Judge. The complainant brings his bill in the Southern district of New York and moves for the appointment of receivers. The complaint is by a citizen and resident of the state of New York against a corporation organized under the Laws of the state of Maine. It alleges that the defendant corporation has a large manufacturing plant at Niagara, in the Western district of New York, and also has merchandise and manufactured product in the Southern district of New York, and further is the owner of various claims and rights of action against residents therein. The complaint sets forth that heretofore the Central Trust Company, a creditor of defendant, filed its bill of complaint in a suit against the defendant in the United States District Court for the Western District of New York, and that defendant filed its answer to said bill in that court, admitting all the several allegations thereof. A copy of the bill of complaint by the Central Trust Company is annexed to the complaint in this cause, which was sworn to July 20, 1914, and alleged that the defendant was unable to meet its obligations, and that unless a receiver was appointed and the operation of defendant's plant kept intact, great loss would be inflicted upon the creditors, since the defendant had then no money to pay its obligations which had matured, and had no reasonable hope of finding assistance from any quarter. In accordance with the relief prayed for in the bill, Messrs. James O. Moore and James A. Roberts were appointed receivers by Judge Hazel in the United States District Court for the Western District of New York "of all the property and assets, real, personal, and mixed, of whatever

☞ For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

kind and description and wheresoever situate, owned by the above-named defendant," and these receivers have duly qualified.

The bill of complaint in the case at bar alleges that the receivers have raised a question as to their right to sue in any other district than that wherein their appointment was made, and have requested the complainant to institute this suit to move for their appointment in order particularly that they may enforce the causes of action above referred to against residents of this district. The complainant in this suit, like the complainant in the suit in the Western district of New York, is not a judgment creditor. It is to be noted, however, that the defendant in the former suit appeared generally and filed an answer to the bill of complaint, admitting the truth of all the allegations therein contained, that that suit is pending, and that the receivers were appointed in pursuance of the prayer for relief in that complaint, and that the defendant in its duly verified answer in that suit "joins in the prayer thereof."

Under these circumstances, I think that the defendant should not be permitted to come into this court and urge that receivers should not be appointed because the plaintiff here is not a judgment creditor. The complaint in the suit brought by the Central Trust Company in which receivers have already been appointed, states that the Central Trust Company "brings this its bill of complaint on its behalf and on behalf of all other creditors of the United States Light & Heating Company, defendant, who may hereafter join in the prosecution of this suit against the United States Light & Heating Company." That suit was, therefore, directly in aid of the complainant in the case at bar, if he is, as he alleges himself to be, a creditor of the defendant corporation. In that suit the defendant corporation admitted by its answer, verified by its secretary and treasurer in an affidavit which states that he executed the answer "pursuant to the authority and direction of the board of directors," all the allegations of the complaint, and joined in the prayer for relief, which contained, among other things, and, indeed, as the principal relief asked for, the appointment of receivers.

I think, under the circumstances, that the defendant should not be heard in another suit brought in this district for the purpose of collecting outstanding claims belonging to the corporation to take the position that the bill will not lie because the complainant is not a judgment creditor. The adjudication in the other suit that receivers should be appointed, made with the consent and at the request of the defendant corporation, amounts, I think, to a decree had upon the complaint instituted by a creditor who had no judgment for the benefit of all other creditors, to the effect that the case was a proper one for a determination of all claims by a court of equity and that a receiver was necessary. In the cases of *Sage v. Memphis*, etc., R. R. Co., 125 U. S. 361, 8 Sup. Ct. 887, 31 L. Ed. 694, *Scott v. Neely*, 140 U. S. 106, 11 Sup. Ct. 712, 35 L. Ed. 358, and *re Metropolitan Receivership*, 208 U. S. 109 28 Sup. Ct. 219, 52 L. Ed. 403, it is said that the complainant must first have exhausted his remedy at law—in other words, must have a judgment establishing his claim—before instituting a creditors' bill unless the claim is acknowledged.

While the defendant may not have acknowledged in this suit the claim of the complainant, it has rendered the objection unavailable by already waiving it in the suit brought in the Western district of New York for the benefit of all creditors including the complainant here whenever he might choose to join in the prosecution. In other words, I do not think that the doctrine enunciated in the Supreme Court cases above referred to properly applies to a case where the complainant, although proceeding as he necessarily must by an original bill in the United States District Court, is in effect instituting an ancillary proceeding. To be sure, the present suit is what is known as a conservation suit; in other words, is not based upon the insolvency of the defendant, yet the reasoning of Judge Wallace, in the case of *Sands v. E. S. Greeley & Co.*, 88 Fed. 130, 31 C. C. A. 424, though that was a case of insolvency, applies equally to the case at bar. He says:

"When such an application is made, the court to which it is addressed exercises its own original jurisdiction. The decree in the court of the domicile of the corporation is evidence in every other state that the corporation is insolvent, and that a proper case exists in that state for the appointment of a receiver, and it is to be respected accordingly, in obedience to the constitutional provision whereby full faith and credit is to be given in each state to the records and judicial proceedings of every other state of the Union."

Accordingly, I think the necessity and propriety of the relief herein asked for has already been adjudicated in the Western district of New York, in a suit brought by the Central Trust Company for the benefit of itself and all other creditors of the defendant, of whom the complainant is one.

Judge Lacombe seems to have adopted this practice without opinion in the case of *Bowker & Maloney v. Haight & Freese Co.*, the original record upon appeal in the United States Circuit Court of Appeals in which case will be found in the bound volume of appeals in the Library of the Law Institute, being No. 3375.

For the foregoing reasons, I have decided to appoint as receivers in this cause the same gentlemen selected by Judge Hazel in the suit brought by the Central Trust Company in the Western district.

In re BLANKENSHIP.

(District Court, S. D. California, S. D. January 25, 1915.)

1. LIMITATION OF ACTIONS ~~25~~—PROMISSORY NOTE.

A note due one day after date, to which the California law was applicable, became barred by limitations four years after maturity, as provided by Code Civ. Proc. Cal. § 337.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 113, 118-131; Dec. Dig. ~~25~~.]

2. LIMITATION OF ACTIONS ~~148~~—BARRED DEBT—NEW PROMISE.

Under Code Civ. Proc. Cal. § 360, providing that a new written promise will toll the statute of limitations, a writing signed by a debtor, acknowledging the existence of the debt, is sufficient to toll the statute of limita-

~~25~~ For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

tions, and make the debt enforceable as from the date of such acknowledgment.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 597-603; Dec. Dig. 148.]

3. LIMITATION OF ACTIONS 165, 182 — EFFECT — PERSONAL DEFENSE — PLEADING.

Code Civ. Proc. Cal. § 337, providing that an action on any written contract executed within the state, etc., shall be commenced within four years, does not bar the indebtedness, but the remedy only; the right to interpose the defense being purely personal to the debtor, and only available by him if pleaded as a defense to suit brought.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 649, 676-680, 682, 695, 705; Dec. Dig. 165, 182.]

4. BANKRUPTCY 314—ACKNOWLEDGMENT OF BARRED DEBT.

Where a bankrupt, in contemplation of bankruptcy, wrote to his sister, acknowledging the existence of an indebtedness to her which was barred by limitations, in order that she might share in his estate, she having no knowledge at the time of his insolvency or contemplated bankruptcy, such act was not a fraud on his other creditors or on the Bankruptcy Act (Act July 1, 1898, c. 541, 30 Stat. 544), and was effective to bar the statute of limitations and render the sister's claim provable.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 469-473, 478, 483-487, 489, 490; Dec. Dig. 314.]

In Bankruptcy. In the matter of bankruptcy proceedings of R. F. Blankenship. On petition to review a referee's order allowing a claim in favor of the bankrupt's sister on a note due one day after date. Affirmed.

W. T. Craig and Carroll Allen, both of Los Angeles, Cal., for trustee.
J. W. Hocker, of Los Angeles, Cal., for claimant.

BLEDSOE, District Judge. [1] This is a review of an order of the referee in bankruptcy allowing a claim in the above-entitled proceeding. The question sought to be reviewed, and the only one urged by counsel for the trustee, representing the creditors, is very simple. It arises out of the following facts:

The bankrupt in 1906, in consideration of money borrowed by him, gave to his sister a promissory note for \$1,200, due one day after date. Under the statute of California (C. C. P. § 337) this note became barred by the statute of limitations four years after maturity. It seems not to have been paid. In 1914, while insolvent, and while the sister of the bankrupt, from her knowledge of the facts, had good reason to believe that the said bankrupt was insolvent, he addressed a communication in writing to his sister, acknowledging the indebtedness, agreeing to pay it, and tendering a payment of \$10 thereon on account. It is found by the referee, and these findings are not challenged, that the claimant, the sister, did not solicit the writing of the said letter, had no knowledge of the intent of the bankrupt in the writing of it, and no knowledge of his then intent to file a voluntary petition in bankruptcy. It is also found that the bankrupt, at the time of the writing of the letter in question, had decided to file a voluntary petition in bankruptcy, that it was because of this that the letter was written, and that it was done with the intent and purpose of renewing said note, in order that it might participate in dividends derived from his estate in bankruptcy.

[2] Under section 360 of the Code of Civil Procedure of California and the decisions based thereon, it has been held that a writing signed by the party to be charged, containing an acknowledgment of the existence of the indebtedness, is sufficient to take such indebtedness out of the operation of the statute of limitations and make it enforceable, as from the date of such acknowledgment.

[3] The question in the case, then, simply stated, is whether or not an insolvent person, who is intending to go through bankruptcy, may make an acknowledgment of an existing indebtedness, the right to recover which is barred by the statute of limitations, so as to take the indebtedness out of the operation of the statute, and permit it to become the basis of a provable claim in bankruptcy? In considering this question it must be kept in mind that the statute above referred to does not in itself bar the indebtedness; it merely bars the remedy. The right to interpose the defense of the statute is a purely personal one, and is not available by the debtor unless actually pleaded as a defense to suit brought.

[4] The claim is made by the trustee, acting for the creditors, that the renewal or rehabilitation of a debt, under such circumstances, operates in fraud of the Bankruptcy Act, and constitutes such a preference as would suffice to render it void and of no effect. It is true it would seem, at first blush, as if the deliberate acknowledgment of an outlawed debt, under such circumstances, for the mere purpose of making it provable in bankruptcy, would be a fraud upon the rights of other creditors, whose claims had not been outlawed by the force of the statute, and in this regard in fraud of the general object of the bankruptcy act. This, however, would be because of the assumption that in the doing of the thing inveighed against the bankrupt had thereby rendered a claim, otherwise unenforceable, enforceable against him. Such, however, could result only in the event that the bankrupt had already pleaded the statute in bar of the indebtedness, or had determined so to do.

If, as it must be assumed is the case herein, the bankrupt had always intended to pay the just claim against him, and had determined upon suit brought not to interpose the special defense permitted by the statute, then, in the making of the acknowledgment at the time it was made, in so far as his own personal attitude was concerned, he was not changing his position either for the worse or otherwise. In this view of the case, it seems to me that his own conduct cannot be defined as in fraud of the Bankruptcy Act, and that, for that reason, the trustee of his estate should not be permitted thus to characterize it. The case is much different, in my judgment, from one in which, for instance, an insolvent person, after having defeated a claim, because of his plea of the statute, should thereafter, and in contemplation of bankruptcy, attempt to rehabilitate the claim, merely that the owner thereof might participate as against other lawful creditors.

I can find nothing in the Bankruptcy Act which prohibits the doing of the thing done herein, and under the assumption in which I have indulged hereinabove with respect to the motives actuating the bankrupt I can find nothing in his own conduct worthy of censure. No authority in support of the claim of the trustee has been called to my at-

tention, save that of a decision of Judge Ray in the District Court of New York, reported as *In re Banks* (D. C.) 207 Fed. 662. I do not understand that decision, however, to hold that such an acknowledgment of an indebtedness as is herein under consideration is either a preference or a fraud upon the Bankruptcy Act.

The claimant having surrendered the \$10 payment and thereby purged her claim of its preferential feature, the order of the referee is affirmed.

EDISON v. CONTINENTAL CHEMICAL CO.

(District Court, S. D. New York. November 30, 1914.)

No. 10-74.

INJUNCTION **128**—GROUNDS—WRONGFUL USE OF NAME.

Complainant *held*, on the evidence, entitled to an injunction restraining defendant from using his name and picture, and a certificate over his name, alleged to have been authorized by him, on the bottles and cartons containing a medicinal compound.

[Ed. Note.—For other cases, see *Injunction*, Cent. Dig. § 278; Dec. Dig. **128**.]

In Equity. Suit by Thomas A. Edison against the Continental Chemical Company. Decree for complainant.

McCarter & English, Robert H. McCarter, and Conover English, all of Newark, N. J., for complainant.

G. W. Weiffenbach, of New York City, for defendant.

ROSE, District Judge. The complainant in this case is the well-known inventor. In 1879 he discovered or invented a preparation which he then thought would be useful as a neuralgia remedy. He made an application for a patent on it. While the application was pending he sold his rights in the invention and in the patent to be issued for it to three persons, of whom a man named McMahon was one. For some reason the patent application was abandoned at the instance, as McMahon testifies, of Edison. Defendant says that the latter agreed that, if the patent application was not prosecuted to issue, the product might be marketed under his name, with his picture upon the wrappers or cartons of the bottle in which the mixture was offered for sale, and that a certificate reading, "I certify that this compound is made according to the formula devised by myself," should appear on each bottle or its wrapper. It is not claimed that there was any written contract to this effect. There is a formal agreement to assign the invention, and an equally formal Patent Office assignment of it. Edison absolutely denies having made any other bargain than that contained in the original instrument, and in this respect I am satisfied that his testimony is accurate.

McMahon and his associates formed a New Jersey corporation to exploit the remedy. The evidence satisfied me that all the rights of

McMahon and his associates were assigned to this company in payment for its capital stock issued to them. That company was not a success. It dragged along its existence for some years, and then went into a receiver's hands. It was reorganized as a Maine corporation under a different name. That was also a failure. Shortly before it abandoned business it gave an assignment of its rights or license to use them to a Chicago man, who organized another New Jersey corporation under the name of the Edison Polyform & Manufacturing Company, which undertook to market the product as Edison's Polyform, with his picture and the certificate in question on the carton of the bottle. Edison promptly asked a New Jersey state court to enjoin all use of his name in connection with the alleged remedy. For the reasons stated in an able and conclusive opinion by Vice Chancellor Stevens, the relief he asked was granted. *Edison v. Edison Polyform & Manufacturing Co.*, 73 N. J. Eq. 136, 67 Atl. 392.

That was in 1907, and nothing more was apparently heard of the medicine until May, 1912, when Mr. Burnstine, of counsel for the defendant, wrote Mr. Edison that his client, one Ferber, of New York, had been offered a one-third interest in the formula known as Edison's Polyform, together with the right to manufacture and sell the same with a certificate and design of trade-mark. He stated that the matter had been handed to him for investigation before closing, and he asked for any information that Mr. Edison might be disposed to give which would aid in determining the merits of the offer. He received a prompt reply that Mr. Edison denied the existence of any right to the term "Edison's Polyform," and that he would not permit the use of his name in connection with Polyform, or recommend the formula, and he was willing to litigate the question to any extent. After this explicit warning, Mr. Burnstine's client proceeded to organize the defendant, and obtained an assignment of what is alleged to be McMahon's one-third interest in consideration of 1,000 shares of stock in the defendant company. The defendant thereupon put Edison's Polyform on the market in cartons which reproduced the old picture and the alleged certificate of Edison over the fac simile of his signature. Edison promptly instituted this suit.

Unless Edison made the verbal contract alleged in the defendant's answer, the latter has not on any theory a shadow of right to do what it is doing, nor has it any unless some title remained in McMahon which he assigned to it. As already stated, I do not believe that any such contract as McMahon alleges with Edison was ever made. McMahon's testimony on the point is far too indefinite to establish that fact against Edison's direct and positive denial. I am also convinced that McMahon parted with whatever title he ever had more than a third of a century ago. He may and did have thereafter some interest in one or more of the companies which in succession unsuccessfully attempted to exploit the remedy, but that is a very different thing from having any title in the formula or trade-mark. This is, however, perhaps outside the mark. Nor is it worth while to inquire whether, if Edison had made a contract, and that was what McMahon says it was, and McMahon (until it was so assigned to the defendant) retained a one-

third interest therein, he could by assigning such one-third confer upon the defendant the rights it claims to exercise. All such questions may be put aside, because Vice Chancellor Stevens was clearly right in holding that such a contract as McMahon claims Edison made was absolutely personal to McMahon and his then associates, and is therefore not assignable.

The remedy is admittedly a compound of a number of dangerous drugs. A. may be willing to allow his name to be used for promoting the sale of such an article, provided it is manufactured and put on the market by some one in whom he has confidence. An agreement by him that B. may use his name for such a purpose does not imply any grant to the latter of the right to authorize others utterly unknown to A. to do the same thing. Complainant is entitled to a decree enjoining the defendant from calling the compound by his name, and by any name of which his forms a part, and from putting his picture or any certificate purporting to come from him on any of its packages or in any of its advertising literature, or from in any wise holding out or suggesting that he is in any wise concerned or interested in its sale. A witness whose testimony defendant itself introduced says that the remedy is worthless, except for the value that the right to use complainant's worldwide reputation in advertising may give to it. Complainant no longer believes that the remedy is useful, or likely to accomplish the purposes for which it was intended. There is no sufficient evidence in the case that that which defendant is putting out is really compounded according to the original formula. If it is using that formula, it doubtless may have a right to say so. In view of the improper use it has already attempted to make of the complainant's name, it should not be allowed even to say that much, or say he was the inventor, unless that statement is accompanied with the further explanation that the complainant now thinks that it is without merit. Such latter statement must in every case appear in immediate connection with the formula and be as conspicuously displayed.

A decree may be drawn up in accordance with the views herein expressed.

PHILADELPHIA CASUALTY CO. v. FECHHEIMER et al.

(Circuit Court of Appeals, Sixth Circuit. February 2, 1915. On Application for Rehearing, April 16, 1915.)

No. 2470.

1. APPEAL AND ERROR ☞273—EXCEPTIONS TO DECISION ON REPORT OF REFEREE—NECESSITY OF SPECIFIC EXCEPTIONS.

Where an action at law in a federal court is tried to the court by stipulation, pursuant to Rev. St. § 649 (Comp. St. 1913, § 1587), and by consent the cause is referred to a referee to take the evidence and report his findings of fact and conclusions of law, a general exception to the action of the court in overruling in a mass the exceptions taken to the report of the referee is too indefinite to present any question for review by the appellate court, and also, if any one of the rulings of the referee excepted to was correct, the exception is not good.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1590, 1606, 1620-1623, 1625-1630, 1764; Dec. Dig. ☞273.]

2. TRIAL ☞417—WAIVER OF RIGHT TO REVIEW RULING—PROCEEDING WITH TRIAL.

An exception to the overruling of a motion for judgment at the close of plaintiffs' evidence on the trial of an action to the court is waived by the introduction of evidence in defense.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 980; Dec. Dig. ☞417.]

3. APPEAL AND ERROR ☞265—NECESSITY OF EXCEPTIONS ON TRIAL BY COURT—SUFFICIENCY OF FINDINGS TO SUPPORT JUDGMENT.

No exception is necessary in a federal court to raise the question whether, when a jury has been duly waived, the special findings of fact by the court are sufficient to support the judgment rendered thereon.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1461, 1536-1551; Dec. Dig. ☞265.]

4. REFERENCE ☞4—POWER TO REFER—FEDERAL COURTS.

It is competent for a federal court to refer an action at law by consent of the parties, and the fact that the referee is designated a "special master" does not impair the validity of the reference.

[Ed. Note.—For other cases, see Reference, Cent. Dig. § 5; Dec. Dig. ☞4.]

5. APPEAL AND ERROR ☞848—REVIEW—FINDINGS OF COURT—ADOPTION OF FINDINGS OF REFEREE.

When special findings of fact made by a referee are adopted by the court in such manner as to show an intention to make such findings its own, such intention will be given effect by the appellate court, and the findings will be treated as having been made by the trial court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3372-3376; Dec. Dig. ☞848.]

6. REFERENCE ☞102—REPORT—EFFECT OF CONFIRMATION.

By overruling all exceptions of both parties to the report of a referee, and rendering judgment for the exact sum found by him to be due, the court evidences its intention to adopt the findings of the referee as its own.

[Ed. Note.—For other cases, see Reference, Cent. Dig. §§ 181-187; Dec. Dig. ☞102.]

7. TRIAL ☞393—TRIAL BY COURT—SPECIAL FINDINGS OF FACT—FORM AND CONTENTS.

Special findings of fact by a court or referee should consist of a concise and specific statement of the ultimate facts found, without recitals of the evidence or conclusions of law.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 920-923; Dec. Dig. ☞393.]

8. APPEAL AND ERROR ☞850—REVIEW—QUESTIONS OF FACT.

Where counsel for appellant or plaintiff in error in the appellate court admit that the findings of fact made by the trial court are sustained by the evidence, such findings will be treated as in effect an agreed statement of facts.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3346, 3351-3362, 3375, 3376; Dec. Dig. ☞850.]

9. APPEAL AND ERROR ☞733—ASSIGNMENTS OF ERRORS—SUFFICIENCY—SPECIFICATION OF ERRORS.

An assignment of error that "the court erred in entering judgment for the plaintiffs, to which the defendant then and there excepted," is insufficient to raise any question for review by the appellate court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3025-3027; Dec. Dig. ☞733.]

10. INSURANCE ☞511—CREDIT INSURANCE—LIABILITY OF INSUREE—RENEWAL POLICY.

A credit insurance policy, or "bond," insuring against loss of accounts due the insured from customers for goods shipped during the calendar year 1903, contained a clause providing that, "if this bond is renewed on or before the date of termination thereof by the issuance of a new bond, the losses occurring during the term of the renewal on goods shipped during the term of this bond shall be included in the calculation of losses under said renewal the same as if the goods had been shipped during the term of such renewal bond." December 4, 1903, a second bond was issued, differing in some of its provisions, covering the term from October 1, 1903, to September 30, 1904. The only reference therein to the previous bond was a provision that losses occurring on goods shipped on and after October 1, 1903, should not be included under the first bond, but under the second. *Held*, that the second bond was a renewal of the first, within the meaning of the quoted clause of the first, and covered losses arising on shipments made during the term of the first bond previous to October 1, 1903.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1296, 1297, 1299; Dec. Dig. ☞511.]

11. INSURANCE ☞511—CREDIT INSURANCE—LIABILITY OF INSUREE—RENEWAL POLICY.

The losses to which such clause relates are to be determined by the terms of the first bond, and not of the renewal, and the insurer is liable for a loss which comes within the terms of the first, although it is of a class not insured against by the renewal.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1296, 1297, 1299; Dec. Dig. ☞511.]

12. INSURANCE ☞511—CREDIT INSURANCE—LIABILITY OF INSUREE.

Each bond provided that on sales not exceeding \$450,000 during its term losses to the aggregate amount of \$5,000, should constitute an initial loss to be borne by the insured, the insurer being liable only for an excess of loss above that sum, and that, if the sales exceeded \$450,000, the initial loss should be proportionately increased. *Held*, that the fact that losses on sales made during the term of the first bond, but occurring during the term of the second, were payable under the latter, did not entitle the insurer to carry over the sales of the first term, and add them to those

of the second, for the purpose of increasing the amount of the initial loss thereunder.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1296, 1297, 1299; Dec. Dig. ☞511.]

13. INSURANCE ☞511—CREDIT INSURANCE—LIABILITY OF INSUREE.

Where goods shipped by insured were returned, no sale was consummated, which can be computed in making up the total sales under the bonds.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1296, 1297, 1299; Dec. Dig. ☞511.]

14. INSURANCE ☞175—CREDIT INSURANCE—LIABILITY OF INSUREE.

Although the renewal bond was not executed until December 4, 1903, a clause therein providing that "losses occurring on goods shipped on and after October 1, 1903," should be included thereunder, and not under the first bond, made the second bond effective for all purposes from that date.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 362-371; Dec. Dig. ☞175.]

15. INSURANCE ☞552—CREDIT INSURANCE—LIABILITY OF INSUREE.

That a preliminary notice of loss required and given the insurer incorrectly stated that the debtor had been adjudged bankrupt, whereas in fact he had been closed on execution, was immaterial, where no objection was made on that ground, and the insurer was liable in either case.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1358; Dec. Dig. ☞552.]

16. INSURANCE ☞146—CREDIT INSURANCE—CONSTRUCTION OF BONDS.

Credit insurance bonds, like other insurance policies, if ambiguous in their language, are to be construed strictly against the insurer, by whom they were framed.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 292, 294-298; Dec. Dig. ☞146.]

17. APPEAL AND ERROR ☞878—REVIEW—EXTENT OF RIGHT OF DEFENDANT IN ERROR.

A defendant in error, who did not himself institute proceedings in error, cannot in the appellate court go beyond supporting the judgment and opposing the assignments of error by the adverse party.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3573-3580; Dec. Dig. ☞878.]

In Error to the District Court of the United States for the Western Division of the Southern District of Ohio; Howard C. Hollister, Judge.

Action at law by Henry H. Fechheimer, Laura Strauss, executrix of the last will of Louis Kiefer, deceased, and Samuel H. Fechheimer, partners as Fechheimer, Kiefer & Co., against the Philadelphia Casualty Company. Judgment for plaintiffs, and defendant brings error. Affirmed.

J. L. Kohl, of Cincinnati, Ohio, for plaintiff in error.

Alfred Mack, of Cincinnati, Ohio, for defendants in error.

Before WARRINGTON and DENISON, Circuit Judges, and TUTTLE, District Judge.

TUTTLE, District Judge. This is an action in assumpsit, brought by defendants in error, hereinafter called plaintiffs, against plaintiff in error, hereinafter called defendant, to recover on two so-called

credit indemnity bonds, which are in their nature and effect policies of insurance against loss on commercial accounts; said bonds having been issued by defendant to plaintiffs in return for premiums paid. The cause was one for trial by jury, but by stipulation in writing, duly signed by both parties hereto, in accordance with the provisions of section 649, United States Revised Statutes, a jury was waived and said cause submitted for trial by the District Judge; it being provided in such stipulation that the court was "to make special findings of fact and conclusions of law." This stipulation also contained the following clause:

"By consent and stipulation of the parties this cause is hereby referred to B. R. Cowen as special master herein, said special master being appointed by the consent and at the request of the parties and on account of his familiarity with accounts; said special master to take the evidence to be submitted by the parties hereto and report the same, together with his special findings of fact and conclusions of law upon the matters in controversy herein."

The master named having died, another was, by order of the court, appointed in his place and directed to take testimony and report in accordance with the directions referred to. In pursuance thereof, the so-called special master, hereinafter called referee, took the testimony and thereafter filed a lengthy report, containing what he termed special findings of fact and conclusions of law, in which he found in favor of the plaintiffs on some items and in favor of the defendant on others, and as a result of his several findings found that plaintiffs were entitled to a judgment against defendant in the sum of \$7,048.90, with certain interest.

The evidence, objections, rulings, and exceptions before the referee, together with his findings of fact and conclusions of law, were transcribed and returned as a part of his report. The report of the referee also states that the parties stipulated that the exceptions taken to the rulings of the referee on the admission and exclusion of evidence, as shown by the report, "be deemed as and stand as exceptions to said report, the same as if said exceptions were specifically filed with the clerk of the court." On the same day that the referee's report was filed with the clerk of the court, each of the parties filed exceptions to the report. We are concerned only with the exceptions filed by the defendant, which were 19 in number. The first of these alleged errors on the part of the referee "in the admission of evidence offered by the plaintiffs to which the defendant excepted" before the referee. This exception did not point out the particular evidence which was objectionable, or assign any reason for the objection, relying upon the stipulation reported by the referee to justify the failure to point out the particular rulings which it was desired to call to the attention of the court, and relying upon the objections made before the referee as a basis for the exceptions to be considered by the court. The second objection to the report of the referee alleged error on the part of the referee in the same indefinite manner "in exclusion of evidence offered by defendant to which defendant excepted" before the referee. The third exception to the referee's report was that he denied the motion for judgment in favor of defendant at close of plaintiffs' proofs; the fourth, that he overruled the

same motion at close of all the proofs; the fifth, the denial of a new trial by the referee. The other 14 exceptions alleged error on the part of the referee in specific findings of fact and conclusions of law.

Upon the hearing by the court of the exceptions filed by the respective parties, the exceptions of the defendant, like those of the plaintiffs, were overruled as a whole. To this the defendant excepted generally. Judgment was thereupon rendered against the defendant for the amount found by the referee to be due to the plaintiffs, to which the defendant excepted, without stating any objections, or assigning any reason for the exception. The bill of exceptions, which sets forth the report of the referee and the exceptions filed thereto, says that the court did "overrule said exceptions and confirm said report, * * * and enter judgment in favor of the plaintiffs, to all of which the defendant then and there excepted." The order entering judgment recites the hearing before the court on exceptions to the report of the referee, and says that:

"The court, being advised, does overrule the exceptions of plaintiffs to said report, * * * to which plaintiffs except, and does overrule the exceptions of defendant to said report, * * * to which defendant excepts."

The order then proceeds in the usual form of judgment for plaintiffs, and closes with this sentence:

"To which finding and judgment the plaintiffs except, and to which findings and judgment the defendant excepts."

The record shows no exceptions taken by the defendant to any of the rulings or proceedings of the court, except this general exception to the court's order in overruling the 19 exceptions as a whole, and the exception "to entering judgment." The defendant sued out this writ of error, and assigns 20 errors. The first 19 respectively allege that the court erred in overruling the 19 exceptions to the referee's report, and the twentieth that:

"The court erred in entering judgment for the plaintiffs, to which the defendant then and there excepted."

[1] At the threshold of our inquiry we are confronted with the question whether the record presents any error which we can properly review. Section 700 of the Revised Statutes is as follows:

"When an issue of fact in any civil cause in a Circuit Court is tried and determined by the court without the intervention of a jury, according to section 649, the rulings of the court in the progress of the trial of the cause, if excepted to at the time, and duly presented by a bill of exceptions, may be reviewed by the Supreme Court upon a writ of error or upon appeal; and when the finding is special the review may extend to the determination of the sufficiency of the facts found to support the judgment."

This provision now applies to District Courts. *Eastern Oil Co. v. Holcomb*, 212 Fed. 126, 128 C. C. A. 642; *Nashville Interurban Railway v. Barnum*, 212 Fed. 634, 129 C. C. A. 170.

"Under these statutes and the established construction given them by the courts, the power of this court is limited to the determination of the question whether errors were committed by the trial court in its rulings during the progress of the trial, and whether the special findings made by the court

were sufficient to support the judgment." *Sayward v. Dexter, Horton & Co.*, 72 Fed. 758, at page 769, 19 C. C. A. 176, at page 186; *Churchill v. Buck*, 102 Fed. 38, 42 C. C. A. 148; *Mason v. Smith*, 191 Fed. 502, 112 C. C. A. 146 (Sixth Circuit).

It is clear that the general exception mentioned is too indefinite to present any question for review by an appellate court. *Felton v. Newport*, 92 Fed. 470, 34 C. C. A. 470 (Sixth Circuit).

This was settled by the decision in *Boogher v. New York Life Insurance Co.*, 103 U. S. 90, 26 L. Ed. 310. In that case, by stipulation following the Missouri state practice, there was a waiver of jury in the lower court, reference to referee, testimony taken by the referee, rulings by the referee on admissibility of evidence, exceptions taken to such rulings, findings of fact and law by the referee, all of which were reported to the court, and to which the defendant filed 22 separate exceptions, including exceptions to the rulings of the referee on the admission of testimony and to his findings of fact and conclusions of law. These 22 exceptions were heard and overruled as a whole by the court, and defendant excepted generally. Judgment was entered in favor of plaintiff on the report of the referee. A bill of exceptions was taken. The writ assigned separate errors, based on the confirmation of the referee's report by the court. The proceedings and practice in that case, so far as affect the point decided, are so identical with those here considered that to recite them is but to repeat the situation here described. Mr. Chief Justice Waite, speaking for the Supreme Court in that case, in a unanimous opinion affirming the court below, says (103 U. S. at page 98, 26 L. Ed. 310):

"The whole case, therefore, turns on the exception to the overruling of the objections to the report. This exception is a general one, to the single order overruling the 22 specific objections as a whole. We have uniformly held that 'if a series of propositions is embodied in instructions (to the jury), and the instructions are excepted to in a mass, if any one of the propositions is correct, the exception must be overruled.' *Johnston v. Jones*, 1 Black [66 U. S.] 209 [17 L. Ed. 117]; *Rogers v. The Marshal*, 1 Wall. 644 [17 L. Ed. 714]; *Harvey v. Tyler*, 2 Wall. 328 [17 L. Ed. 871]; *Lincoln v. Claffin*, 7 Wall. 132 [19 L. Ed. 106]; *Beaver v. Taylor*, 93 U. S. 46 [23 L. Ed. 797]. The same rule should be applied to cases of this kind. Here are, so to speak, a series of propositions in respect to the report of the referee. They were overruled, and excepted to in a mass. If one of the propositions was correct, therefore, the exception will not be good. The party should, by his exception, direct the attention of the court to the specific proposition or propositions on which he relies, and separate it or them from the rest."

Boogher v. Insurance Co., *supra*, has often been cited with approval by the Supreme Court, and the rule there stated has never been changed. It would be difficult to find a case which would better illustrate the necessity for the rule than the one presented by this record. The defendant not only took 19 exceptions to the report of the referee, but the first of these was intended to be so broad that it should cover any one of 42 different exceptions taken by the defendant to rulings of the referee in admitting testimony offered by the plaintiffs. Twenty-four of the 42 were based on objections without any reason for the objections being stated, and most, if not all, of the other 18 exceptions were based on objections too general to be considered. *Patrick v. Graham*, 132 U. S. 627, 10 Sup. Ct. 194, 33 L. Ed. 460;

Boston & Albany Railroad Co. v. O'Reilly, 158 U. S. 334, 15 Sup. Ct. 830, 39 L. Ed. 1006; Baltimore & Ohio Railroad Co. v. Hellenthal, 88 Fed. 116, 31 C. C. A. 414; Western Union Telegraph Co. v. Burgess, 108 Fed. 26, 47 C. C. A. 168; Merchants' Ins. Co. of Newark, N. J., v. Buckner et al., 110 Fed. 345, 49 C. C. A. 80; Erie Railroad Co. v. Schomer, 171 Fed. 798, 96 C. C. A. 458.

[2] The exception to the overruling of the motion for a directed verdict at the close of plaintiffs' proofs was waived by introducing evidence in defense. Grand Trunk Railway Co. v. Cummings, 106 U. S. 700, 1 Sup. Ct. 493, 27 L. Ed. 266; Accident Ins. Co. v. Crandall, 120 U. S. 527, 7 Sup. Ct. 685, 30 L. Ed. 740; Northern Pacific Railroad Co. v. Mares, 123 U. S. 710, 8 Sup. Ct. 321, 31 L. Ed. 296; Union Insurance Co. v. Smith, 124 U. S. 405, 8 Sup. Ct. 534, 31 L. Ed. 497; Robertson v. Perkins, 129 U. S. 233, 9 Sup. Ct. 279, 32 L. Ed. 686; Columbia Railroad Co. v. Hawthorne, 144 U. S. 202, 12 Sup. Ct. 591, 36 L. Ed. 405; Bogk v. Gassert, 149 U. S. 17, 13 Sup. Ct. 738, 37 L. Ed. 631; McCabe & Steen Construction Co. v. Wilson, 209 U. S. 275, 28 Sup. Ct. 558, 52 L. Ed. 788. This is sufficient to show that the ruling of the court in overruling the exceptions filed by the defendant to the report of the referee was correct as to at least "one of the propositions," and therefore the general exception taken by defendant is not good. Holloway v. Dunham, 170 U. S. 615, 18 Sup. Ct. 784, 42 L. Ed. 1165.

[3] It is, however, well settled that no exception is necessary to raise the question whether, when a jury has been duly waived, the special findings of fact of the court are sufficient to support the judgment rendered thereon. Aetna Insurance Co. v. Boon, 95 U. S. 117, 24 L. Ed. 395; Seeberger v. Schlesinger, 152 U. S. 581, 14 Sup. Ct. 729, 38 L. Ed. 560; Webb v. National Bank of Republic, 146 Fed. 717, 77 C. C. A. 143; Chicago, R. I. & P. Ry. Co. v. Barrett, 190 Fed. 118, 111 C. C. A. 158; Guaranty Trust Co. v. Koehler, 195 Fed. 669, 115 C. C. A. 475. We have had some doubt as to whether the trial court can be said to have made special findings of fact within the meaning of the statute above quoted. The court neither itself framed special findings nor stated specifically that it made the findings of the referee its own.

[4]. The reference as made, to the special master, so called, was proper, under the inherent power of the court, at least where, as here, it was with the consent of the parties. Hecker v. Fowler, 2 Wall. 123, 17 L. Ed. 759; Fenno v. Primrose, 119 Fed. 801, 56 C. C. A. 313. As was said in Shipman v. Straitsville Central Mining Co., 158 U. S. 356, 15 Sup. Ct. 886, 39 L. Ed. 1015:

"This case was referred by consent to * * * a so-called 'master commissioner,' as referee, with instructions to report the testimony, with the findings of fact and of law, to the court. The fact that no such officer as master commissioner is known to the law does not impair the validity of the reference, as it is perfectly competent for the court to refer a case to a private person. Hecker v. Fowler, 2 Wall. [1 Black] 123 [17 L. Ed. 45]."

"While the federal statute makes no provision for such reference in a law action, it is a recognized practice in the federal jurisdiction to make such reference by consent of parties; and, after the coming in of the referee's report, before judgment is entered upon the findings, either party may inter-

pose objections thereto in writing, and the court may, upon request of either party, re-refer the matter for further findings, or proceed to verdict and judgment on the record as the evidence and the law may direct. *Hecker v. Fowler*, 2 Wall. [1 Black] 123-129, 17 L. Ed. 759; *St. L. Elec., Light & P. Co. v. Edison, etc. (C. C.)* 64 Fed. 997-1004." *Boatmen's Bank v. Trower Bros. Co. (C. C.)* 171 Fed. 966; *Fenno v. Primrose*, 119 Fed. 801, 56 C. C. A. 313.

[5] And when special findings of fact, made by a master or referee to aid the court, are adopted by the court in such a manner as to show an intention to make such findings its own, such intention will be given effect by the appellate court, which will then consider the special findings, so adopted, as if they had been framed by the trial court. *Chicago, Milwaukee & St. Paul Ry. Co. v. Clark*, 178 U. S. 353, 20 Sup. Ct. 924, 44 L. Ed. 1099; *Shipman v. Straitsville Central Mining Co.*, 158 U. S. 356, 15 Sup. Ct. 886, 39 L. Ed. 1015; *Roberts v. Benjamin*, 124 U. S. 64, 8 Sup. Ct. 393, 31 L. Ed. 334; *Paine v. Central Vermont Ry. Co.*, 118 U. S. 152, 6 Sup. Ct. 1019, 30 L. Ed. 193; *Shipman v. Ohio Coal Exchange*, 70 Fed. 652, 17 C. C. A. 313 (Sixth Circuit); *Board of Commissioners v. Sherwood*, 64 Fed. 103, 11 C. C. A. 507. As was said in the recent case of *Tiernan v. Chicago Life Ins. Co.*, 214 Fed. 238, at page 241, 131 C. C. A. 284:

"It was at one time questioned whether there could be a review in an appellate court of the United States where the facts were found by a referee (*Boogher v. Insurance Co.*, 103 U. S. 90, 95, 26 L. Ed. 310), but it is now settled that when a jury has been waived in writing, and the findings of the referee have been confirmed by the trial court as reported, or as modified by it, the question whether the judgment rendered was warranted by the facts found will be reviewed by the appellate court as though the findings were wholly made by the trial court itself. *C. M. & St. P. R. Co. v. Clark*, 178 U. S. 353, 364, 20 Sup. Ct. 924, 44 L. Ed. 1099."

[6] In the present case we think that by overruling all the exceptions of both parties to the referee's report, confirming such report, and rendering judgment for the exact sum found by such referee to be due, the court indicated an intention to adopt as its own the findings of the referee. Being satisfied that such was the intention, we have decided to treat such findings as those of the District Court.

[7] We have also had difficulty in determining whether these findings of the referee were general or special within the meaning of the statute. The form in which they were framed by the referee is not to be commended. Instead of having a concise statement of the ultimate facts found, apart from recitals of evidence and conclusions of law, we are compelled, in order to discover such facts, to search through a voluminous report in and throughout which are mixed and interspersed findings of facts, conclusions of law, reference to evidence, and arguments of counsel. The following language is applicable here:

"It is not very easy to determine from this record whether the court's finding of facts was intended to be general or special. We call attention again to the very unsatisfactory practice that obtains in some of the Circuit Courts in the trial of cases before the court without a jury. The finding in such cases may be general, like the general verdict of a jury, or it may be special, like the special verdict of a jury. When the finding is special, the facts found should be stated as they would be in a special verdict of a jury. In stating the facts found, no reference whatever should be made to the evidence upon which those facts are found. Neither the evidence nor any discussion of it

should be injected into the ultimate finding of facts, upon which the court rests its judgment. The special finding of facts should be a clear cut statement of the ultimate facts, without importing into it the evidence, or the reasoning by which the court arrived at its finding." *Minchen v. Hart*, 72 Fed. 294, at page 295, 18 C. C. A. 570, at page 571.

"The special finding contemplated by the statute is a specific statement of those ultimate facts upon which the law must determine the rights of the parties. It corresponds to the special verdict of a jury, is equally specific and responsive to the issues, and is spread at large upon the record, as part thereof, in like manner as is such a verdict." *United States v. Sioux City Stockyards Co.*, 167 Fed. 126, at page 127, 92 C. C. A. 578, at page 579.

[8] It is, however, apparent that the present record presents no disputed question of fact. Defendant, indeed, admits in its brief that "the facts are undisputed and necessarily sustain the finding of fact." We think, therefore, that the facts stated in the report of the referee, called therein special findings, and adopted by the court, can and should be treated as at least constituting an agreed statement of facts, and consequently equivalent to the special findings contemplated by the statute referred to. *Mutual Life Insurance Co. v. Kelly*, 114 Fed. 268, 52 C. C. A. 154; *United States v. Cleage*, 161 Fed. 85, 88 C. C. A. 249; *Fellman v. Royal Life Insurance Co.*, 185 Fed. 689, 107 C. C. A. 637; *Treat v. Farmers' Loan & Trust Co.*, 185 Fed. 760, 108 C. C. A. 98. As was said by Lurton, C. J., speaking for this court, in *Kentucky Life & Accident Insurance Co. v. Hamilton*, 63 Fed. 93, 11 C. C. A. 42:

"An agreed statement of facts, upon which a judgment is founded, will be taken, on appeal or writ of error, as the equivalent of a special finding of facts. *Bond v. Dustin*, 112 U. S. 607 [5 Sup. Ct. 296, 28 L. Ed. 835]; *Supervisors v. Kennicott*, 103 U. S. 554 [26 L. Ed. 486]; *Lehnens v. Dickson*, 148 U. S. 73 [13 Sup. Ct. 481, 37 L. Ed. 373]."

"There was * * * an agreement as to certain facts, which, though not technically such an agreed statement as is the equivalent of a special finding of facts, yet enables us to approach the consideration of the declaration of law with a certainty as to the facts upon which it was based." *St. Louis v. Western Union Telegraph Co.*, 148 U. S. 92, 13 Sup. Ct. 485, 37 L. Ed. 380.

"The findings are not to be construed with the strictness of special pleadings. It is sufficient if from them all, taken together with the pleadings, we can see enough upon a fair construction to justify the judgment of the court, notwithstanding their want of precision and the occasional intermixture of matters of fact and conclusions of law." *O'Reilly v. Campbell*, 116 U. S. 418, 6 Sup. Ct. 421, 29 L. Ed. 669.

In the words of the Supreme Court in *Louisiana Mutual Insurance Co. v. Tweed*, 74 U. S. (7 Wall.) 44, 19 L. Ed. 65, where counsel had agreed in the appellate court to certain portions of the opinion of the trial court as containing the material facts of the case:

"Inasmuch as they could have made such an agreement in the court below, we have concluded to act upon it here as if it had been so made."

[9] The only assignment of error specifically directed against the correctness of the judgment is the twentieth, which is as follows:

"The court erred in entering judgment for the plaintiffs, to which the defendant then and there excepted."

Such an assignment is insufficient to raise any question for review here. *Deering Harvester Co. v. Kelly*, 103 Fed. 261, 43 C. C. A. 225.

In the language of the court in *Felker v. First National Bank*, 196 Fed 200, at page 202, 116 C. C. A. 32, at page 34:

"The only other assignment is in effect that the court erred in rendering a judgment for the plaintiff. Unless we supplement this assignment by adding 'on the facts found,' it presents nothing for review by this court. *Bell v. Union Pacific R. Co.*, 194 Fed. 366 [114 C. C. A. 326] just decided. Assuming, therefore, that the assignment meant to challenge the judgment on the statutory ground that the facts found were insufficient to support it, it is entirely without merit, and cannot be sustained."

But several of the assignments of error raise questions which, in effect, involve the sufficiency of the facts found to support the judgment, and we have therefore concluded to consider such assignments as if they had specifically questioned such sufficiency, and we proceed to consider the questions thus presented.

[10] 1. Was bond 1318 renewed by bond 2071?

This suit involves two credit insurance policies, called bonds, issued by defendant to plaintiffs, the first bond, No. 1318, by its terms indemnifying them against loss of accounts due them from customers for goods shipped between January 1, 1903, and December 31, 1903, and the second bond, No. 2071, furnishing such indemnity on shipments between October 1, 1903, and September 30, 1904; both bonds being subject to certain terms and conditions hereinafter referred to. Bond 1318 contained the following clause:

"Outstandings Covered under Renewal Bond.

"Seventh. If this bond is renewed on or before the date of termination thereof by the issuance of a new bond, the losses occurring during the term of the renewal on goods shipped during the term of this bond shall be included in the calculation of losses under said renewal, the same as if the goods had been shipped during the term of such renewal bond."

On December 4, 1903, and therefore before the date of the termination of bond 1318, bond 2071 was issued, and by its terms, as stated, covered losses on shipments between October 1, 1903, and September, 30, 1904. It also contained the following clause:

"In consideration of issuing the attached bond, it is agreed and understood that losses occurring on goods shipped on and after October 1, 1903, shall not be included under bond 1318, but under the attached bond, subject to the terms and conditions thereof."

This was its only reference to the previous bond, from which it differed in several of its provisions.

Certain losses to plaintiffs occurred during the term of the second bond on shipments made prior to the commencement of such term and during the term of the first bond. And the question is raised whether bond 1318 was renewed by bond 2071, within the meaning of the clause quoted, so that losses occurring during the term of the latter bond on shipments made during the term of the former bond can be included in the calculation of losses under said latter bond. It is urged that because it is not recited in the latter bond that it is a renewal of the earlier one, and because there is no direct evidence that the parties agreed that it should be so considered, therefore it is not

such a renewal within the meaning of the first bond, and the losses last mentioned are not protected by it.

We are unable to agree with such contention. We think that by the clause quoted the parties intended to, and did, agree that if, on or before the expiration of this first bond, defendant should issue to plaintiffs a new bond, such clause should become operative. It is unnecessary to determine whether the second bond is itself technically a renewal bond, because it is clear that the parties themselves have stipulated that such renewal should be effected "by the issuance of a new bond." It is obvious that these parties were not interested in, if they understood, the technical legal meaning of the term "renewal." What they were interested in, and unquestionably understood, was the protection to be extended to losses occurring after, on shipments made before, the termination of the old bond, "by the issuance of a new bond," on or before such termination. And when such new bond was so issued the "outstandings" referred to were thereby "covered."

[11] 2. Are the losses occurring during the term of the renewal bond, on shipments made during the term of the original bond, the losses contemplated and defined by the original bond?

The kind of losses on shipments made during the period of the second bond recoverable thereunder differed materially from the kind of losses recoverable under the conditions of the first bond. Thus, the only losses against which plaintiffs were indemnified by the second bond were those "sustained on claims against debtors by or against whom, between the dates of the execution and termination of this bond, judicial proceedings of any kind have been taken, establishing such debtors' insolvency," while the first bond gave indemnity against losses arising on claims against the following debtors:

"A debtor for an amount not exceeding \$250, where the preliminary notice of loss has attached to it a report from the designated mercantile agency, or from some collection agency or attorney practicing in the place where the debtor did business, that the claim against such debtor is uncollectible through legal proceedings; * * * a debtor who has effected a compromise with his creditors; * * * a debtor by or against whom a petition to be declared a bankrupt or insolvent has been filed under the federal bankruptcy law or under some insolvency or assignment law of any of the United States or any territory thereof; * * * a debtor against whom an execution in favor of the indemnified or some other creditor has been returned unsatisfied," and losses arising under certain other circumstances mentioned in said bond.

It is contended by defendant that, if the first bond be considered as renewed by the second, so that losses on shipments during the term of the former, occurring during the term of the latter bond, may be included in the calculation of the losses under said latter bond, only such losses can be so included as are within the class of losses specifically covered by such bond when occurring on shipments made during its term.

We think that to so hold would require a forced and unnatural construction of the clause in question. It will be observed that by this clause it was agreed that "the losses occurring" during the term of the renewal, on shipments made during the term of the original policy, should be included in the calculation of losses under such renewal. In

the absence of any express definition of the word, we think it evident that by "the losses" was meant the losses against which plaintiffs were then being insured. And the basis for calculating these losses was then being fixed, in the language of the policy already quoted.

If the parties had desired to make the provability of such losses subject to the terms and conditions of the renewal policy, such an intention could easily have been expressed in appropriate language, as was done by the insertion in the second bond of the following provision, above referred to:

"In consideration of issuing the attached bond, it is agreed and understood that losses occurring on goods shipped on and after October 1, 1903, shall not be included under bond No. 1318, but under the attached bond, subject to the terms and conditions thereof."

Even if the language of clause 7 alone is not sufficient to require the payment under the renewal policy of the "losses" as defined in 1318, incurred during its term upon goods shipped before October 1, 1903, we think also that the language just quoted is a clear recognition by the parties that, except as expressly provided thereby, the losses mentioned in clause 7 are those "included under bond No. 1318," and not "under the attached bond, subject to the terms and conditions thereof."

Although counsel have not cited, and we have been unable to find, a case in which the facts were identical with those involved here, the same general situation was presented in two cases already decided by this court.

The case of American Credit Indemnity Co. v. Athens Woolen Mills, 92 Fed. 581, 34 C. C. A. 161, involved two credit insurance bonds quite similar to those involved here. By clause 8 of the first bond it was provided that:

"No loss can be proven after the expiration, provided, however, that in case this bond is renewed, and the premium on such renewal is paid at or before the expiration of this bond, loss resulting after such date of expiration, on shipments made during the term of this bond, may be proven during the term of the renewal bond next immediately succeeding."

Before the expiration of the bond complainant renewed it, paying the required premium, and received bond No. 2443 in renewal. In nearly all respects this bond was like the old. Its eighth condition was:

"In case this bond is renewed, and the premium on such renewal is paid at or before the expiration of this bond, loss resulting after said date of expiration, upon shipments made during the term of the bond, may be proven under such renewal bond, in accordance with the terms and conditions of such renewal. In case this bond is a renewal, and the premium has been paid at or before the expiration of the preceding bond, losses occurring during the term of this bond, on shipments made during the terms of said preceding bond, may be proven hereunder."

It was urged by the insurer that only such losses were carried over from the old to the new bond as were within the terms and conditions of the latter bond. This court, speaking by Circuit Judge Taft, said:

"The question before us is one of construction. Is the loss guaranteed against under clause 8 of bond 1540, in case of a renewal, loss resulting from insolvency, as defined in that bond, or as defined in the renewal bond, 2443? If the former, then the judgment is supported by the averments of the bill; if

the latter, then, because the affairs of the debtor firm were in the hands of a receiver, a judgment, execution, and nulla bona return are not the test of insolvency, and the plaintiff's case is not made out. The exception as to the receivership was a new provision of bond No. 2443. Clause 8 of No. 1540 was of a somewhat illusory character. It did not become operative and binding until renewal, and it was of course, possible for the insurer to modify the effect of clause 8 by the terms of the very renewal upon which alone it became his contractual obligation. These contracts of indemnity are merely contracts of insurance, carefully framed, to limit as narrowly as possible the liability of the insurer, and doubtful expressions in them are to be construed favorably to the insured. Supreme Council Catholic Knights of America v. Fidelity & Casualty Co., 11 C. C. A. 96, 63 Fed. 48; Guarantee Co. of North America v. Mechanic's Sav. Bank & Trust Co., 26 C. C. A. 146, 80 Fed. 766. Taking clause 8 of bond No. 1540 alone, it cannot be doubted that 'the loss resulting after such date of expiration on shipments made during the term of this bond,' which was to be proven during the term of the renewal bond, was intended to be the same kind of loss as that for which the bond was given, to wit, a loss resulting from insolvency, as in bond No. 1540 defined. This conclusion is enforced by the language of clause 11 in bond No. 1540, in which it is agreed that insolvency shall be return of judgment executions unsatisfied during the term of bond or the renewal thereof aforesaid. Does clause 8 of bond No. 2443 indicate an intention to change the character of the loss upon goods sold during the life of the previous bond for which the insurer should become liable? The material words of that clause are: 'In case this bond is a renewal, * * * losses occurring during the term of this bond on shipments made during the term of said preceding bond may be proved hereunder.' Does proof, under the renewal bond, require that the insolvency shall be established according to the definition of that bond? Standing alone, it may be conceded that this would be the natural meaning of the words; but we are to construe this clause with clauses 8 and 11 of bond No. 1540. We are to consider that by that clause it was clearly intended to extend the benefit of the old bond to cover sales of goods made under that bond, though losses thereon did not accrue during its life; and we ought not to defeat that intention and just expectation of the assured, unless the words of the renewal bond necessarily require it. Do they require it? We think not. In the light of the circumstances and the necessity for reconciling the clauses of the two bonds, the words of clause 8 of bond No. 2443 may be reasonably construed to mean merely that the formal proof of loss is to be made under the renewal bond and during its life, while clauses Nos. 8 and 11 of bond No. 1540 shall be given effect by holding that the fact of the loss is to be settled by the terms of the old bond."

In American Credit Indemnity Co. v. Champion Coated Paper Co., 103 Fed. 609, 43 C. C. A. 340, the same contention was made in reference to somewhat different provisions contained in bonds similar to those in the instant case. Lurton, C. J., speaking for this court, said:

"The initial loss and single debtor liability of the two bonds are irreconcilable, if we construe the conditions of the renewal bond as applicable to losses resulting from sales under the first bond. They are not so, if we limit the terms and conditions in respect of the initial loss and single debtor liability, found in the new bond, to sales occurring during its period. This is the most reasonable interpretation, and accords most nearly with the justice of the matter. In the case of American Credit Indemnity Co. v. Athens Woolen Mills, a cause decided by this court, and reported in 34 C. C. A. 161, 92 Fed. 581, we found a difficulty of the same general character arising out of a doubt as to whether the definition of insolvency found in a renewal policy applied to a loss which was provable under the renewal bond, though it arose from sales made during the currency of the preceding bond. * * * In the same case we held bonds of this character to be essentially insurance contracts, and that doubtful and ambiguous expressions were to be construed most favorably to the insured. Applying this rule, we have no hesitation in holding that the provisions which determine the amount * * * of the single

debtor liability applicable to claims resulting from sales during the period of the preceding bond are those found in the preceding bond."

We think that the losses on goods shipped during the period of the first bond, and before October 1, 1903, but occurring during the period of the second bond, which may be included in the calculation of the losses under the second bond, are not limited to the class of losses covered by said bond, but are the losses coming within the classes covered by the first bond.

[12] 3. Should the amount of sales under the first bond be added to the amount of sales under the second bond, to determine the amount of initial loss to be borne by the insured?

The renewal bond contained the following provision:

"If between the date of the execution of this bond and the 30th day of September, 1904, both dates inclusive, on goods usually dealt in and at the time of shipment solely owned by the indemnified, shipped since the 1st day of October, 1903, the indemnified shall sustain actual losses in excess of \$5,000 hereinafter called the 'initial loss,' on sales and shipments not exceeding \$450,000, or, if such sales and shipments as aforesaid exceed such sum, a proportionately increased initial loss, the company agrees to pay such excess loss."

The first bond contained the same clause, excepting as to the dates mentioned. The contention is made by defendant that, if the losses on shipments during the first bond are carried over into the renewal bond, the amount of sales and shipments during the same period should also be carried over and added to the amount of sales and shipments made during the term of the latter bond; that, if this was done, said last-mentioned amount would exceed the maximum fixed, \$450,000; and that consequently the initial loss to be borne by the insured should be proportionately increased above \$5,000. It is a sufficient answer to this contention to point out that, while the parties might have made an agreement to that effect, they have not done so, and we cannot add to the contract which they have seen fit to make. By that contract it was specifically provided that:

"The losses occurring during the term of the renewal on goods shipped during the term of this bond shall be included in the calculation of losses under said renewal, the same as if the goods had been shipped during the term of such renewal bond."

No provision having been made for also carrying over the sales and shipments, we do not feel warranted in speculating on the question whether such provision should have been made. It should also be borne in mind that each bond, by its express terms, insured certain losses, in excess of an initial loss, on shipments made during a certain period, which period was different in each bond. And the amount of the initial loss to be borne by the insured under either bond, on the losses occurring during the period of such bond, depended, by the terms thereof, upon the amount of the shipments made during such period. Thus, the amount of the initial loss on the losses occurring during the period of the first bond, on shipments made during such period, depended upon the total amount of such shipments. Consequently, if those shipments, or any part thereof, were carried over and used in computing the total amount of shipments under the second bond, the result would be that,

to that extent, the same shipments would be available twice as a basis for determining one initial loss, and the total loss to be borne by the insured would be proportionally increased beyond the sum agreed upon. We think that the contention of defendant cannot be sustained.

4. What has been said is also applicable to the contention that only losses, if any, in excess of \$5,000 on shipments made during the first bond, are covered by the renewal clause. This clause, however, specifically refers to losses, and not excess losses, and as the parties used plain language to express their agreement, we cannot substitute therefor other language of our own, which would alter the meaning of such agreement.

Moreover, as already pointed out, to adopt the contention of defendant in this regard would result in increasing the initial loss beyond the amount expressly agreed upon. The effect, in fact, would be that the insured would be obligated to bear one initial loss on losses on shipments made during the period of the first bond and occurring during such period, another similar initial loss on losses on the same shipments but occurring during the period of the second bond, and a third initial loss of the same amount on losses on shipments made during the period of the second bond and occurring during that period. That such a result, so inconsistent with the express provisions of the bonds governing the initial loss, was intended to be effected by the renewal clause in question, is hardly conceivable. Certainly no such intent was expressed by the language of such clause. While the other provisions refer to "losses in excess of" the initial loss, and to "excess loss," this clause mentions merely "the losses" occurring after, on shipments made before, the term of the first bond. We think that by the various provisions and clauses to which reference has been made the parties agreed: First, that defendants should indemnify plaintiffs against the losses defined by the first bond and occurring, in excess of the initial loss therein provided, on shipments made during such term, the total amount of the shipments made during such term being the basis for determining the amount of such initial loss; second, that the losses defined by the first bond, on shipments made during the term thereof (and therefore included in the basis for computing the initial loss thereunder), but occurring during the term of the second bond, should be included in the amount of the losses defined by, and occurring during the term of, such second bond on shipments made during its term; and, third, that the defendant should indemnify the plaintiffs against the losses defined by the second bond and occurring, in excess of the initial loss therein provided, during the term thereof on shipments made during such latter term, the amount of such initial loss depending, and depending only, upon the amount of shipments actually made during such latter term, but the amount of the losses, that is, the gross losses, including not only the losses occurring on such shipments, but also the losses occurring during such latter term on the shipments made during the term of the first bond (which shipments had been already used, as shown, in computing the amount of the initial loss under the first bond). This contention, therefore, must be overruled.

[13] 5. Should the shipments of goods which were returned by customers to the insured have been deducted from the amount of sales

and shipments, in determining whether the total amount of such sales and shipments exceeded the maximum fixed in each policy?

We think that, when goods shipped have been returned and accepted by the insured, no sale is consummated within the meaning of this policy. It does not appear, nor is it claimed, that any of the goods so returned were not accepted by the insured. It must therefore be assumed that such goods were shipped, but not sold, or else that any sales thereof were rescinded. In either event, no risk thereon was assumed by the insurer, and we think that the court did not err in refusing to include these shipments among the total amount of sales and shipments, in determining whether the maximum fixed had been exceeded.

[14] 6. Were plaintiffs insured against losses occurring between October 1, 1903, and December 4, 1903, the date of the execution of the renewal bond?

This bond contained the following clause:

"If between the date of the execution of this bond and September 30, 1904,
* * * on goods * * * shipped since the 1st day of October, 1903, the
indemnified shall sustain actual losses in excess of \$5,000, * * * provided:
* * * (b) That such losses shall have been sustained on claims against
debtors by or against whom between the dates of the execution and termina-
tion of this bond, judicial proceedings of any kind have been taken, estab-
lishing such debtor's insolvency."

The losses on three accounts, known as the Mandelstamen, Gammon, and Trigg claims, occurred between October 1, 1903, and such date of execution, which was December 4, 1903, and defendant contends that by reason of the language just quoted these losses were not covered by such bond. By reference to the schedules attached to the master's report we find that all the Gammon and Trigg shipments, and most of the Mandelstamen shipments, on which such losses occurred, were made before October 1, 1903. These losses, therefore, were covered by the renewal clause already discussed, and defendant's contention, if tenable, is inapplicable thereto. This leaves only a small part of the Mandelstamen shipments open to the objection last referred to. If the provisions here invoked by defendant were the only ones in the last bond relating to this question, the contention made might not be without some force. The same bond, however, contains the following language, already quoted in another connection:

"In consideration of issuing the attached bond, it is agreed and understood that losses occurring on goods shipped on and after October 1, 1903, shall not be included under bond No. 1318, but under the attached bond, subject to the terms and conditions thereof."

It is evident that the parties intended that the renewal bond should cover losses on goods shipped after October 1, 1903, and that the reference to the "date of the execution" of such bond was merely a printed clause designed to apply if the bond had taken effect at the date of its execution, instead of, as here, prior thereto. That the court committed no error in so holding is manifest from the rule of construction, applicable to such a case, to which reference is hereinafter made.

7. Among the losses insured by the first policy were losses—
"against a debtor for an amount not exceeding \$250 where the preliminary notice of loss has attached to it a report from the designated mercantile agency, or from some collection agency or attorney practicing in the place

where the debtor did business, that the claim against such debtor is uncollectible through legal proceedings."

Defendant objects to the allowance of any part of the loss on the account of Middleton, Chandler & Co. under this clause, because said account exceeded \$250, contending that said clause covers only a loss on an account not exceeding that sum, and no portion of an account which is in excess of the sum named.

It is unnecessary to construe this provision, because a reference to the findings and to certain exhibits mentioned therein discloses the fact that a petition in bankruptcy had been filed against the firm in question and defendant had duly filed a proof of claim therein. This loss was therefore insured, in any event, under the clause covering losses—

"against a debtor by or against whom a petition to be declared a bankrupt or insolvent has been filed under the federal bankruptcy law or under some insolvency or assignment law of any of the United States or any territory thereof."

[15] 8. Defendant assigns error on the allowance of the losses on the so-called Strauss and Henderson claims under the first bond, "for the reason that the record does not show that any event transpired during the term of either bond No. 1318 or No. 2071 which rendered said claims a provable claim under either of said bonds."

With respect to the Strauss account, the findings and the evidence referred to therein show that plaintiffs duly sent defendant preliminary notice of loss, "because the debtor has been adjudged bankrupt according to the advices received from his brother," and that defendant replied by informing plaintiffs that:

"We have advices from our local attorney to the effect that this party was closed out under execution and nothing can be made out of him."

The schedule attached to, and made a part of, the findings, shows that said debtor was "closed out under execution." The loss was therefore covered by the policy, either as a loss on a debtor who had become a bankrupt, as a loss on a debtor duly reported uncollectible, or as a loss on "a debtor whose stock in trade has been sold in judicial proceedings." That formal notice of such facts was not specifically given in the preliminary proof of loss is immaterial, as defendant had prompt and sufficient knowledge of such threatened loss, and did not dispute liability on that ground. American Credit Indemnity Co. v. Wood, 73 Fed. 81, 19 C. C. A. 264; American Credit Indemnity Co. v. Carrollton Furniture Mfg. Co., 95 Fed. 111, 36 C. C. A. 671; Sloman v. Mercantile Credit Guarantee Co., 112 Mich. 258 70 N. W. 886.

Regarding the Henderson account, it appears to be undisputed that a judgment was obtained thereon, that no property was found upon which execution could be levied, and that attorneys for defendant returned said claim to it uncollected. The loss was manifestly covered by the first bond, both as a loss on a debtor against whom an execution had been returned unsatisfied, and as a loss on an account reported by an attorney as uncollectible.

[16] It is, of course, well settled that credit insurance bonds, or policies, as they really are, like other insurance policies, if ambiguous in their language, are to be construed strictly against the insurer, by

whom they have been framed. *American Credit Indemnity Co. v. Champion Coated Paper Co.*, *supra*; *Tebbetts v. Mercantile Credit Guarantee Co.*, 73 Fed. 95, 19 C. C. A. 281; *American Credit Indemnity Co. v. Wood*, 73 Fed. 81, 19 C. C. A. 264. As was said in the case last cited:

"The bond, with its numerous conditions, being an instrument prepared by the insurer, we must apply to its construction the rule which was applied by this court in *Guarantee Co. v. Wood*, 15 C. C. A. 563, 68 Fed. 529: 'If the particular clause requiring interpretation cannot be brought into harmony with the rest of the contract, and the instrument, considered as a whole, is ambiguous touching the precise loss which the policy covers, that meaning is to be given to it which is most favorable to the insured.'"

And the following language of the Supreme Court is applicable to our construction of these bonds:

"If the latter construction of the bond be not clearly right, it cannot be said to be inconsistent with its provisions. And it would be going very far to say that the construction given to it by the company was so clearly right that a different construction would be unreasonable or entirely inadmissible. We have, then, a contract so drawn as to leave room for two constructions of its provisions, either of which, it may be conceded, is reasonable, one favorable to the company, and the other favorable to the bank, and most likely to subserve the purposes for which the bond was given. In such a case the terms used must be interpreted most strongly against the party who prepared the bond and delivered it to the party for whose protection it was executed." *American Surety Co. v. Pauly*, 170 U. S. 160, at page 168, 18 Sup. Ct. 563, at page 566 (42 L. Ed. 987).

[17] Plaintiffs complain of certain rulings of the court; but, as they did not appeal from the judgment, they cannot in this court go beyond supporting such judgment and opposing every assignment of error. *Landram v. Jordan*, 203 U. S. 56, 27 Sup. Ct. 17, 51 L. Ed. 88; *Southern Pine Lumber Co. v. Ward*, 208 U. S. 126, 28 Sup. Ct. 239, 52 L. Ed. 420; *Texas Co. v. Central Fuel Oil Co. et al.*, 194 Fed. 1, 114 C. C. A. 21; *Swager v. Smith*, 194 Fed. 762, 114 C. C. A. 482; *O'Neil v. Wolcott Mining Co.*, 174 Fed. 527, 98 C. C. A. 309, 27 L. R. A. (N. S.) 200.

We have carefully considered all the assignments of error raising questions which in effect involve the sufficiency of the facts found to support the judgment. No other questions have been properly presented for review. Nor do we intend to hold that without exceptions properly taken and directed to specific parts of a controversy of this complex character, or at least assignments of error specifically and clearly directed at the sufficiency of particular findings of fact to support the judgment rendered, this court will consider the details of the controversy, searching the record as has been done in this case; but we have thought that course advisable here under the unusual conditions shown by this record.

As we find no error, the judgment is affirmed.

On Application for Rehearing.

PER CURIAM. We are satisfied that whatever doubts exist as to the true mutual construction of the two contracts, as urged originally and as again presented by the rehearing application, are properly to be solved in favor of the insured by virtue of the rule pointed out in the opinion. The application for rehearing is denied.

RININGER et al. v. PUGET SOUND ELECTRIC RY. et al.

(Circuit Court of Appeals, Ninth Circuit. February 15, 1915.)

No. 2450.

1. APPEAL AND ERROR ☞403—**PARTIES—AMENDMENT.**

Under U. S. Comp. St. 1901, p. 714, § 1005, authorizing the allowance of an amendment of a writ of error when the statement of the title or parties in the writ is defective, if the defect can be remedied by reference to the accompanying record without prejudicing or injuring defendant in error, where a motion for judgment by one of the defendants was granted without objection, and such defendant was not named in the writ of error or citation, or made a party to the proceedings taken by plaintiffs to review a judgment in favor of the other defendant, plaintiffs will be permitted to amend the writ of error and citation by inserting the name of such defendant, and to substitute a new and amended appeal bond, conforming to the amended writ of error and citation, and a motion to dismiss the writ of error will be denied.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2115-2119; Dec. Dig. ☞403.]

2. RAILROADS ☞350—**ACTIONS FOR DEATH—QUESTIONS FOR JURY.**

In an action for the death of a person riding in an automobile, struck by an electric interurban car at a crossing, evidence as to the speed of the car and of the automobile, and as to whether an alarm gong was ringing, and whether deceased and his chauffeur looked and listened for approaching cars, held to make questions for the jury as to defendant's negligence and deceased's contributory negligence.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1152-1192; Dec. Dig. ☞350.]

In Error to the District Court of the United States for the Northern Division of the Western District of Washington; Edward E. Cushman, Judge.

Action by Nellie M. Rininger and another against the Puget Sound Electric Railway and another. Judgment for defendants, and plaintiffs bring error. Reversed and remanded.

H. H. A. Hastings and L. B. Stedman, both of Seattle, Wash., for plaintiffs in error.

James B. Howe and Hugh A. Tait, both of Seattle, Wash., for defendants in error.

Before GILBERT and ROSS, Circuit Judges, and WOLVERTON, District Judge.

ROSS, Circuit Judge. This action was brought by the plaintiffs in error against the defendants in error to recover damages resulting to them from the death of the husband of Nellie M. and the father of Helen Dorothy Rininger, which was in the complaint alleged to have been caused by the joint negligence of the defendants in error. The deceased Rininger was killed by a car of the defendant electric railway—an interurban road—colliding with an automobile in which he was riding. Both companies were represented in the court below by the same counsel.

[1] At the trial, upon the conclusion of all of the evidence on the part of the plaintiffs, the defendant Puget Sound Traction, Light & Power Company moved the court for judgment in its favor, "on the ground that it had been in no way connected with the ownership or operation or management or control of the interurban railroad, and that no negligence on its part had been shown." The record shows that that motion was granted as to that defendant without objection, and it was not named in the writ of error or citation, or in any way made a party to the proceedings taken by the plaintiffs in error to review the judgment which was subsequently entered by the court below in favor of the electric railway company, in consequence of which the latter company has moved for the dismissal of the writ of error.

To meet that motion the plaintiffs in error asked leave to amend the writ of error and the citation issued in the cause by inserting the name of the traction, light and power company as a codefendant in error with the electric railway company, and also for permission to substitute for the original appeal bond a new and amended bond to conform to such amended writ of error and citation, on the ground that the traction, light and power company was inadvertently omitted from the original writ of error and citation. The latter motion is granted, and the former one denied. Section 1005, U. S. Compiled Statutes 1901, p. 714; *T. W. Teel v. Chesapeake & O. Ry. Co. of Virginia*, 204 Fed. 914, 123 C. C. A. 210; *Gilbert v. Hopkins*, 198 Fed. 849, 117 C. C. A. 491; *Walton v. Marietta Chair Co.*, 157 U. S. 342, 15 Sup. Ct. 626, 39 L. Ed. 725; *Estis v. Trabue*, 128 U. S. 225, 9 Sup. Ct. 58, 32 L. Ed. 437.

[2] After the elimination of the traction, light and power company the trial proceeded against the electric company, both parties thereto introducing much evidence, upon the conclusion of all of which the defendant company moved the court for a directed verdict in its favor, which motion was granted, and such verdict accordingly rendered by the jury. That action of the trial court is the matter for consideration here upon the merits. In granting that motion the court based its ruling mainly upon the decision of this court in the case of *Northern Pacific Ry. Co. v. Alderson*, 199 Fed. 735, 118 C. C. A. 173, and the decisions of the Circuit Court of Appeals of the Eighth Circuit in the cases of *Chicago & N. W. Ry. Co. v. Andrews*, 130 Fed. 65, 64 C. C. A. 399, and *Chicago, M. & St. P. Ry. Co. v. Bennett*, 181 Fed. 799, 104 C. C. A. 309. The evidence in each of those cases was very different from that in the present case.

This accident occurred at the crossing by the electric company's tracks of a macadamized highway at a place called Riverton, some miles south of the city of Seattle—the interurban electric line being that connecting Seattle with Tacoma. The plaintiffs in the case introduced evidence tending to show that over the highway at the crossing in question there is and was at the time a very large amount of travel, and also evidence going to show that about two miles southerly of Seattle the roadbed of the electric company, which is double-tracked beyond Riverton, crosses the Duwamish river, then passes a point called Quarry, then a little further south a place called Allentown, and

that about 1,200 feet still southerly of Allentown is the town or settlement of Riverton. From Quarry to Riverton the defendant company's tracks are constructed on a curve and at the foot of a high bluff, in places 44 feet high, until it approaches within 120 feet of the highway at Riverton, when it gradually recedes and disappears there. About 120 feet west of the west rail at Riverton, and about 17 feet north of the center of the highway, the defendant company had erected an iron post about 12 feet high upon which is an electric alarm gong about 12 inches in diameter, and on the top of which post are a series of red electric lights and a large railroad crossing sign; 1220 feet north of the crossing and on the company's west rail is an electric mechanism so constructed that a south-bound car cuts in the current and ordinarily sets the gong to ringing and lights the red electric lamps, for the purpose of warning travelers on the highway of the approach of a south-bound car or train. About 20 feet south of the crossing is another electric mechanism that cuts out the current from the gong and lights, causing the gong to cease ringing and the lights to be extinguished. A similar mechanism is constructed on the east rail of the company in inverse position, being operated similarly by north-bound cars. There was evidence given tending to show that under ordinary conditions the gong, when in operation, could be heard from 700 to 800 feet; one witness testifying that on a clear day it could be heard from 1,200 to 1,500 feet. There was testimony also tending to show that the curvature of the bank of the bluff was such as to deflect the sounds and warnings of south-bound cars toward the east, and that in consequence it was and is difficult for one at or near the Riverton crossing to hear the rumble or sounds of a south-bound car until it was practically at the crossing. There was also evidence tending to show that from a point 300 feet west of the crossing the highway descends towards it at about a grade of 4 per cent. until it reaches within 15 or 20 feet of the track of the railway company, when it becomes level until the railway track is crossed, and that from such point to the crossing a south-bound car following the west track around the curve could not be seen after it leaves Allentown until within 40 or 50 feet of the crossing.

At the time of the accident the deceased, who was a physician, was being driven by his chauffeur, and was sitting on the front seat with him, there being two ladies on the rear seat. They were approaching the crossing from the west, and consequently going towards Seattle. There was undoubtedly testimony on the part of the defendant company tending to show that the car that killed the deceased was not approaching the crossing at an immoderate speed, and that the alarm gong there was ringing, and that the gong upon the car was ringing, and that the deceased was being driven towards the crossing at an immoderate speed—some of the witnesses stating it as from 30 to 35 miles an hour—and consequently tending to show that the deceased was guilty of contributory negligence. And the court below so held, in effect, in taking the case from the jury and directing a verdict for the defendant. But in view of the evidence on behalf of the plaintiffs we are clearly of the opinion that the court below was in that regard in error.

It will be sufficient to cite a little only of the testimony given on behalf of the plaintiffs. The testimony of the chauffeur—Kent Brodnix—is in part as follows:

"My name is Kent Brodnix, and am an automobile driver and repair man, having followed this business seven years, and was following this business in July, 1912, and was then employed by Dr. Rininger, the deceased mentioned in this case. Dr. Rininger at that time owned a Sterns, and I had been driving it a few days over three months prior to July 25, 1912. To a certain extent at that time I was familiar with this crossing known as the Riverton crossing. During the afternoon of July 25, 1912, Dr. Rininger, the nurse, Miss Davis, and the doctor's sister, Miss Rininger, and myself had been to Kent. We were on our way back to Seattle, and approached this crossing a few minutes after 4 in the afternoon. As I was coming along as usual, and when I got to the top of this grade, possibly 300 feet back from the crossing, as I always had done before, I released the engine from the machine and started coasting down this grade, using the brake to control the machine, and I got down almost to the store, and I looked to the south to see if there were any trains approaching from that way and then looked towards the north, and I could not see any there. We were going about 15 or 16 miles an hour, not to exceed that. As I looked to the north, I did not see any car, and I let the machine come on down, and I looked to the south again between the freight house and the store, and then turned and looked to the north again, and the car was only a short distance from the crossing. I mean by this the Interurban car. Before this I had made an effort to listen to ascertain whether there was any car approaching. I heard no sound at all of any approaching car. I did not hear any whistle or the ringing of any bell on the car. Q. Do you know whether the doctor himself made any effort to ascertain if there was a car approaching? A. Yes. Q. Now you may state to the jury what you saw the doctor do, what efforts, or what the doctor did in respect to ascertaining. A. He looked both ways. Q. When you say both ways, what do you mean? A. To the north and to the south. Q. And did he indicate to you as to what should be done? A. Well, he gave the customary signal to go ahead. Q. At that time, as you were approaching, or at the time you saw the electric car approaching, was the electrical alarm ringing? A. Not that I heard. As soon as I saw the approaching electric car, I set the brakes and locked both rear wheels, and allowed the machine to stop as quick as possible. We were in the neighborhood of 25 to 30 feet west of the west track when I first saw the electric car. After I had set the brakes of the auto, both rear wheels skidded. I was able to bring the auto to a standstill before the electric car came along. The speed of the electric car, I should judge, was from 40 to 45 miles an hour. The motorman was not slowing down the approaching car that I noticed. I should judge the electric car was from 100 to 150 feet away when I first saw it. The electric car struck the front end of the automobile. Q. What happened? A. It picked the machine up and threw it back from the track about 35 feet and almost completely turned it around. The doctor and the other two occupants were thrown from the machine, but I was not, as I was behind the steering wheel, which prevented me from being thrown. The doctor was thrown into the front trucks of the car and dragged, I should say, about 50 feet, and was killed. The doctor's sister was thrown just to the side of the track, and Miss Davis was thrown clear through the cattle guard. Referring to Exhibit 10, we came along in the customary manner to the top of the hill, which was somewhere near the point marked 'J,' where I pushed the clutch out of the engine. Pushing the clutch out disconnects the car with the engine. This was a downgrade, and then the machine moved along of its own weight. Bearing in mind that this plat is drawn to a scale of 30 feet to an inch, I would say that when we first saw the electric car it would be at a point on this map one inch from the west rail of the west track. Just about one inch back up the highway. We were about 300 feet back when I disengaged the engine from the clutch, and did not connect the clutch again with the engine before we reached the track. The automobile was at the point marked letter 'S' in lead pencil on this plat (Exhibit 10) when the electric car struck it. (Witness is shown Plaintiffs' Exhibit 1, which is a large

photograph.) I recognize the surroundings in this picture, and it shows the appearance of the highway at that time. It would be hard to make a mark on this picture to show where we were when the electric car struck us. It would be right in behind that railing. It is hard to make a mark there. I mean the railing that is on the platform in front of the store. This road as shown on this picture is a downgrade towards the car track. Our automobile weighed, when it was not loaded with passengers, close to 5,000 pounds. Exhibit No. 9 is a picture of the crossing where the collision took place, and I am able to make an indication on this picture as to where we were when the electric car struck us. This is indicated by the letter 'S' which I now mark on it, so that the point at the letter 'S' on Exhibit 9 is approximately the location where the collision took place. As we approached the crossing, we were going at a speed, I should judge, of about 15 miles an hour, not to exceed that. Ordinarily I could bring this automobile to a standstill when proceeding at that rate under similar conditions, in about 25 feet. * * * I have been driving an automobile about 7 years, and am familiar with the general conditions under which an automobile should be operated. * * * Since this accident occurred, I have made personal observations of the surrounding conditions at the crossing, and I have made observation with reference to the ability to see a south-bound car or train approaching this crossing, and have also made observation with reference to the sound that is made by such a car, especially with reference to the ability of one being at this crossing to hear the approaching car. Last summer was the last time I made these observations. I also made similar observations shortly after the accident. I found that, while you could see the car at the bridge, it goes completely out of sight from that time until it gets to the crossing. I mean by this bridge the one that is shown on Plaintiff's Exhibit 10, which is the bridge for the main highway across the Duwamish river."

The witness Isaac N. East testified for the plaintiffs, among other things, as follows:

"My occupation is that of a tea man. I have a tea and coffee route through the country in the south end of the town, and was engaged in that business in July, 1912. I have been in it for the last nine years, and I travel out through the various neighborhoods south of Georgetown. My territory is from Spokane Avenue South to Des Moines, and between the Sound and the N. P. Railroad, and I take in Tukwila and Foster; that is, I have the territory for selling our teas in that locality. I have regular customers up there that I call every week. I have a regular route that I travel once a week. I make the trip with a team and wagon. In July, 1912, my team was a Grand Union tea wagon. I guess most everybody is familiar with it. It is just a medium size delivery wagon, two horses; one is a gray horse and the other is a bay, and they weigh about 1,000 pounds apiece. I am familiar with the highway crossing across the Riverton crossing, and have been familiar with it for more than seven years. I have been over this road once a week, up and back, as a rule, unless there was a holiday came on my delivery date. For seven years, or probably a little more than that, I have been over it once a week, and during that time have become familiar with the traffic that passes over it. There is almost a continuous traffic there during the day, and it was fully as much in July, 1912, as any time before or since, I think. I didn't see any difference. It doesn't vary much. And that congested traffic has existed ever since I have been going over the road. I must have been over that crossing between 700 and 800 times. * * * I have stated that in July, 1912, and for some time prior to that, it was almost a continuous traffic over that thoroughfare during the daytime. There are teams there backwards and forwards almost all the time. At that time I think there were four trains a day passing over the tracks—two single cars, and two double-car trains, and then sometimes a freight train in between them. The single cars were known as the 'flyer,' or 'limited.' By that is meant that it does not stop between Seattle and Tacoma as I know of; maybe it stops at Auburn. I don't know as to that. I never rode over it, but it makes no stops at the stations this side of

Kent. The rate of speed that those limited trains usually run over this crossing was about 25 or 30 miles an hour. At about 4 o'clock on the afternoon of the day the accident occurred, I was coming home right there just about Riverton; was approaching the crossing. I saw the automobile that was occupied by some one. I did not then know who it was, but I afterwards found it was the doctor. They passed me somewhere near where Dr. Brown used to keep his automobile. I don't know just how far that is. Anybody that is familiar with the road knows it sits right in the bank on the right-hand side as you go south. They overtook me and passed me on the left side. At the time I was traveling about 4 or 5 miles an hour, and the rate of speed that the automobile was proceeding at was probably 12 miles an hour. After they passed me, I kept going right along behind them, and I saw the electric car strike the automobile. I was probably 50 or 75 feet from the crossing when the collision took place. I could not tell exactly. I was just behind those people a little ways. I did not hear any whistles from the approaching car. I was right there on the road. I think I could have heard the whistle of the train if anybody could. The alarm gong there at the crossing was not ringing. I am positive of that. Several minutes after the accident it was ringing, because I stood right under it. (Witness shown Plaintiffs' Exhibit 6, a photograph showing this electric gong.) I stood right here, just across the street. I just helped the lady upon her feet that was thrown out of the automobile, and stepped back a few steps and stood there. It was quite a little bit after that before the gong began ringing. I could not say just how long. I did not look at my watch. The automobile was coming down at a slow rate of speed, and the car darted out from behind that hill there and struck them. The front wheels of the automobile stood on the plank that lies on the right-hand side of the right-hand rail going south. It shoved the tires back from the bottom of the automobile about that far (showing), probably a foot or 15 inches, and the left-hand wheel took up a little sliver in the plank that stood up about that high (showing); at least it was partially taken up and stood right that way, and the automobile crumpled to the right and ran back, and turned a little more than half way round, with the end rather turned back up the street. After the collision the two ladies laid in the street—one across the cattle guard, with her head towards the east and her feet a little bit towards the northwest; the other one laid with her face towards the cattle guard in the street; and the doctor laid up under the freight shed. The top of the automobile was down, so that I could see the occupants all the time, as I was sitting above them in the wagon. The seat in my wagon is so arranged that it is elevated high enough so that I could see over the horses and into the automobile. I was about 50 feet from the automobile when the car struck it, or a little less, I could not tell exactly; but I know I was there almost in a minute with my team hitched and on the ground. The doctor was killed. He was dead when I got to him. I helped what I heard afterwards was the doctor's sister—helped her to get upon her feet. The other lady, there was a number of other people helping her, so that I didn't need to go there. I did not hear the train approaching. Q. What has been your observation with respect to being able to see a south-bound car on the west track as it approached this crossing? A. I should judge you would have to be within 25 feet of the track at the least calculation to see it, because there is a bluff and shrubbery and one thing and another there that obstructs your view, and then the car circles in towards the bank. I could not say positively whether or not it is a fact that, if a person stood between 50 and 60 feet west of the track, they could see a south-bound train at all times after it left the Riverton station. I never took any notice as to that. I have noticed that from that crossing and other places it is nearly impossible to hear where there is a bank or a bluff shields it. I did not hear that day this south-bound car. I have noticed at other times that it has been difficult to hear the train approaching, because I know that I came near driving out there onto the road because I heard nothing. That was before the gong was there. Q. Can one readily hear the rumble of the approaching train? A. I think not. This is on account of the bluff, I suppose. The bluff diverts the sound eastward."

Another witness for the plaintiffs—Elora Lamb—testified, among other things, as follows:

"My age is 21. I am a chauffeur and mechanic, and was such in July, 1912, and am accustomed to driving automobiles. At about 4 o'clock in the afternoon of July 25, 1912, I was standing on the waiting or passenger station of defendants' railroad at Riverton, waiting for the Seattle or north-bound train. I saw Dr. Rininger's automobile approaching the crossing. (Witness shown Plaintiffs' Exhibit 10.) I notice the station in this picture. I was standing on the platform at about the point marked 'A' in pencil thereon. I should judge that the automobile was approaching the crossing at a rate of speed between 12 and 15 miles an hour. It was being driven by Mr. Brodnix. Q. Did you observe whether or not he made any effort to see whether a train was approaching? A. I seen him looking both ways. At that time I could and did, from my side, see the south-bound car on the west track of the defendants' line. It was at the rock quarry when I first saw it, just between Allentown and the rock quarry, which is a point north of the Allentown station, and I continued to observe it as it proceeded southward, and observed it until it struck the auto. From where I was on the platform I could see it during all the time that it was going south. It was running at a rate of speed between 45 and 50 miles an hour. It seemed to slacken just a little bit, not much, as it approached the crossing. I did not hear any whistles blown on the train, and I was watching it all the time. I am sure I could have heard the whistles if any had been blown on this train. There was nothing the matter with my hearing. It was all right, and there was no defect in my vision or means of seeing at the time. The whistle was not blown. I did not hear it at all. I am sure I could have heard it if it had been blown, because I have heard them lots of times there. The electric gong maintained at the crossing did not ring at that time. I was about 75 feet from it. After the collision, when the next flyer came through, it rang. It rang regularly, and did not ring fast—you know, now and then a tap. At that time I had been out home to see my parents, who lived out beyond there at that time, and continued to live there until about five months ago. It was a frequent occurrence for me to go out there to that station. I went out every week. At that time I was familiar with the driving of automobiles. The automobile was approaching the crossing at a rate of between 12 and 15 miles an hour."

There was certainly in the foregoing quotations testimony tending to show that the defendant company's car not only approached the crossing where the accident occurred at an excessive speed—at from 40 to 45 miles an hour according to two of the witnesses—but positive testimony of two of them that the alarm gong did not ring, and testimony tending to show that the deceased, as well as his chauffeur, looked and listened both north and south in approaching the railroad track before attempting to cross it, and tending to show that they neither heard nor saw the approach of the car, and tending to show that they were at the time only going at the rate of from 12 to 15 miles an hour. Under such circumstances, we think it clear that the trial court was not justified in holding as a matter of law that the deceased was guilty of contributory negligence, or that the defendant company was not guilty of any negligence. The testimony being substantially conflicting, both as respects negligence of the defendant company and contributory negligence on the part of the deceased, the case was peculiarly one for the jury under appropriate instructions.

The judgment is reversed, and the cause remanded for a new trial.

INDIAN REFINING CO. v. BUHRMAN.

(Circuit Court of Appeals, Second Circuit. January 12, 1915.)

No. 108.

1. APPEAL AND ERROR ~~5102~~—REVIEW—QUESTIONS OF FACT.

In an action for salary by the assistant treasurer of a corporation, where the testimony of plaintiff and the treasurer as to whether the treasurer discharged plaintiff at a certain time, or whether the matter was left open, the jury's finding for plaintiff was conclusive.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3935-3937; Dec. Dig. ~~5102~~.]

2. CORPORATIONS ~~5119~~—OFFICERS—ACTIONS FOR COMPENSATION—EVIDENCE.

In an action for salary by the assistant treasurer of a corporation, evidence *held* insufficient to show that the executive committee authorized or ratified plaintiff's discharge by the treasurer, or that it discharged him by electing his successor.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2085, 2088-2089, 2091, 2093; Dec. Dig. ~~5119~~.]

3. CORPORATIONS ~~521~~—OFFICERS—ACTIONS FOR COMPENSATION—INSTRUCTIONS.

In an action for salary by the assistant treasurer of a corporation, if a statement in the minutes of a meeting of the executive committee, at which plaintiff's failure to resign was discussed, that a member of the committee said that the matter be left with the treasurer with instructions to go ahead, was ambiguous as to whether this authorized plaintiff's discharge by the treasurer, defendant's rights were fully preserved by an instruction that it was claimed by defendant that the instructions to go ahead were instructions to discharge or cut down salaries at will, and by plaintiff that so far as he was concerned the instructions simply related to getting his resignation, and that the jury would put the construction on it and give it such force as they thought it deserved.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2094-2098; Dec. Dig. ~~521~~.]

4. CORPORATIONS ~~522~~—OFFICERS—ACTIONS FOR COMPENSATION—AMOUNT OF RECOVERY.

In an action for salary by the assistant treasurer of a corporation appointed November 15, 1911, where it appeared that plaintiff continued to attend at the company's offices regularly until after August 1, 1912, but that shortly thereafter he left, a verdict for his salary to September 15th was too large to the extent of the salary from August 15th.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2035, 2099-2113; Dec. Dig. ~~522~~.]

5. EVIDENCE ~~389~~—CORPORATE RECORDS—PAROL EVIDENCE.

The written minutes of a corporation could be explained, but not changed, varied, or modified, by oral testimony.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1717, 1718; Dec. Dig. ~~389~~.]

In Error to the District Court of the United States for the Southern District of New York.

This cause comes here on writ of error to review a judgment of the District Court, Southern District of New York, entered upon the verdict of a jury in favor of defendant in error, who was plaintiff below. The action was brought to recover salary as assistant treasurer of defendant from March 1 to September 15, 1912.

J. W. Weed, of New York City, for plaintiff in error.
C. H. Payne, of New York City, for defendant in error.
Before LACOMBE, COXE, and ROGERS, Circuit Judges.

LACOMBE, Circuit Judge. Buhrman was appointed to his position on November 15, 1911, by the board of directors, to serve until his successor was appointed. The fixing of his salary was left to the president of the company, and was fixed by him at \$7,000 per annum. The by-laws invested the board of directors with the powers of the corporation, including the power to remove officers. There was an executive committee, authorized by the board to exercise all the powers of the board when the latter was not in session. Mr. Pomeroy was the treasurer and one of the members of the executive committee. The power to remove other officers, such as the assistant treasurers, was not an incident of his office, and there is nothing to show that he possessed such power by usage. Plaintiff does not contend that he could not be dismissed by proper authority before the appointment of his successor, nor that the board of directors could not authorize Pomeroy to discharge him, nor that, Pomeroy having undertaken to discharge him, the board could not ratify his action in so doing. The main questions raised here are not questions of law, but questions of fact.

[1] The company was financially embarrassed in the autumn of 1911. Pecuniary assistance was given it by the Guaranty Trust Company. Some of the officers of the latter company were elected to the directorate of defendant and placed on its executive committee. Mr. Franklin was one of these, so was Mr. Pomeroy, and an effort was made to reduce expenses. The first plaintiff knew of this was on February 3, 1912, when he had an interview with Pomeroy. Of this interview there are two narratives. Pomeroy says he told Buhrman he must go on March 1st, drawing salary to that time, and that, although Buhrman protested that it was unfair to throw him out summarily, in view of his long service with the company, he did not refuse to go. If this is what happened, Pomeroy discharged plaintiff on that day, and, if the board or executive committee subsequently ratified his action, it would be operative, certainly from the date of ratification.

Buhrman, however, gave a different narrative of what took place. He said that Pomeroy told him of the arrangement with the Trust Company, and that his services would no longer be required; that upon his objection and protest, and after some discussion, Pomeroy told him to go on and see Franklin about the matter; that he did so; that he and Franklin talked it over, and the latter told him he would take it up, and let him (Buhrman) hear from him. This was evidently not a discharge. The subject was still left open. It was sent to the jury to say which narrative of this interview of February 3d was the correct one. Their verdict shows that they found Buhrman's story to be correct, a conclusion which we must accept.

[2] The next item of evidence is found in the minutes of the executive committee held on February 6, 1912. The relevant portions are as follows:

"Salaries: Mr. Pomeroy reported that he had taken up the matter of salary with a number of men. He stated that he had explained the situation to Mr. Buhrman, but that Mr. Buhrman had not sent in his resignation, as he felt that some man younger in the service of the company should be let out in place of himself, who had been with the company several years. Mr. Pomeroy replied that the situation the company had to face was one of economy, and that if men were being paid too much there would have to be a remedy. Mr. Dwight asked if Mr. Buhrman's knowledge to the company was not of some importance."

After some discussion as to other employés with whom Pomeroy had had interviews, some of whom he said had agreed to leave, the minutes state:

"Mr. Franklin said that in view of the fact that the President had stated to the board that there was not a man whose resignation could not be obtained immediately, that the matter be left with Mr. Pomeroy with instructions to go ahead."

These minutes do not evidence any ratification of a prior discharge of plaintiff (by Pomeroy), because there is no proof of any prior discharge, nor, indeed, any indication on the face of the minutes that a prior discharge was supposed to have taken place.

[3] It is contended, however, that these minutes show that Pomeroy was authorized by the executive committee on February 6th to discharge Buhrman. We do not think the minutes should be thus construed; but, if there be any ambiguity in them, defendant's rights were fully preserved in this excerpt from the charge to the jury:

"It is claimed here on the part of the defendant that instructions to go ahead were instructions to go ahead and discharge at will, discharge employés, or cut down salaries, do as he pleased; while on the part of this plaintiff it is contended that instructions to go ahead simply related, so far as this plaintiff was concerned, to getting his resignation. Of course, you will put the construction on it and give it such force as you think it deserves, and is entitled to, and has. You see, there is no formal resolution."

The verdict shows that the jury construed this record of the transactions of the executive committee as we think it should be construed.

The next item of proof is found in an excerpt from the minutes of the executive committee February 13, 1912, which reads:

"Mr. Pomeroy said that it was advisable to have some one authorized to sign assignments sent to the Guaranty Trust Company, and suggested that Mr. J. S. Bailey be authorized to do so. Upon nomination duly seconded Mr. J. S. Bailey was unanimously elected an assistant treasurer of the company, with power to sign all checks, notes, drafts, and obligations for payment by the company, and to serve until his successor should be chosen by the board."

Of course, if this minute recorded that Bailey had been elected by the executive committee, which had full power in the matter, as successor of Buhrman, that would end the controversy, because Buhrman's term of employment as fixed originally lasted only until the appointment of his successor. But at the time this action was taken there were two "assistant treasurers," Buhrman and Dillaway. The resolution does not state which of these two Bailey was to succeed; indeed, for aught that appears, the resolution provided only for the appointment of a third assistant treasurer.

The only other item of evidence from the minutes is found in the record of a meeting of the executive committee on June 11, 1912, at which the "chairman stated that at the present time the officers of the company are as follows," giving a list which includes "assistant treasurer, Bailey," and "assistant treasurer, Dillaway." This cannot be taken as a ratification of a prior discharge, because no prior discharge calling for ratification has been shown, the jury having found for plaintiff on all the disputed points of his interviews with Pomeroy.

[4] Buhrman continued to attend at the company's offices regularly until "after August 1, 1912," doing such work as was given to him. Shortly after August 1st he seems to have left them. Exactly why, under these circumstances, he was allowed to recover salary until September 15th, is not made clear to us. We think the verdict was too large to the extent of salary from August 15th to September 15th.

[5] We think there was no error in refusing to charge that the jury "were not entitled to consider any oral testimony in the case for the purpose of varying or modifying the written minutes of the company." It was correct to charge, as the court did, that oral testimony could explain the meaning of the minutes, but that a fact recorded could not be changed by oral evidence.

The construction we have given to the minutes, especially to the record of the meeting of February 13th, makes it unnecessary to discuss the exceptions to the charge.

Upon plaintiff's consenting to reduce the verdict in the amount of salary from August 15th to September 15th, the judgment is affirmed.

DELAWARE, L. & W. R. CO. v. YURKONIS.

(Circuit Court of Appeals, Second Circuit. January 12, 1915.)

No. 123.

1. COMMERCE ↗8—FEDERAL LIABILITY ACT—EXCLUSIVE POWER OF CONGRESS.

When the federal Employers' Liability Act (Act April 22, 1908, c. 149, 35 Stat. 65 [Comp. St. 1913, §§ 8657-8665]) applies, it is the supreme law of the land, and supersedes all other remedies.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. § 5; Dec. Dig. ↗8.]

2. COMMERCE ↗16—LAW GOVERNING—"INTERSTATE COMMERCE"—MINING.

The mere act of mining coal is not "interstate commerce," within the federal Employers' Liability Act.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. § 2; Dec. Dig. ↗16.]

For other definitions, see Words and Phrases, First and Second Series, Interstate Commerce.]

3. COURTS ↗23—JURISDICTION—EFFECT OF STIPULATION.

Where an employer was not engaged in interstate commerce, a concession by the defendant, in an employe's action for injuries, that the parties were engaged in interstate commerce, as alleged, in the complaint, could not give the court jurisdiction on that ground.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 75, 75½, 81; Dec. Dig. ↗23.]

Consent of parties to jurisdiction of federal courts, see note to Philadelphia & Reading Coal & I. Co. v. Keslusky, 127 C. C. A. 557.]

4. STIPULATIONS ~~6~~13—SETTING ASIDE OR GRANTING RELIEF.

In an employe's action for injuries, where, though the parties were not engaged in interstate commerce, plaintiff alleged and defendant conceded that they were so engaged, if such concession gave jurisdiction, plaintiff's motion to strike such allegations should have been granted, as even a stipulation entered into inadvertently will be relieved against, if the opposite party is not prejudiced.

[Ed. Note.—For other cases, see Stipulations, Cent. Dig. §§ 67-76; Dec. Dig. ~~6~~13.]

5. MASTER AND SERVANT ~~6~~256—ACTIONS FOR INJURIES—COMPLAINT.

It was proper, in an employe's action for injuries, and in harmony with the New York practice, to so prepare the complaint as to enable plaintiff to recover either under the federal or state Employers' Liability Act or under the common law as supplemented by the state mining law, as the evidence might permit.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 809-812, 815; Dec. Dig. ~~6~~256.]

6. MASTER AND SERVANT ~~6~~285—ACTIONS FOR INJURIES—QUESTIONS FOR JURY.

In a coal miner's action for injuries, his testimony that, after lighting a squib to fire a blast, he was knocked down twice by explosions of gas, and that before he could get away the blast was exploded by the gas, was not so incredible, nor was the cause of the explosion so disconnected with the employer's failure to ventilate the mine, as required by Mining Law Pa. June 2, 1891 (P. L. 176), as to justify the direction of a verdict, and these questions were properly submitted to the jury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1002, 1003, 1007, 1008, 1016, 1035, 1043, 1053; Dec. Dig. ~~6~~285.]

In Error to the District Court of the United States for the Eastern District of New York.

For opinion below, see 213 Fed. 537.

F. W. Thomson, of New York City, for plaintiff in error.

J. V. Bouvier, Jr., and W. Montague Geer, Jr., both of New York City, for defendant in error.

Before LACOMBE, WARD, and ROGERS, Circuit Judges.

WARD, Circuit Judge. This is a writ of error to review a judgment entered on the verdict of a jury in favor of the plaintiff for \$50,000 for personal injuries sustained by him while in the employment of the defendant, which verdict under an order of Judge Chatfield the plaintiff consented to reduce to \$36,000.

July 6, 1911, the plaintiff, who was a certified miner, employed for 18 years in the Pettibone anthracite coal mine, owned by the defendant, was terribly injured by the explosion of a blast which he had prepared. May 7, 1913, this action was brought in the Supreme Court of New York for Richmond county, and removed by the defendant to the United States District Court for the Eastern District of New York. The complaint proceeded upon the theory that the blast was prematurely exploded before the plaintiff could get away by an explosion of gas due to the defective ventilation of the place where he was working, in violation of the Pennsylvania Mining Law of June 2, 1891.

The amended complaint set forth sections 1, 4, 8, and 9 of article X

and rules 1 and 9 of article XII, also section 8 of article XVII which are as follows:

"Article X. * * *

"Section 1. The owner, operator or superintendent of every mine shall provide and maintain a constant and adequate supply of pure air for the same, as hereinbefore provided. * * *

"Sec. 4. The ventilating currents shall be conducted and circulated to and along the face of each and every working place throughout the entire mine, in sufficient quantities to dilute, render harmless and sweep away smoke and noxious or dangerous gases, to such an extent that all working places and traveling roads shall be in a safe and fit state to work and travel therein. * * *

"Sec. 8. All cross-cuts connecting the main inlet and outlet air-passages of every district, when it becomes necessary to close them permanently, shall be substantially closed with brick or other suitable building material, laid in mortar or cement whenever practicable, but in no case shall said air-stopings be constructed of planks except for temporary purposes.

"Sec. 9. All doors used in assisting or in any way affecting the ventilation shall be so hung and adjusted that they will close automatically."

"Article XII.

"Rule 1. The owner, operator or superintendent of a mine or colliery shall use every precaution to insure the safety of the workmen in all cases, whether provided for in this act or not. * * *

"Rule 9. In every working approaching any place where there is likely to be an accumulation of explosive gases, or in any working in which danger is imminent from explosive gases, no light or fire or other than a locked safety lamp, shall be allowed or used."

"Article XVII. * * *

"Sec. 8. That for any injury to person or property occasioned by any violation of this act or any failure to comply with its provisions by any owner, operator, superintendent, mine foreman or fire boss of any coal mine or colliery, a right of action shall accrue to the party injured against said owner or operator for any direct damages he may have sustained thereby."

Also the Pennsylvania Employers' Liability Act of June 10, 1907 (P. L. 523), which is as follows:

"Section 1. Be it enacted, etc., that in all actions brought to recover from an employer for injury suffered by his employé, the negligence of a fellow servant of the employé shall not be a defense, where the injury was caused or contributed to by any of the following causes, namely: Any defect in the works, plant, or machinery, of which the employer could have had knowledge by the exercise of ordinary care; the neglect of any person engaged as superintendent, manager, foreman or any other person in charge or control of the works, plant, or machinery; the negligence of any person in charge of or directing the particular work in which the employé was engaged at the time of the injury or death; and negligence of any person to whose orders the employé was bound to conform, and did conform, and, by reason of his having conformed thereto, the injury or death resulted; the act of any fellow servant, done in obedience to the rules, instructions, or orders given by the employer, or any other person who has authority to direct the doing of said act.

"Sec. 2. The manager, superintendent, foreman, or other person in charge or control of the works, or any part of the works, shall, under this act be held as the agent of the employer, in all suits for damages for death or injury suffered by employés.

"Sec. 3. All acts or parts of acts inconsistent herewith be and the same are hereby repealed."

The mine consisted of a series of coal levels separated by strata of rock, and extended 1,047 feet below the surface of the ground; the level where the plaintiff was working being 500 feet below the sur-

face. All these levels were ventilated by a ventilating fan, which sucked the air out of the mine and so caused a vacuum into which fresh air rushed.

The plaintiff was working in a chamber about 400 feet in length running east and west, and around it a continuous gangway was gradually constructed as the work progressed, to be used by the miners as a working place. In the middle of the west end two doors were placed, opposite to each other, with a space between, so that one would always be shut when the other was open, making an air lock. The air entered this chamber at a point south of these doors, and then went by the south side to the east end, thence north to the north side, and thence back into the main gangway. A miner named Fine and his helper had the mining on the south side of the chamber, and the plaintiff and his helper had the mining on the north side. They made a series of north and south cross-cuts into the coal 60 feet apart, as required by law, working toward each other from the opposite sides. When they met at the center a solid cement and brick or masonry wall was erected, also as required by law. There were six cross-cuts in the chamber, beginning at the west end; the first three had been filled at the center, but the fourth was only closed by a loose board partition. The plaintiff was working at the sixth cross-cut, which was the limit of the property, was some 75 feet from the fifth, and had not been cut through. The fifth cross-cut was properly left open, so that the air coming along the south side to the east end could be turned back and passed through the fifth cross-cut, and thence to the sixth cross-cut. This diverting of the air was accomplished by a tight board partition, called a brattice, between the floor and the roof at the south side, and a similar brattice at the north side.

The negligence charged was that the fourth cross-cut was insufficiently closed, that the distance between the fifth and the sixth cross-cut was too long, that the plaintiff was allowed to go into the chamber with an open lamp, and that the brattice which was intended to direct the air into his working place was not long enough, and was not extended by canvas, as the practice was. It was alleged that in this way most of the air circled around the brattice into the gangway on the north side of the floor, without going as far as his working place, the effect of which was that gas accumulated at the top of the cross-cut, and was exploded by the open miner's lamp in his hat, knocking him down twice, and exploding the blast before the fuse which he had lighted reached the powder, and before he could get away to a place of safety.

October 2, 1913, more than two years after the cause of action arose, the plaintiff was permitted to file an amended complaint, which included additional allegations to the effect that both he and the defendant were engaged in interstate commerce at the time the cause of action arose, which allegations the amended answer denied, and also set up as a defense that the cause of action was barred under the federal statute. At the trial, however, before any proof was made on this point, the defendant conceded that the parties were engaged in interstate commerce. This decided that issue in favor of the plaintiff's allegation. Accordingly, at the close of the case the defendant asked the court to

direct a verdict for it, on the ground that the federal statute was exclusive of all other remedies and that the cause of action was first pleaded when the amended complaint was served, more than two years after it arose, and when it was barred. *Union Pacific R. R. Co. v. Wyler*, 158 U. S. 285, 15 Sup. Ct. 877, 39 L. Ed. 983. Thereupon the plaintiff moved to strike the allegations as to interstate commerce out of the amended complaint. The court denied this motion, on the ground that it was unnecessary, because the plaintiff could recover, either under the law of master and servant at common law, or under the Pennsylvania Employers' Liability Act, as the evidence permitted; the federal act, by virtue of the limitation of two years, having ceased to apply.

[1-5] We think this was a right conclusion for a wrong reason. The plaintiff had a right to recover otherwise if he could, not because the federal act had ceased to apply, but because it never did apply. When it does apply, it is the supreme law of the land, and supersedes all other remedies. *Second Employers' Liability Cases*, 223 U. S. 1, 32 Sup. Ct. 169, 56 L. Ed. 327, 38 L. R. A. (N. S.) 44; *Wabash R. R. v. Hayes*, 234 U. S. 86, 89, 34 Sup. Ct. 729, 58 L. Ed. 1226. We think it is quite clear that the mere act of mining coal is not interstate commerce, and no concession by the defendant can give the court jurisdiction on that ground. However, if it could, the plaintiff's motion to strike the allegations out should have been granted. Even a stipulation entered into inadvertently in course of a trial will be relieved against if the opposite party is not prejudiced. *Carnegie Steel Co. v. Cambria Iron Co.*, 185 U. S. 403, 414, 22 Sup. Ct. 698, 46 L. Ed. 968; *Barry v. Mutual Life Insurance Co.*, 53 N. Y. 536. The amended complaint was evidently intended to enable the plaintiff to recover either under the federal act, or under the Employers' Liability Law of Pennsylvania, or under the law of master and servant at common law, supplemented as to negligence by the Pennsylvania Mining Law, according as the evidence might permit. This was quite proper (*Wabash R. R. Co. v. Hayes*, 234 U. S. 86, 34 Sup. Ct. 729, 58 L. Ed. 1226), and is the practice in the courts of the state of New York (*Payne v. New York, Susquehanna & Western R. R. Co.*, 201 N. Y. 436, 95 N. E. 19). The trial judge was therefore right in submitting the case to the jury, if a cause of action was developed under either.

[6] The plaintiff was the only witness as to the circumstances immediately preceding the accident, and he testified that he was allowed to go into the chamber with an open lamp; that, having examined for gas with his safety lamp, he discovered none; that he thereupon lighted the squib placed to fire the blast, picked up his hat, in which was an open mining lamp, and started to walk out. As he raised his head he was knocked down by an explosion of gas, got up and was knocked down again, and before he could get away the blast was exploded by the gas. He also testified that he had informed the mining foreman on the morning of the day of the accident that the brattice was not long enough to properly ventilate his working place, and that the foreman promised to have it corrected, which he did not do. The defendant sought to prove that this account of the explosion was impossible, and

that the blast must have gone off through the plaintiff's own negligence. These were questions which we think were properly submitted to the jury. The plaintiff's account does not appear to us so incredible, or the cause of the explosion so disconnected with failure to furnish the ventilation required by the Pennsylvania Mining Law, as to justify the direction of a verdict for the defendant.

The judgment is affirmed.

In re DOYLE.

In re NEUN.

(Circuit Court of Appeals, Second Circuit. January 12, 1915.)

No. 10-160.

1. BANKRUPTCY ~~376~~—COMPROMISE OF CLAIMS.

At the time of a person's bankruptcy certain corporate stock stood in his name on the books of the corporation; but he claimed to have transferred it to his wife, and, apparently having been transferred in blank, it was held by a trust company as collateral to a loan to B., a friend of the bankrupt. The wife filed a claim for \$76,000, and the trustee commenced an action to recover the stock as the property of the bankrupt, offering to pay the indebtedness to the trust company. The bankrupt applied for a discharge, which was denied; the special master and the District Judge sustaining objections based on the transfer of the stock and other property. Pending an application for a rehearing, B. proposed a compromise by which he was to pay the trustee \$40,000, the wife was to withdraw her claim, the trustee was to discontinue the action to recover the stock, the settlement was to be approved by a majority of the creditors, and objections to the bankrupt's discharge were to be withdrawn. This was approved by a majority of the creditors voting thereon and by the District Court, and was carried out, except that the objections to the discharge were not withdrawn. On rehearing of such objections they were overruled. *Held*, that the proposed compromise appeared proper, and there was no error in approving it.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 598-600, 602; Dec. Dig. ~~376~~.]

2. BANKRUPTCY ~~457~~—REVIEW OF PROCEEDINGS—MATTERS PRESENTED FOR REVIEW.

The overruling of the objections to the discharge would not be reviewed on appeal, until the District Court amended its order to show whether such objections were overruled under the impression that the proposed settlement had been fully carried out, and that further consideration of the objections was unnecessary or because, on reconsideration the court believed the evidence did not support the objections.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 917; Dec. Dig. ~~457~~.]

3. BANKRUPTCY ~~460~~—REVIEW OF PROCEEDINGS—EFFECT OF COMPROMISE.

An objecting creditor, who has filed specifications against a bankrupt's discharge and has not withdrawn them, is entitled to be heard with respect to the granting of a discharge on appeal, and his rights cannot be prejudiced by the vote of a majority of the other creditors to accept a proposed compromise of conflicting claims.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 919; Dec. Dig. ~~460~~.]

Appeal and review in bankruptcy cases, see note to *In re Eggert*, 43 C. A. 9.]

~~376~~ For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

4. BANKRUPTCY ☞386—COMPROMISE OF CLAIMS—FAILURE TO CARRY OUT—RESTORATION.

Where, pursuant to a proposed compromise of a controversy over stock, which a bankrupt claimed to have transferred to his wife, under which \$40,000 was to be paid to the trustee, the wife was to withdraw a claim against the estate, the trustee to discontinue an action to recover the stock, and creditors to withdraw their objections to the bankrupt's discharge, the payment was made, and the wife's claim released in reliance on the trustee, or the person who proposed the compromise, being able to secure the withdrawal of the objections to the discharge, but such objections were not withdrawn, equity required that such payment and release should be returned.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 606; Dec. Dig. ☞386.]

Petition to Revise and Appeal from Orders of the District Court of the United States for the Western District of New York.

This cause comes here in two aspects: First, on petition to revise an order of the District Court, Western District of New York, approving a proposed compromise; and, second, on appeal from an order granting bankrupt's discharge.

See, also, 199 Fed. 247.

W. F. Lynn, of Rochester, N. Y., for petitioner and appellant.
H. W. Rippey and W. W. Armstrong, both of Rochester, N. Y., for appellees.

Before LACOMBE, COXE, and ROGERS, Circuit Judges.

LACOMBE, Circuit Judge. [1, 2] At the time of the bankruptcy, August 7, 1908, 275 shares of the stock of the Mohawk Condensed Milk Company stood in bankrupt's name on the books of the company. Bankrupt contends that these were conveyed to his wife by written assignments dated December 24, 1897 (270 shares), and January 6, 1908 (5 shares). There was conflicting evidence as to the authenticity of these assignments. Apparently the certificates of stock had been transferred in blank, because prior to August 8, 1908, they had been deposited with the Genesee Valley Trust Company as collateral to a loan of about \$47,000 to Robert A. Badger, a friend of the bankrupt, who was endeavoring to assist him in his financial difficulties. It does not seem to be disputed by any one that the value of the stock greatly exceeds the sum for which it was pledged as collateral. Mrs. Doyle, the bankrupt's wife, filed a claim against his estate for upwards of \$76,000. The bankrupt made application for discharge (July 5, 1909), to which specifications of objections were filed. Subsequent to bankruptcy the Milk Company increased its stock and 68 shares were allotted to Badger as holder of the 243 shares. Badger borrowed \$10,200 additional from the Trust Company to pay for them, pledging the 68 shares as collateral. Still later the Milk Company declared a stock dividend, of which 343 shares was received by Badger as holder of the other 343 (275 plus 68) and turned over to the Trust Company as collateral to its loans.

On October 7, 1912, the trustee commenced an action in the Supreme Court of the state against the Trust Company to recover the 686 shares

☞ For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

of stock, claiming that it was property of the bankrupt and offering to pay the indebtedness to the Trust Company. The special master, to whom the matter had been referred, reported against discharge on February 21, 1912. Upon application for review in the District Court, Judge Hazel filed an opinion sustaining the special master as to two of the specifications and refusing discharge on September 12, 1912. Before order was entered on such opinion, application was made on affidavits for a rehearing. Subsequent to September 12, 1912, and before rehearing was ordered on August 26, 1913, the proposed compromise was prepared and submitted at a meeting of the creditors. The special master reported that 44 claimants did not vote at all, although some of them were present; that of those who voted 26 favored the compromise, and 11 rejected it; that "the amount of money represented by those in favor of the compromise is far in excess, several times the amount of money represented by those who were present and voted 'no,' and the number who voted 'yes' also exceeds in amount the number who have failed to vote, with the exclusion of Mrs. Doyle."

The proposed compromise, which the District Judge approved, provided as follows:

- (1) Badger, who proposed the compromise, for the expressed reason that he was "desirous of compromising and settling the trustee's action and procuring the discharge of the bankrupt and the distribution of his bankrupt estate," was to pay the trustee \$40,000 in cash.
- (2) Mrs. Doyle was to withdraw her claim against the estate and execute all necessary releases thereof.
- (3) The trustee was to discontinue the action to recover the stock which Mrs. Doyle claimed she owned.
- (4) There should be an approval of the proposed settlement by a majority of the creditors.
- (5) Such creditors as have heretofore filed objections to the discharge of said Michael Doyle shall waive and withdraw the same, and no further objection to his discharge shall be made.

This seems to us an entirely proper adjustment, if it can be carried out in its entirety, and we find no error in the court's approval.

The appeal from the order of discharge presents a more complicated situation. There were specifications of objections to discharge filed by various creditors, who, as the special master states, "represented more than half of the valid claims filed, with the exception of the claim of the bankrupt's wife." There were six different specifications of objection, and the special master sustained them all. The District Court reversed the master as to all except Nos. 4 and 5, as to which on September 13, 1912, it sustained him. These specifications dealt with two alleged assignments of property, the Milk stock being one of them. The master discussed the testimony at considerable length, and so did the court, which gave its reasons for holding upon the facts proved that the averments of objectors had been proved.

Subsequent to decision, and before order was signed, the court granted an order to show cause why there should not be a rehearing. On the return day, the proposed settlement being before the court, a rehearing was ordered upon condition that the action by the trustee to recover the stock be compromised and settled upon the terms and

conditions "hereinafter stated"; such statement enumerating all the provisions of the proposed settlement, except No. 5.

Upon the rehearing there was presented a petition showing that the "trustee has received said money and said papers"—i. e., the \$40,000 and release of Mrs. Doyle's claim—provided for in clauses 1 and 2. It also appeared that a large majority of the creditors had voted approval of the proposed settlement. Thereupon the court made an order overruling all objections to the discharge and granting the same.

It appears that the proposed settlement was not carried out according to its terms. Clauses 1, 2, 3, and 4 were carried out, but 5 was not. No creditor, who had filed objections to discharge, withdrew them. From the language of the orders granting rehearing and granting discharge, it might be inferred that the court was under the impression that the proposed settlement had been fully carried out. If it had been, further consideration of the objections would, of course, be unnecessary, there would be none left to consider, and an order of discharge would be proper. It is, of course, possible that the court made its order, not because it supposed the proposed settlement had been fully carried out, but because upon reconsideration of the evidence before the special master it was satisfied that the stock in question did not belong to the bankrupt. If the former of these postulates be correct, the order should be reversed, for there certainly was evidence, referred to in Judge Hazel's opinion, to sustain the original finding of the master and the court that the stock was the property of the bankrupt, and the record shows that objections were not withdrawn, as clause 5 of the compromise assumed they would be.

[3] If the other postulate be correct, then this court should examine the testimony to see if the court was in error in reversing the master's findings as to this specification (and also specification 5). But we should not be required to make this examination until we are advised whether the master and the court are in accord or not as to the merits of these specifications. An objecting creditor, who has filed specifications against discharge and not withdrawn them, is entitled to be heard here on their merits. His rights cannot be prejudiced, on that branch of the case, by the vote of a majority of the other creditors expressing satisfaction with a proposed compromise of conflicting claims.

[4] The case is further complicated by the circumstance that the bankrupt and his wife, who claims to own the stock, have never received the full consideration they bargained for when they agreed to the proposed settlement. It is hardly to be assumed that they would have procured a payment of \$40,000 cash to the trustee and released the wife's claim, if they still had to persuade the court that specifications of objections to discharge were unsound. If, contrary to the provisions of clause 5, they have to make that fight here, equity requires that the cash and releases they turned over in reliance on the trustee or Badger being able to secure performance of clause 5 should be returned; the trustee's suit being reinstated.

The order is reversed, and the cause remanded to the District Court, with instructions to amend its order by inserting findings whether or

not the specifications of objections Nos. 4 and 5 are sustained by the proofs, and then to make such order touching petition for discharge as it may be advised. When this is done, the precise question to be decided here will be presented, without the uncertainty which now obscures it.

SMYTH v. SUPREME LODGE, K. P.

(Circuit Court of Appeals, Second Circuit. January 12, 1915.)

No. 68.

1. INSURANCE ~~718~~—MUTUAL BENEFIT INSURANCE—CONSTITUTION AS PART OF CONTRACT.

A provision in an application for membership in a fraternal benefit society that the contract should be controlled by all the laws, rules, and regulations of the order then in force or thereafter enacted did not make a constitution adopted shortly prior to the contract a part of the contract, unless it had been promulgated and was called to the attention of applicants for insurance, or at least such applicants as asked to be shown the laws, rules, and regulations by which they were agreeing to be controlled.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1854; Dec. Dig. ~~718~~.]

2. INSURANCE ~~819~~—MUTUAL BENEFIT INSURANCE—CONSTITUTION AS PART OF CONTRACT—EVIDENCE.

In a suit to enjoin the cancellation of a benefit insurance certificate, evidence *held* to show that complainant was asked to contract and did contract on printed representations that a constitution, which provided that the assessments for a person of complainant's age were \$3 a month, was the basis of the contract; and hence a later constitution, providing that the assessments were \$3 a month unless otherwise provided by the Supreme Lodge, was not a part of the contract.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 2006, 2007; Dec. Dig. ~~819~~.]

3. INSURANCE ~~719~~—MUTUAL BENEFIT INSURANCE—CHANGE IN LAWS—AMOUNT OF ASSESSMENTS.

A provision of a benefit insurance contract that insured would be controlled by all the laws, rules, and regulations then in force or thereafter enacted did not authorize a change in assessments from \$3 to \$14.70 a month.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1855; Dec. Dig. ~~719~~.]

Mutual benefit insurance contracts as affected by subsequent provisions and amendments of charter, constitution, or by-laws, see note to Supreme Council, A. L. H., v. Champe, 63 C. C. A. 285.]

Appeal from the District Court of the United States for the Northern District of New York.

This cause comes here on appeal from a decree of the District Court, Northern District of New York, holding that a certain policy of insurance issued by defendant to complainant was in full force and effect and enjoining defendant from canceling the policy. The opinion of the District Court will be found in 198 Fed. 967.

J. P. Goodrich, of Indianapolis, Ind., and J. J. McCall, of Albany, for appellant.

R. J. Sanson, of Amsterdam, for appellee.

Before LACOMBE, COXE, and ROGERS, Circuit Judges.

LACOMBE, Circuit Judge. The policy in question was issued November 8, 1889, for \$3,000, complainant to pay assessment of \$3 each month. It is that kind of policy under which the fund to pay death losses consists of the assessments on survivors of the insured's class and contains a provision that if at the time of death the proceeds of one assessment on all members of the class shall not be sufficient to pay the endowment stipulated for in full, then the amount paid shall be equal to the proceeds of one full assessment on all remaining members of the class, less 10 per cent. for expenses.

Complainant paid his monthly \$3 assessments as they came due, until December, 1910, when defendant notified him that unless he surrendered his policy and accepted another containing different terms and agreements, and paid \$14.70 per month, instead of \$3, his policy would be canceled. This notification was based on a clause in complainant's application, which was made a part of the contract, providing that the "contract shall be controlled by all the laws, rules, and regulations of the order governing this Rank, now in force, or that may hereafter be enacted by the Supreme Lodge." The increase of assessment was provided for in amendments to the constitution and by-laws adopted some years after complainant's insurance was effected.

The facts are stated at great length and in minute detail by Judge Ray and need not be repeated here. In the constitution as it stood in 1886, article IV provided that each member of the Endowment Rank (insurance class) shall pay the assessment provided in a table included in the article (\$3 for a person of complainant's then age) "each month thereafter as long as he remains a member of the Endowment Rank." It is contended that in 1888 the article was amended by adding after the passage quoted supra the words "unless otherwise provided for by the Supreme Lodge." The argument is that because the constitution, which was made a part of the contract, provided that another sum than \$3 a month might be assessed on each member at the option of defendant, and because the assessment had been increased as above stated, complainant was bound to pay at the increased rate or forfeit his policy.

[1] The difficulty with this syllogism is found in its major premise. In the first place, the testimony offered to prove that the constitution was amended in 1888 is very unsatisfactory. The sole witness, examined in 1912, was at the time secretary of the defendant. In 1888 he was not secretary, and was 13 years old; he had no personal knowledge of its affairs at that time. The original constitution provided that the constitution might be "altered or amended at any regular session of the Supreme Lodge by a two-thirds vote." The witness was examined in Indianapolis, where the office of defendant was located. He stated that he had in his possession the original minutes, records, and journal, but no part of the minutes of the session June 12 to 23, 1888, at which

it was contended the old constitution was amended and the so-called "constitution of 1888" adopted, was put in evidence. The witness merely identified a pamphlet marked "Exhibit A" as being a true copy of the constitution of 1888, which *he* said was adopted by the Supreme Lodge at the June session of that year, "effective August 1, 1888," by a unanimous vote. But, waiving this objection, and assuming that the minutes showed what the witness said they contained, something more must be shown to make this particular constitution a part of the contract. It must appear that it was promulgated and was called to the attention of applicants for insurance, at least of such applicants as asked to be shown the "laws, rules, and regulations" which by their application they were agreeing to be controlled by. Which constitution was it, that of 1886 or of 1888, which was made a part of the contract with this complainant? By the one he was to pay \$3 a month "as long as he remains a member"; by the other he was to pay assessment at that rate "unless otherwise provided by the Supreme Lodge."

[2] On this branch of the case the testimony is as follows: Complainant testified that at the time he applied and was accepted he was given a little pamphlet (Exhibit C) which contains the constitution of 1886; that it was given him by defendant's agent, who negotiated his application and gave him his certificate; that he had kept it in the same envelope with his certificate of membership, and he produced it. The agent testified that sometimes he handed out copies of the constitution, and sometimes he did not; some applicants asked for them, and some did not; that he could not now remember whether or not he gave complainant a copy; but that he was supplied from the home office with copies of the constitution, and when he did give applicants copies, he gave them out of the latest that he had. This made out a *prima facie* case, which was not contradicted, but, on the contrary, corroborated by other proof.

Complainant, at Amsterdam, N. Y., applied for insurance in October, 1889; he was furnished by the local secretary, or agent, of defendant with a form of application, which he filled up, signed and dated October 26, 1889. Upon this the home office issued its "certificate of insurance," dated Chicago, November 7, 1889, which was sent to Amsterdam and approved by complainant November 26, 1889. It is contended that the constitution of 1888, with its new provision giving power to increase rates, was adopted June 1, 1888, "effective August 1, 1888." That same constitution, however, prescribed several changes in the form of "certificate of insurance." Examination of the certificate issued by the Chicago office and given to Smyth shows that it was in the form prescribed by the constitution of 1886, without the amendments which the constitution of 1888 provided. If a year and more after the alleged adoption of the constitution the home office was still using the certificate forms of 1886 unchanged, it would not be surprising that its agents were still supplied only with copies of the constitution of that year. Certainly the chance of their getting new members would be greater if applicants supposed they were joining under a constitution which did not provide for an increase of rates.

In this connection it may be noted that complainant produced a cir-

cular D, which he testified he got at the time he made application. Defendant contends that such circular was not sent out until 1894; but it is a significant circumstance that the circular states that "payments do not increase with increasing age, but always remain the same." It seems quite unlikely that defendant would be making such representations in the circular, when at the same time it was handing out copies of a constitution which showed that the representation was untrue.

On the whole, we find nothing to overcome complainant's testimony that he was asked to contract, and did contract, on printed representations which advised him that the constitution of 1886 was the basis of this contract, and that therefore the "power to increase" referred to in constitution of 1888 was not a part of the contract entered into between defendant and himself.

[3] As to the effect on such a contract of the general provision that insured will be "controlled by all the laws, rules, and regulations governing this rank, now in force, or that may hereafter be enacted by the Supreme Lodge," it is unnecessary to add to Judge Ray's exhaustive discussion of the authorities. In Ayres v. Ancient Order of Workmen, 188 N. Y. 280, 80 N. E. 1020, the court laid down the proposition that:

"While a 'mutual benefit fraternity,' or fraternal insurance society, may so amend its by-laws as to make reasonable changes in the methods of administration, the manner of conducting its business, and the like, no change can be made which will deprive a member of a substantial right conferred expressly or impliedly by the contract itself. That is beyond the power of the Legislature, as well as the association, for the obligation of every contract is protected from state interference by the federal Constitution."

In Judge Ray's conclusion on the facts of this case to the same effect we fully concur.

Decree affirmed, with costs.

STANARD, County Treasurer, et al. v. DAYTON.

DAYTON v. STANARD, County Treasurer, et al.

(Circuit Court of Appeals, Eighth Circuit. January 4, 1915.)

Nos. 4218 and 4223.

1. BANKRUPTCY \Leftrightarrow 314—CLAIMS—PRIORITIES—PAYMENT OF TAXES.

Under Bankr. Act July 1, 1898, c. 541, 30 Stat. 563 (Comp. St. 1913, § 9648), § 64a, providing that the court shall order the trustee to pay all taxes legally due and owing by the bankrupt to the United States, state, county, district, or municipality in advance of the payment of dividends to creditors, taxes accruing after bankruptcy proceedings are instituted are included among those to be paid.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 469–473, 478, 483–487, 489, 490; Dec. Dig. \Leftrightarrow 314.]

2. BANKRUPTCY \Leftrightarrow 322—CLAIMS—PRIORITIES—PAYMENT OF TAXES.

Bankr. Act, § 64a, relative to the payment of taxes, contemplates the payment of interest and penalties on taxes in default, as penalties imposed by law for the nonpayment of taxes become a part of the taxes.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 508–510; Dec. Dig. \Leftrightarrow 322.]

3. BANKRUPTCY ☞322—CLAIMS—PRIORITIES—PAYMENT OF TAXES.

Though proceedings may be instituted by the proper state, county, or municipal officers to require a trustee in bankruptcy to pay taxes, it is the trustee's duty to ascertain what the taxes are, and to secure authority to pay them, and his failure to perform this duty will not suspend state statute imposing penalties for nonpayment.

[Ed. Note.—For other cases, see *Bankruptcy*, Cent. Dig. §§ 508-510; Dec. Dig. ☞322.]

4. BANKRUPTCY ☞215—TAX SALES—AVOIDABILITY.

Tax sales of a bankrupt's property, made after the adjudication of bankruptcy, may be avoided.

[Ed. Note.—For other cases, see *Bankruptcy*, Cent. Dig. §§ 324-326; Dec. Dig. ☞215.]

5. BANKRUPTCY ☞215—TAX SALES—AVOIDABILITY.

When a tax sale of a bankrupt's property is set aside at the instance of the trustee, the purchasers are entitled to reimbursement for the amount paid at such sales and subsequent taxes paid by them, together with interest thereon, as provided by state laws relative to redemption from tax sales, out of the general fund, regardless of the amount which the particular property may bring at bankruptcy sale.

[Ed. Note.—For other cases, see *Bankruptcy*, Cent. Dig. §§ 324-326; Dec. Dig. ☞215.]

Appeal from the District Court of the United States for the District of Colorado; Robert E. Lewis and John A. Riner, Judges.

Action by William L. Dayton, trustee in bankruptcy, against A. H. Stanard, Treasurer of the County of Pueblo, State of Colorado, and others. From a decree, defendants appeal, and plaintiff files cross-appeal. Plaintiff's cross-appeal dismissed, and decree modified.

John F. Mail, of Denver, Colo., for appellants.

Harvey Riddell, of Denver, Colo., for appellee and cross-appellant.

Before CARLAND, Circuit Judge, and T. C. MUNGER and YOUNMANS, District Judges.

YOUNMANS, District Judge. On the 16th day of January, 1908, James B. Orman and William Crook, partners as Orman & Crook, were adjudged bankrupts, and on the 6th of February, 1908, William L. Dayton was appointed trustee of the bankrupt estate. Among the assets belonging to said estate were a number of lots in Pueblo, Colo. At the time of the adjudication the general taxes and certain special assessments against said lots for the years 1906 and 1907 were due. On the 9th of November, 1908, and at various times thereafter, the taxes remaining unpaid, the appellant, Stanard, as county treasurer of Pueblo county, after giving the notice required by law, proceeded to sell said lots for the general taxes and special assessments of 1906 and 1907. Certificates of purchase were issued to the purchasers at such sale, some of whom are appellants.

From time to time thereafter the appellants, other than Stanard, paid certain subsequent taxes and special assessments on the same lots. Notice was given, as required by law, that tax deeds would be issued on the certificates of purchase. The trustee brought this suit: (1) To enjoin the issuance of any tax deed for default in the payment of gen-

eral taxes or special assessments. (2) To have all tax sales declared void. (3) For authority to sell the property free and clear of liens for such taxes and special assessments. (4) To compel the appellants to look to the proceeds of the sales of the properties against which each of them held certificates of purchase, and to such proceeds only, for reimbursement, if they should be adjudged to have valid claims for reimbursement.

Appellants moved to dismiss the bill, and the motion was overruled. They then filed answer, which raises practically the same questions which were raised by the motion to dismiss. The decree contained the following order:

"It is further ordered that each of said respondents, who became a purchaser or assignee of a purchaser of any said real estate, or any part or parcel thereof, at said tax sale of November 9, 1908, has the right to be repaid out of the proceeds arising from the sale by the trustee in bankruptcy of that particular lot or parcel as to which said respondent or his assignor holds any such certificate of purchase, but not otherwise, for the amount of taxes assessed against said lot or parcel for the taxes of the year 1906, and for any said special assessments for paving or for storm and sanitary sewer, and for the interest or penalties that may have accrued upon any such tax or special assessment up to the 6th day of February, 1908, amounting to 10½ per cent. of the tax so assessed, and also for the principal sum of any subsequent taxes that may have been paid by the holder of any such certificate of purchase, but that no said respondent be paid therefrom any interest, penalties or costs, or other sum, over or beyond the principal of said taxes and special assessments as assessed, except the interest and penalties that may have accrued up to February 6, 1908, aforesaid."

The assignments of error in No. 4218 are substantially that the court erred: (1) In holding the tax certificates void. (2) In limiting the amount which should be refunded to each certificate holder to the taxes and special assessments, interest, and penalties which accrued up to February 6, 1908, and the principal sum paid by them after that date.

The trustee took a cross-appeal, which is No. 4223 here, and assigned as error the finding of the court that appellants should be reimbursed at all.

The bill alleges that the trustee has been in possession of all the property involved in this suit since his appointment as trustee. That allegation is not denied. This case is governed by the decision of this court in the case of *In re Eppstein*, 156 Fed. 42, 84 C. C. A. 208, 17 L. R. A. (N. S.) 465. The court there said:

"We do not mean that property in the course of administration under the Bankruptcy Act is exempt from taxation, or freed from tax liens or claims theretofore fastened upon it (*Swarts v. Hammer*, 194 U. S. 441, 24 Sup. Ct. 695, 48 L. Ed. 1060, and cases *supra*), but that it is in *custodia legis*, and that any act interfering with the court's possession, or with its power of control and disposal, and done without its sanction, is void. The general rule is practically conceded; but it is said that the procurement of the tax deed was not such an interference, because it merely perfected an incipient title, and did not disturb the possession. The distinction does not impress us. The issuance of the deed was the principal act connected with the sale. If effective, it extinguished the right of redemption, which was still alive, transferred to the vendee the title and right of possession, became *prima facie* evidence of the validity of the sale and the proceedings anterior to it, and started the statute of limitations to running against any claim to the contrary. The attempt to

thus strip the court of all but the naked possession was plainly an interference with its power of control and disposal, and consequently was of no effect without its sanction, although the possession was not then disturbed. Such is the effect of the ruling in *Wiswall v. Sampson* [14 How. 52, 14 L. Ed. 322] and *Barton v. Barbour* [104 U. S. 126, 26 L. Ed. 672]. The cases of *Rice v. Jerome*, 97 Fed. 719, 38 C. C. A. 388, and *Whitehead v. Farmer's Loan & Trust Co.*, 98 Fed. 10, 39 C. C. A. 34, relied upon as expressing a contrary conclusion, do not, as we think, go further than to hold that when the question is presented to the court before the tax deed is issued, and it appears that there is no lawful objection to the recognition of the tax claim, and that there has been no offer to redeem, the fact that the property is in custodia legis is not of itself enough to warrant the court in withholding its sanction to, or in enjoining, the issuance of the deed."

[1, 2] Under section 64a of the Bankrupt Act the court is required to—

"order the trustee to pay all taxes legally due and owing by the bankrupt to the United States, state, county, district, or municipality in advance of the payment of dividends to creditors."

Taxes accruing after bankruptcy proceedings are instituted are included among those to be paid. *Swarts v. Hammer*, 120 Fed. 256, 56 C. C. A. 92; *Id.*, 194 U. S. 441, 24 Sup. Ct. 695, 48 L. Ed. 1060; *City of Waco v. Bryan*, 127 Fed. 79, 62 C. C. A. 79. While the Bankrupt Act does not, in terms, provide for the payment of interest and penalties on taxes in default, we think such payment is clearly contemplated. The penalties imposed by law for nonpayment of taxes become a part of the taxes. *In re Prince & Walter* (D. C.) 131 Fed. 546; *In re Kallak* (D. C.) 147 Fed. 276; *In re Scheidt Bros.* (D. C.) 177 Fed. 599.

In the case of *Swarts v. Hammer*, 194 U. S. 441, 24 Sup. Ct. 695, 48 L. Ed. 1060, it is said that the referee allowed a tax bill, "together with the accrued penalties and fees provided by law." On review the District Court affirmed the order as to the amount of taxes, but disapproved it as to penalties and fees. It does not appear that exception was taken to that portion of the order disallowing penalties and fees. Neither the Court of Appeals nor the Supreme Court was called upon to consider that question.

[3-5] Proceedings may be instituted by the proper state, county, or municipal officers to require the trustee to pay taxes. *Hecox v. Teller County*, 198 Fed. 634, 117 C. C. A. 338. Nevertheless, it is the duty of the trustee to ascertain what the taxes are and to secure authority to pay them. *In re Kallak* (D. C.) 147 Fed. 276. His failure to perform this duty will not suspend state statutes imposing penalties for nonpayment. Tax sales, made after adjudication of bankruptcy of property belonging to the bankrupt estate, may be avoided; but purchasers will be entitled to reimbursement for the amount paid at such sales and subsequent taxes paid by them, together with interest thereon, as provided by the laws of Colorado on redemption from tax sales of lands, out of the general fund, regardless of the amount which the property may bring at bankruptcy sale.

Property may not be taken from estates in bankruptcy through the operation of state tax statutes. At the same time such property is subject to all taxes, and penalties for nonpayment thereof, that other property is subject to.

The decree of the lower court in No. 4218 will therefore be modified, in accordance with the views herein expressed, and, as modified, it will be affirmed; and the cross-appeal in No. 4223 will be dismissed.

TAPACK et al. v. UNITED STATES.

(Circuit Court of Appeals, Third Circuit. February 18, 1915.)

No. 1881.

1. CONSPIRACY ~~28~~—OFFENSES AGAINST BANKRUPTCY LAWS—CONCEALMENT OF PROPERTY.

Under Pen. Code (Act March 4, 1909, c. 321) § 37, 35 Stat. 1096 (Comp. St. 1913, § 10201), providing that if two or more persons conspire to commit any offense against the United States, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties shall be punished as therein provided, persons other than a bankrupt may commit an offense by conspiring with him to conceal his goods.

[Ed. Note.—For other cases, see Conspiracy, Cent. Dig. §§ 40, 41; Dec. Dig. ~~28~~.]

2. CONSPIRACY ~~43~~—OFFENSES AGAINST BANKRUPTCY LAWS—SUFFICIENCY OF INDICTMENT.

Under Bankr. Act July 1, 1898, c. 541, § 29b (1), 30 Stat. 554 (Comp. St. 1913, § 9613), providing that a person shall be punished as therein provided upon conviction of the offense of having knowingly and fraudulently concealed, while a bankrupt, or after his discharge, from his trustee, any property belonging to his estate in bankruptcy, an indictment charging that defendants, knowing that two of them were insolvent and contemplating that they would be adjudicated bankrupts, in order to defraud the creditors of the prospective bankrupts, corruptly, wickedly, and unlawfully conspired to conceal the property of such bankrupts, and to continue to conceal it, after they should be adjudicated bankrupts, from the person to be appointed trustee, and that after the adjudication and appointment of a trustee they removed, secreted, and concealed such property, was not insufficient because of the failure to use the statutory words "knowingly and fraudulently" in describing the crime that was the object of the conspiracy, as the language used implied inevitably that the concealment was, and was intended to be, knowing and fraudulent, especially in view of Rev. St. § 1025 (Comp. St. 1913, § 1691), providing that no indictment shall be deemed insufficient by reason of any defect or imperfection in matter of form only which shall not tend to the prejudice of the defendant.

[Ed. Note.—For other cases, see Conspiracy, Cent. Dig. §§ 79, 80, 84-99; Dec. Dig. ~~43~~.]

3. INDICTMENT AND INFORMATION ~~60~~—REQUISITES—ELEMENTS OF OFFENSES.

In the interest of orderly procedure and for the full protection of a defendant's rights, an indictment must sufficiently set forth a definite crime, under penalty of being declared invalid, if an essential element be lacking.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 182, 266, 267; Dec. Dig. ~~60~~.]

4. INDICTMENT AND INFORMATION ~~75~~—REQUISITES—MATTERS OF FORM.

The prevailing tendency is to be satisfied with substance in an indictment, rather than to insist upon a rigid adherence to form; and an indictment will be held good, if it substantially charges the particular offense for which the defendant is about to be, or has already been, tried.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 202-204; Dec. Dig. ~~75~~.]

5. CRIMINAL LAW \Leftrightarrow 1159—APPEAL—REVIEW—QUESTIONS OF FACT.

If there is any evidence to sustain a verdict that was proper to go to the jury, the verdict is conclusive.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3074–3083; Dec. Dig. \Leftrightarrow 1159.]

In Error to the District Court of the United States for the District of New Jersey; Thos. G. Haight, Judge.

Louis Tapack and another were convicted of an offense, and they bring error. Affirmed.

Merritt Lane, of Jersey City, N. J., for plaintiffs in error.

J. Warren Davis, U. S. Dist. Atty., of Trenton, N. J., and Archibald Palmer, Sp. Asst. U. S. Dist. Atty., of New York City (William Hawkins, of New York City, of counsel), for the United States.

Before BUFFINGTON, McPHERSON, and WOOLLEY, Circuit Judges.

J. B. McPHERSON, Circuit Judge. The indictment in this case was found at January term, 1913, and charged five defendants with conspiracy under section 5440, R. S. (section 37, Penal Code of 1909). One of them was acquitted, and the other four, Jacob Torem, Samuel Moore, Louis Tapack, and Nathan Tapack, were convicted. Of these the last two have taken the present writ of error. In the District Court the sufficiency of the indictment was challenged by motions to quash, for a directed verdict, for a new trial, and in arrest of judgment, and this subject has been urged upon our attention with special earnestness.

In substance the indictment avers that the five defendants unlawfully conspired, etc., to commit an offense against the United States, and then proceeds to describe the crime as follows: On and before September 27, 1912, Torem and Moore were silk manufacturers who had become insolvent and unable to meet their obligations, as all the defendants well knew; they were all contemplating and expecting that Torem and Moore would be adjudicated bankrupt, and a trustee be appointed; the bankrupts had certain property (describing it) which would pass to the trustee in case of the expected adjudication; whereupon all the defendants, "in order to defraud the creditors of them, the said Jacob Torem and Samuel Moore, copartners," etc., "did corruptly, wickedly, and unlawfully conspire," etc., "that the said Jacob Torem and Samuel Moore, copartners," etc., "should conceal the said property, and should continue to conceal the same after they should be adjudicated bankrupts, so contemplated," etc., from the person thereafter to be appointed trustee. The indictment further avers the subsequent adjudication and the appointment of a trustee, and sets forth as the overt act that on the next day, September 28, all the defendants did remove the goods described, and did "secrete and conceal the said property, and still secrete and conceal the same," from the trustee.

[1-3] That other persons than a bankrupt may commit an offense by conspiring with him that he shall conceal his goods is a proposition that does not seem to need discussion, in view of Cohen v. U. S. (C. C. A., 2d Cir.) 157 Fed. 651, 85 C. C. A. 113, and the analogous decision in Nemcof v. U. S. (C. C. A., 3d Cir.) 202 Fed. 911, 121 C. C. A. 269.

See, also, U. S. v. Holte, 236 U. S. 140, 35 Sup. Ct. 271, 59 L. Ed. —, decided February 1, 1915. Indeed, we do not understand this position to be in serious dispute; the indictment is attacked mainly because it does not use the statutory words "knowingly and fraudulently" in describing the crime that was the object of the conspiracy. It is undoubtedly true that section 29b (1) of the Bankruptcy Act describes the crime as a knowing and fraudulent concealment, and if this indictment does not contain the fair equivalent of these words it is fatally defective. Upon the other hand, although the language of the indictment might have been improved in form or arrangement, section 1025, R. S., requires us to uphold it if the defect or imperfection did not tend to the prejudice of the defendants. Just how they have been prejudiced may be a matter of some doubt. They understood exactly with what crime the government believed them to be charged; during eight days the trial was conducted on the theory that the offense was conspiracy to conceal goods knowingly and fraudulently; and the judge submitted the question of that offense to the jury. Nevertheless we agree that, in the interest of orderly procedure and for the full protection of a defendant's rights, an indictment must sufficiently set forth a definite crime, under penalty of being declared invalid if an essential element be lacking.

[4] In earlier days, when excellent reasons existed for construing an indictment strictly so as to favor life and liberty, it is probable enough that such an indictment as this might have been held deficient in precise statement; and, indeed, some comparatively recent decisions still reflect something of the earlier spirit. But there can be no doubt that the prevailing tendency now, both in statute law and in decision, is to be satisfied with substance rather than to insist upon rigid adherence to form; an indictment will be held good if it substantially charge the particular offense for which the defendant is about to be, or has already been, tried. Burton v. U. S., 202 U. S. 344, 26 Sup. Ct. 688, 50 L. Ed. 1057, 6 Ann. Cas. 362; Dunbar v. U. S., 156 U. S. 195, 15 Sup. Ct. 325, 39 L. Ed. 390; McNiel v. U. S., 150 Fed. 82, 80 C. C. A. 36; State v. Stein, 48 Minn. 466, 51 N. W. 474; State v. Smith, 63 Vt. 201, 22 Atl. 604; Worsham v. Murchison, 66 Ga. 715.

Tested by this standard, we think the indictment before us should be sustained. Knowing the bankrupts' precarious situation, all the defendants are charged with having conspired "corruptly and wickedly" to bring about the concealment, and the object of the conspiracy is stated to be "in order to defraud the creditors of Torem and Moore." In our opinion this language inevitably implies that the concealment of the goods was, and was intended to be, knowing and fraudulent; the conduct of a defendant cannot be innocent, and at the same time be corrupt and wicked, aiming at the commission of fraud. We think the language just quoted qualifies from first to last the whole description of the conspiracy. Nothing need be read into the indictment to produce this result; the words are already there, and if their arrangement were slightly different, even the criticism that is now being considered would be fully answered. Without further discussion, we overrule the assignments of error that question the sufficiency of the indictment.

[5] The only other matter that calls for consideration is the argument that the evidence should not have been submitted to the jury at all. It is hardly necessary to say that the verdict is beyond our power; if there is any evidence to sustain it that was proper to go to the jury, the finding of that tribunal is conclusive. *Humes v. U. S.*, 170 U. S. 210, 18 Sup. Ct. 602, 42 L. Ed. 1011; *Burton v. U. S.*, *supra*. Without discussing the testimony contained in this record of 650 pages, but after careful consideration of all the arguments, we are of opinion that the learned trial judge committed no error in refusing to give the binding instruction that was asked for. The trial was fair and the charge was adequate; the verdict is not the subject of review.

The judgment is affirmed.

PHOTO-DRAMA MOTION PICTURE CO., Inc., v. SOCIAL UPLIFT FILM CORPORATION.

(Circuit Court of Appeals, Second Circuit. January 12, 1915.)

No. 102.

1. COURTS ~~291~~ — UNITED STATES COURTS — JURISDICTION — CASES UNDER COPYRIGHT LAWS.

Irrespective of citizenship, the federal courts have jurisdiction of suits to enforce rights under the copyright statutes.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 833; Dec. Dig. ~~291~~.]

2. COPYRIGHTS ~~39~~ — EXTENT OF RIGHTS ACQUIRED — DRAMATIZATION.

A copyright covering a novel gives the holder the exclusive right to dramatize the novel in the usual form, or in the form of a motion picture play.

[Ed. Note.—For other cases, see Copyrights, Cent. Dig. § 39; Dec. Dig. ~~39~~.]

3. COPYRIGHTS ~~7~~ — SUBJECTS OF COPYRIGHT — SEPARATE DRAMATIZATIONS.

Under the Copyright Act, as amended in 1912, the rights to dramatize a novel in the usual form and in the form of a motion picture play are separable, and there may be a copyright for each dramatization.

[Ed. Note.—For other cases, see Copyrights, Cent. Dig. § 5; Dec. Dig. ~~7~~.]

4. COPYRIGHTS ~~46~~ — ASSIGNMENTS — FAILURE TO RECORD — EFFECT.

Under Copyright Act, § 44, providing that every assignment of copyright shall be recorded in the copyright office within three months after its execution, in default of which it shall be void as against any subsequent purchaser or mortgagor for a valuable consideration without notice, whose assignment has been duly recorded, an unrecorded assignment of the motion picture rights in a copyrighted novel was void as against a subsequent assignee without notice, whose assignment was duly recorded.

[Ed. Note.—For other cases, see Copyrights, Cent. Dig. § 44; Dec. Dig. ~~46~~.]

5. COPYRIGHTS ~~47~~ — ASSIGNMENTS — FAILURE TO RECORD — NOTICE.

Where an assignee of the moving picture rights in a copyrighted novel was told by the assignor that he had licensed T. to reproduce the story as a drama, but that he had not assigned the motion picture rights, the

assignee was not charged with notice that the motion picture rights had been assigned to T.

[Ed. Note.—For other cases, see Copyrights, Cent. Dig. § 45; Dec. Dig. 36.]

6. COPYRIGHTS 36—EFFECT OF COPYRIGHT ON LITERARY RIGHTS.

One obtaining a statutory copyright of a book or play has no common-law literary property rights left, notwithstanding Copyright Act, § 2, providing that nothing therein shall annul or limit the right of the author or proprietor of an unpublished work, at common law or in equity, to prevent the copying, publication, or use of such unpublished work without his consent, and to obtain damages therefor, as that section is intended only to indicate that the statute does not displace the common-law right

[Ed. Note.—For other cases, see Copyrights, Cent. Dig. § 37; Dec. Dig. 36.]

Appeal from the District Court of the United States for the Southern District of New York.

This cause comes here upon appeal from an interlocutory order granting a preliminary injunction restraining defendant from making, selling, etc., motion pictures based upon the book or novel entitled "The House of Bondage." The opinion of the District Court will be found in 213 Fed. 374.

H. R. Guggenheimer, of New York City, for appellant.

A. E. Stevenson, of New York City, for appellee.

Before LACOMBE, COXE, and WARD, Circuit Judges.

LACOMBE, Circuit Judge. [1-3] The suit is brought to enforce complainant's rights to exclusive production of certain motion pictures, under the provisions of the United States copyright statutes. Of such an action, irrespective of citizenship, the federal courts have jurisdiction. The facts shown are as follows:

One Kauffman wrote a novel, entitled "The House of Bondage." He assigned his right to copyright the same to Moffatt Yard & Co. Moffatt Yard & Co. duly secured copyright. That gave them exclusive rights to publish and sell the novel; also to make dramatizations of it, whether in the usual form for acting on the stage of a theater, or in the more recent form of a motion picture play. Moffatt Yard & Co. assigned all dramatization rights to Kauffman. He then had exclusive right to make dramatizations of either kind. Moreover, since the amendment of the Copyright Act (in 1912, passed subsequent to the Kalem Case, 222 U. S. 55, 32 Sup. Ct. 20, 56 L. Ed. 92, Ann. Cas. 1913A, 1285), these rights were separable; there might be a copyright for a dramatization of the old sort (acted on a stage), and also a copyright for a dramatization of the new sort (arranged in motion pictures).

Kauffman on April 30, 1913 (or possibly July 12, 1913), made an assignment to one Totten. It is contended that this covered his "exclusive dramatic rights, including moving picture rights." The preamble to the written assignment submitted to him by Totten so states, but the phraseology of Kauffman's letter of July 12, 1913, in which he agreed to the assignment, leaves it doubtful whether he intended to include anything except a drama, which Totten had written founded

on the book. For the purposes of this decision, however, it may be assumed that Kauffman did on July 12, 1913, assign to Totten all his dramatic rights including the moving picture rights.

On December 4, 1913, Kauffman assigned to complainant the exclusive right to make motion pictures, which assignment was duly filed and recorded in the Library of Congress January 6, 1914, and on January 13, 1914, application for copyright of said motion pictures was duly filed.

[4, 5] Defendant claims the right to produce moving pictures under assignment from Totten. The assignment of copyright from Kauffman to Totten was not recorded as required by section 44; therefore it was void as against complainant, unless the latter had notice of it. We concur with Judge Hand in the conclusion that no such notice is shown. The statement made by Kauffman to complainant's president was that Kauffman "had licensed Totten to reproduce the story as a drama, but that he had never parted with or assigned the motion picture rights." Complainant's title seems clear. Moffatt Yard & Co. had all the conceivable copyrights; they assigned to Kauffman all the dramatic rights, including both kinds; the statute contemplates separate copyrights for each kind. The assignment of the one kind to the complainant, wholly without actual notice that Kauffman had ever parted with his rights of that kind to any one, and without any recorded assignment of them to give constructive notice, gave it clear title to a copyright in the motion picture arrangement of the story of the novel.

Appellant suggests various propositions which are not here for discussion. Complainant is not trying to enjoin an old-style dramatization of the story acted on the stage, but merely a threatened motion picture arrangement to which its copyright gives it exclusive right.

As to the recording section 44, we find it difficult to appreciate complainant's point. If a book can be copyrighted, if a drama giving the story of the book can be copyrighted, if a moving picture showing such story fictionally also can be copyrighted, then each of these copyrights can be separately assigned, and must be recorded to avail of the constructive notice which the section contemplates. We fail to see how, since the amendment, a motion picture play, for which by itself a copyright may be taken, can be described merely as "an incidental right" under a copyright.

The case here presented is unlike some of those cited on appellant's brief, where the author of a book or of a play has assigned to some one all the dramatic rights thereto without reservation. Such an assignment conveys the right to acquire a copyright under the statute which will give an exclusive right to both an old-style dramatization and the modern variant, a motion picture presentation of the drama.

[6] We do not concur in Judge Hand's holding that one who has obtained statutory copyright of a book or play has left in him any common-law right in literary property by virtue of section 2 of the act. We think that section is intended only to indicate that the statute does not displace the common-law right. Whoever elects to avail himself of the statute, however, must be held to have abandoned his common-law right.

Order affirmed, with costs of appeal.

In re LEVIN, KRONENBERG & CO.

In re AUTOMATIC SPRINKLER CO. OF AMERICA.

(Circuit Court of Appeals, Second Circuit. January 12, 1915.)

No. 92.

SALES ~~477~~—CONDITIONAL SALES—WAIVER OF RESERVATION OF TITLE—MECHANICS' LIENS.

An automatic sprinkler system was installed on the premises of L. & Co., with a reservation of title by the sprinkler company. Thereafter the sprinkler company filed mechanics' liens against the premises. L. & Co. subsequently made an assignment for the benefit of creditors, which was followed by the filing of an involuntary petition in bankruptcy. The bankrupt scheduled the sprinkler company as a general creditor, and its attorney by motion had the schedules corrected to include the sprinkler company as a secured instead of a general creditor, because of the mechanics' liens. *Held*, that the sprinkler company lost its right to retake the property, as the claim of title was inconsistent with the claim of a lien, and the election of either remedy, if the sprinkler company had a choice, would be final, and while it could not without the consent of the bankrupt substitute a claim of lien for the claim of title, the bankrupt or the assignee for the benefit of creditors could consent, and this was in effect done.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1411-1417; Dec. Dig. ~~477~~.]

What constitutes a contract of conditional sale, see note to *Dunlop v. Mercer*, 86 C. C. A. 448.]

Petition to Revise and Appeal from Order of the District Court of the United States for the Eastern District of New York.

H. T. Edwards, of New York City, for petitioner.

L. C. Norris, of Brooklyn, and M. S. Hyman, of New York City, for respondents.

Before LACOMBE, COXE, and WARD, Circuit Judges.

WARD, Circuit Judge. June 2, 1913, Levin, Kronenberg & Co., a corporation, carrying on the business of lumber and wood working in Brooklyn, entered into a written contract with the Automatic Sprinkler Company of America whereby the latter agreed to install in its premises an automatic sprinkler system as a protection against fire. The system included pipes, fittings, valves, sprinkler heads, a fire pump, and an air compressor, all of which could be removed without substantial injury to themselves or to the premises. The contract was one of conditional sale, providing that the title to the equipment should remain in the sprinkler company until paid for in full, but was not filed by the sprinkler company in accordance with the provisions of section 62 of the Personal Property Law.

November 1, 1913, the installation of the system was completed. November 23d Levin, Kronenberg & Co. mortgaged the premises for \$25,000 to the Title Guarantee & Trust Company, which subsequently assigned the mortgage to the Newburg Savings Bank. December 29,

1913, and January 26, 1914, within 90 days from completion of the work, as required by law, the sprinkler company filed mechanics' liens against the premises, for the balance due on the equipment contract, in the Kings county clerk's office. January 12, 1914, Levin, Kronenberg & Co. made an assignment for the benefit of creditors, and an involuntary petition in bankruptcy was filed against Levin, Kronenberg & Co. thereafter on the same day.

April 1, 1914, the sprinkler company filed a petition, asking that the alleged bankrupt and its assignee for benefit of creditors be required to turn over to the petitioner the equipment covered by the contract of conditional sale. April 30, 1914, the special commissioner to whom the petition was referred reported that the sprinkler company was not entitled to remove the equipment as against the mortgagee, both because the contract was not filed in accordance with section 62 of the Personal Property Law and because it had elected to file mechanics' liens against the premises for the balance due under the contract, which was inconsistent with any claim of title to the equipment. May 27th, upon a further hearing, the special master reported that the schedules filed by the alleged bankrupt should be corrected so as to include the sprinkler company as a secured instead of a general creditor, because it had filed mechanics' liens. June 15, 1914, both these reports were confirmed by Judge Veeder, and it is these orders from which the sprinkler company appeals and which it seeks to revise.

It will not be necessary for us to consider the effect of the sprinkler company's failure to file the contract under section 62 of the Personal Property Law or the effect of the decision in *Central Union Gas Company v. Browning*, 210 N. Y. 10, 103 N. E. 822, both of which points have been argued by the parties at length, as we shall affirm the orders because of the filing of the liens.

The sprinkler company's claim of reclamation is entirely inconsistent with its claim of a mechanic's lien upon the premises. The former of necessity implies title to the fixtures in it, whereas the latter equally implies title to them in Levin, Kronenberg & Co. If the sprinkler company had a choice between these remedies, the election of either would be final. But it could not, without the consent of Levin, Kronenberg & Co., substitute for the claim of title vested in it by the contract of conditional sale a claim of a lien against the premises. If it filed a lien without such consent, it would be making a mistake of law, which would not prevent it from subsequently making a claim of reclamation. *Bierce v. Hutchins*, 205 U. S. 340, 27 Sup. Ct. 524, 51 L. Ed. 828. This on the ground that it really had no election at all.

But, of course, the alleged bankrupt or its assignee for benefit of creditors could consent that the sprinkler company should have a mechanic's lien instead of its claim of title, and this was what was actually done. The sprinkler company proved no claim in bankruptcy, but the alleged bankrupt included the company in its schedules as a general creditor for the unpaid balance on the contract. Subsequently its attorney moved that this liability be stricken from the schedules and that the sprinkler company be included as a creditor secured by a mechanic's lien, which was done. Accordingly, the situ-

ation of the sprinkler company is that of a mechanic's lien creditor, and its right of reclamation is gone. *Kirk v. Crystal*, 8 App. Div. 32, 103 N. Y. Supp. 17; *Id.*, 193 N. Y. 622, 86 N. E. 1126.

The orders are affirmed.

ROGERS et al. v. HENNEPIN COUNTY et al.

(Circuit Court of Appeals, Eighth Circuit. January 4, 1915.)

No. 4185.

COURTS ~~405~~—UNITED STATES COURTS—APPELLATE JURISDICTION—CASES INVOLVING JURISDICTION OF LOWER COURT.

Under Judicial Code (Act March 3, 1911, c. 231) § 238, 36 Stat. 1157 (Comp. St. 1913, § 1215), providing that appeals and writs of error may be taken from the District Courts direct to the Supreme Court in any case in which the jurisdiction of the court is in issue, an appeal lay to the Supreme Court, and not to the Court of Appeals, from a decree dismissing a bill on the ground that the jurisdictional amount was not involved.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 1097–1099, 1101, 1103; Dec. Dig. ~~405~~.

Review by the Supreme Court of the decisions of the United States Circuit and District Courts since Circuit Court of Appeals Act March 3, 1891, c. 517, 26 Stat. 826, see note to *City of Paducah v. East Tennessee Telephone Co.*, 106 C. C. A. 333.]

Appeal from the District Court of the United States for the District of Minnesota; Page Morris, Judge.

Suit by George D. Rogers and others against the County of Hennepin and others. From a decree dismissing the bill, plaintiffs appeal. On motion to dismiss the appeal. Motion sustained.

H. V. Mercer, of Minneapolis, Minn. (Mercer, Swan & Stinchfield, of Minneapolis, Minn., on the brief), for appellants.

James Robertson, of Minneapolis, Minn. (R. S. Wiggin, of Minneapolis, Minn., on the brief), for appellees.

Before CARLAND, Circuit Judge, and T. C. MUNGER and YOUNMANS, District Judges.

YOUNMANS, District Judge. The appellees have challenged the jurisdiction of this court by motion to dismiss the appeal. It appears from the record that George D. Rogers, Frank E. Crandall, and Albert L. Goetzman, each as representing himself and others of a similar class brought suit in the United States District Court for the District of Minnesota against the county of Hennepin, Henry C. Hanke, as county treasurer, and individually, and Al P. Erickson, as county auditor, and individually, to enjoin as illegal the collection of assessments, imposed under a statute of the state of Minnesota, on persons holding certificates of membership in the Chamber of Commerce of Minneapolis. It is alleged in the bill that there are 550 members, who are each assessed the sum of \$36.77.

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The defendants in the court below moved to dismiss the bill on the ground that the amount involved was less than \$3,000, and that no plaintiff had an interest in excess of \$40. The motion to dismiss was sustained. It is clear, from the written opinion of the judge and the decree of the court, that the case was dismissed on the ground of jurisdiction. In his opinion Judge Morris said:

"I think this bill ought to be dismissed for lack of jurisdiction, because I do not think that you can sum together these assessments against the individual members, and thus get the required jurisdictional amount."

In the decree appears the following order:

"It is further ordered that the motion to dismiss be and the same is hereby in all things granted, upon the ground that the amount in controversy as to each of said plaintiffs is the sum of \$38.77, and no more, and that said plaintiffs and those whom they claim to represent cannot aggregate their claims for the purpose of conferring jurisdiction on this court. It is further ordered that the above entitled action be and the same is in all things dismissed."

Authority to dismiss the cause was derived from section 37 of the Judicial Code (Comp. St. 1913, § 1019). From such an order of dismissal appeal lies under section 238 of said Code to the Supreme Court, and not to the Court of Appeals.

Therefore the motion to dismiss the appeal must be sustained.

GREAT ATLANTIC & PACIFIC TEA CO. v. CAREY.

(Circuit Court of Appeals, Second Circuit. January 12, 1915.)

No. 114.

COURTS ~~356~~—RESERVATION OF GROUNDS OF REVIEW—EXCEPTION TO DENIAL OF NEW TRIAL.

An exception to the refusal to set aside a verdict as contrary to the weight of the evidence, and on the other grounds set forth in Code Civ. Proc. N. Y. § 999, presents nothing for review in a federal appellate court.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 937; Dec. Dig. ~~356~~.]

In Error to the District Court of the United States for the Southern District of New York.

This cause comes here upon writ of error to review a judgment of the District Court, Southern District of New York, entered upon the verdict of a jury in favor of defendant in error who was plaintiff below. The action was for personal injuries sustained by plaintiff while driving one of the defendant's delivery wagons. Affirmed.

Martin Conboy, of New York City, for plaintiff in error.

E. L. Ryder, of New York City, for defendant in error.

Before LACOMBE, COXE, and ROGERS, Circuit Judges.

PER CURIAM. The only exception in the case is to the refusal of the trial judge to set aside the verdict on the ground that it is

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contrary to the weight of evidence and on other grounds set forth in section 999 of the New York Code of Civil Procedure. Such exception presents nothing for review in a federal appellate court.

Judgment affirmed.

STEVENS v. MITCHELL.

(Circuit Court of Appeals, Seventh Circuit. January 5, 1915.)

No. 1791.

PATENTS ☞328—INFRINGEMENT—COMBINED LETTER SHEET AND ENVELOPE.

The Mitchell reissue patent No. 12,675 (original No. 827,809), for a combined letter sheet and envelope, designed also to hold and carry an inclosure, claims 1 and 7, construed, and held not infringed.

Appeal from the Circuit Court of the United States for the Eastern Division of the Northern District of Illinois; Christian C. Kohlsaat, Judge.

Suit in equity by John T. H. Mitchell against Roderick G. Stevens. Decree for complainant, and defendant appeals. Reversed.

For opinion below, see 183 Fed. 782.

Edward Rector, of Chicago, Ill., for appellant.

Charles Gilbert Hawley, of Chicago, Ill., for appellee.

Before BAKER, SEAMAN, and MACK, Circuit Judges.

MACK, Circuit Judge. This is an appeal from a decree holding claims 1 and 7, the only ones in suit, of reissued letters patent No. 12675, for a combined letter sheet and envelope valid and infringed by a mailing folder manufactured by appellant under and in accordance with his letters patent No. 892,461.

The claims read as follows:

"1. A combined letter sheet and envelope, comprising a transversely scored sheet of thick paper or cardboard having upper and lower flap portions and an intermediate portion, said portions adapted to be folded together, and, when folded, forming an open-ended envelope, and one of said flap portions being formed to receive an inclosure and hold it against endwise movement in the envelope thus formed, substantially as described."

"7. A device of the class specified, comprising a folded letter sheet provided with a cross-slot, a postal inserted in said slot, and a sticker holding said letter in closed condition."

In view of the conclusions reached on the question of infringement, it is unnecessary to determine the validity of either of these claims. Appellee's device, both as described in the patent in suit and as utilized commercially, is an advertising folder designed to go through the mail for one cent postage although giving the appearance of a sealed communication, and containing, not only printed or written matter on the inside of the folder itself, but some article carried within the folder. The articles so to be carried are not, however, either by the terms of the patent or by the actual commercial use, confined to return postal cards, but may be anything whatsoever, and, in actual practice, have been business cards, catalogues, price lists, etc., as well

as return postal cards. The desired aim of holding the inclosure fast when the folder is sent by mail was secured by the method of folding the envelope into three parts and by providing a slit in either the upper or the lower of these parts.

While the language of the seventh claim, unlike that of the first claim, does not confine this slit to the upper or lower flap, it is obvious from the specifications and it is conceded by appellee's experts that his specific purpose could be accomplished only by a device in which the slit was either in the upper or the lower flap; the flap which, when the envelope was closed and sealed or fastened, would be on the inside. Obviously, anything inserted in a single slit on the intermediate portion of the envelope would have no protection against falling through, even though it could be held in place endwise if the slit was, as designed, narrower than the intermediate portion.

Claim 7 must therefore, in our judgment, be confined, as the other claims expressly are, to a device in which the slit is in the upper or lower flap and not in the intermediate portion, inasmuch as it is perfectly clear, both from the specifications, the drawings, and the device in actual use, that appellee's conception and invention did not include any means of firmly holding the inclosure endwise other than that produced by the single slit. *State Bank v. Hillmans*, 180 Fed. 732, 104 C. C. A. 98.

Appellant's device, in our judgment, was not a mere improvement on appellee's, but was distinctly different, and was designed to serve a narrower and different purpose. The inclosure, which is expressly confined to a return postal card, was designed to be held in place endwise, not merely at a single point at each end of the slit, but by a bandlike arrangement produced by a double slit and operating in exactly the same way as would a separate band pasted on the sheet. Even if this were the only or essential function of the double slit, it would differ from and have the advantage over appellee's device, in that it could be made on the intermediate part of the folder as well as on either flap. While this would ordinarily be no advantage if the folder were to be mailed, inasmuch as a part of the inclosure would thereby be exposed to view, it would be an advantage, if, as appellant contends, the folders were to be placed in boxes, so that passers-by could take them, as well as to be mailed; for in that case appellant's inclosures would be held firmly lengthwise as well as endwise by the two flaps, whereas appellee's inclosures, protected lengthwise only by one flap, would drop out at the bottom unless the outer flap were in some way sealed. While the seventh as well as other claims not now in suit provided for a seal or sticker, the first claim contains no such element.

But the function of appellant's double slit is not primarily to create a different method of holding the inclosure firmly endwise, but while so holding it, to expose a part thereof. And while, ordinarily, the exposure of a part of an inclosure contained in an envelope designed to pass through the mails would be a disadvantage, when that inclosure is limited, as in appellant's device, to a return postal card, and the exposed portion is designed to show the addressee's name and address, the advantage is obvious in an advertising scheme. By the

use of appellant's device the sender saves writing the intended recipient's address on the envelope, utilizing for this purpose the same name and address on the return postal, placed there obviously in order to save the recipient time and trouble, and thereby more readily induce him to use it.

While neither a double slit in place of a single slit, nor the slit of the intermediate portion in place of one of the flaps, would escape the charge of infringement, if such change were designed merely to avoid a prior patent, and if thereby no really different construction were made and no new function served, we are of the opinion that appellant's device does not infringe on appellee's, because, in our judgment, the construction, the purpose thereof, and the functions served thereby are distinctly different.

The decree must therefore be reversed, with directions to dismiss the bill for want of equity.

ST. JOHN V. TAINTOR.

(District Court, S. D. New York. February 10, 1915.)

REMOVAL OF CAUSES **☞14 — COURT TO WHICH CAUSE MAY BE REMOVED — “PROPER DISTRICT.”**

Under Judicial Code (Act March 3, 1911, c. 231) § 28, 36 Stat. 1094 (Comp. St. 1913, § 1010), authorizing the removal of suits pending in state courts to the District Court of the United States for the "proper district," and section 29, providing that the party desiring to remove such a suit may file a petition for the removal of such suit into the District Court to be held in the district where such suit is pending, a suit may only be removed to the District Court for the district where the suit is pending, section 29 identifying such district as the "proper district" within the meaning of section 28; and hence an action in the Montana state courts against a resident of New York could not be removed to the District Court for the Southern District of New York.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. § 35; Dec. Dig. **☞14**.

For other definitions, see Words and Phrases, Second Series, Proper District.]

At Law. Action by C. C. St. John against C. M. Taintor. On motion to remand to the state court. Motion granted.

George C. Holt and Henry M. Ward, both of New York City, for plaintiff.

O'Gorman, Battle & Vandiver, of New York City, for defendant.

AUGUSTUS N. HAND, District Judge. The plaintiff, a citizen and resident of Wyoming, sued the defendant, a citizen and resident of New York, in the Montana state court. The cause was removed to United States District Court for the Southern District of New York, and the plaintiff now appears specially and moves to remand. The motion must be granted.

Section 29 of the Judicial Code is perfectly clear, and furnishes the only provision of law applicable to this case. It says that the party entitled to remove "any suit mentioned in the last preceding section"

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shall file a petition "for the removal of such suit into the District Court to be held in the district where such suit is pending." These words indubitably specify the District Court where the suit is pending as "the proper district" referred to in the preceding section 28 of the Judicial Code.

The present statutes relating to removal of causes have been carried forward from sections 2 and 3 of the Judiciary Act of 1875, and from the later Judiciary Act of 1888. The act of 1875 was construed in the case of *Knowlton v. Congress & Empire Spring Co.*, 13 Blatchf. 170, Fed. Cas. No. 7,902, and the act of 1888 in the case of *Hyde v. Victoria Land Co.* (C. C.) 125 Fed. 970. See, also, the language of the Supreme Court in *Ex parte State Insurance Co.*, 18 Wall. 417, 21 L. Ed. 904. Judge Rose, in the case of *St. John v. United States Fidelity & Guaranty Co.* (D. C.) 213 Fed. 685, has decided the exact question under the present statute in accordance with the views which I have expressed.

The dictum of Judge Ray in *Mattison v. Boston & Maine R. R. Co.* (D. C.) 205 Fed. 821, and the decision of Judge Toulmin in *Stewart v. Cybur Lumber Co.* (D. C.) 211 Fed. 343, seem to me irreconcilable with the language of the statute, the former decisions under the acts of which the present law is a practical codification, and also with what I conceive to be the object of the law, namely, to enable a party sued by a citizen of another state to be relieved from local prejudices, which have been thought more likely to exist when the suit was brought against a party in the courts of the former's own state. It is to be noted that neither of these cases even mentions the express provisions of the statute that the removal is to be into the court "to be held in the district where such suit is pending."

It is not to be supposed that a citizen of Wyoming would encounter local prejudice in suing a citizen of New York in the courts of the state of Montana.

UNITED STATES v. TOLEDO NEWSPAPER CO. et al.

(District Court, N. D. Ohio, W. D. January 23, 1915.)

(Syllabus by the Court.)

1. CONSTITUTIONAL LAW ~~90~~—FREE SPEECH—RIGHT TO PUNISH.

The constitutional guaranty of free speech and a free press is not infringed by summary process and conviction in contempt, because of publications respecting a pending cause and tending to obstruct the administration of justice therein.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 172; Dec. Dig. ~~90~~.]

2. CONTEMPT ~~9~~—PUBLICATION OF AFFECTING PENDING CAUSE—EXEMPTION FROM PUNISHMENT—STATUTE.

The act of March 2, 1831 (Rev. St. § 725; Judicial Code, § 268 [Comp. St. 1913, § 1245]), declaratory of the law of contempt, was not intended to, nor does it, exempt publishers and editors from attachment for contempt for publications improperly affecting a pending case.

[Ed. Note.—For other cases, see Contempt, Cent. Dig. §§ 8, 15–18; Dec. Dig. ~~9~~.]

3. CONTEMPT ☞6—NEWSPAPER PUBLICATION—PENDING CASE—OBSTRUCTION OF JUSTICE.

It is provided in section 268, Judicial Code, that this court may punish as contempt of its authority misbehavior so near its presence "as to obstruct the administration of justice." *Held*, that the criterion whether an alleged misbehavior is within this provision of the act is not the physical or topographical propinquity of the act to the court; but, having reference to all the pertinent circumstances attending its commission, it is the nature of the act as tending directly to affect the administration of justice.

[Ed. Note.—For other cases, see Contempt, Cent. Dig. §§ 6, 9, 10, 13; Dec. Dig. ☞6.]

4. CONTEMPT ☞6—NEWSPAPER PUBLICATION—PENDING CASE—OBSTRUCTION OF JUSTICE.

Publications in a newspaper of general circulation in the city wherein the court sits, which publications are of a nature to embarrass the judge of the court in his consideration of a pending cause, or which tend to appeal to prejudice against the court or against a party to the cause respecting a pending case, may be misbehavior so near the presence of the court as to obstruct the administration of justice, wherefore they may subject the publisher or the editor, or both, to summary process in contempt under section 268, Judicial Code.

[Ed. Note.—For other cases, see Contempt, Cent. Dig. §§ 6, 9, 10, 13; Dec. Dig. ☞6.]

5. CONTEMPT ☞9—NEWSPAPER PUBLICATION—PENDING CASE—OBSTRUCTION OF JUSTICE.

In order to produce a conviction, as contempt of court, for a newspaper publication affecting a pending cause, it is not necessary that the proof should show either that the publication ever came to the attention of the judge of the court, or that it had any influence on the consideration of the cause to which it refers. It is sufficient if, excluding any other reasonable interpretation of the language of the publication, after applying the ordinary rules for construing the English language and considering how it may be reasonably understood by ordinary readers, the state of public feeling on the subject-matter of the publication, and any other relevant matter which may reasonably aid in understanding the necessary effect of such publication respecting the pending cause, it is seen to tend to obstruct the administration of justice therein.

[Ed. Note.—For other cases, see Contempt, Cent. Dig. §§ 8, 15-18; Dec. Dig. ☞9.]

6. CONTEMPT ☞60—NEWSPAPER PUBLICATION—EVIDENCE—OTHER PUBLICATIONS.

In considering whether a publication is a contempt of court, in that it tends to obstruct the administration of justice in a pending case, the court may consider other publications on the same subject by the same publisher.

[Ed. Note.—For other cases, see Contempt, Cent. Dig. §§ 183-187; Dec. Dig. ☞60.]

7. CONTEMPT ☞9—NEWSPAPER PUBLICATION—DEFENSE.

It is no defense to a charge of contempt of court by publications respecting a pending case that the court was without jurisdiction to entertain such pending case.

[Ed. Note.—For other cases, see Contempt, Cent. Dig. §§ 8, 15-18; Dec. Dig. ☞9.]

The Toledo Newspaper Company and another were charged with criminal contempt. Judgment against defendants.

U. G. Denman, U. S. Atty., of Toledo, Ohio, and William L. Day, of Cleveland, Ohio, Special Counsel, for the government.

Lawrence Maxwell and Jay W. Curts, both of Cincinnati, Ohio, and Charles S. Northup, of Toledo, Ohio, for respondents.

KILLITS, District Judge. The respondents, the Toledo Newspaper Company and Negley D. Cochran, respectively the publisher and editor in chief of a daily newspaper published in the city of Toledo, Ohio, known as the "Toledo News-Bee," are before the court to answer to charges of contempt for publications in that paper between the dates of March 24 and September 17, 1914, inclusive.

The information is in three counts, and is filed by the district attorney by order of the court. The first count deals with publications between March 24 and September 12, 1914, affecting a cause pending in this court entitled Henry L. Doherty et al., Partners as Henry L. Doherty & Company, v. Toledo Railways & Light Co.

The second count offers publications of September 12 and 14, 1914, touching the proceedings in contempt in this court against one John Quinlivan; the rule to show cause against said Quinlivan in the contempt proceedings being entitled in the civil case whose title is given above.

The third count deals with a publication on September 17, 1914, relating to a proceeding in contempt in this court against Harry J. Howard, managing editor of the Toledo News-Bee.

The publications complained of, with the contexts of which they are a part, are set out in full in the information. They are so numerous and many of them so long that to reproduce them in a statement of fact, even by reasonable editing in condensation, would be to very greatly tax the situation. Besides, as not unusual in the style of journalism which the newspaper in question affects, they were so embellished with exaggerated headlines and other typographical display, operating as emphasis upon certain features, that their full effect cannot be exhibited in a practical attempt at reproduction in an opinion. For the present purpose, it is sufficient to set forth a superficial view of their scope, although that will of necessity be extended.

The information charges that the publications involved in the first count were calculated and intended to produce two effects: First, an influence on the court's consideration of the pending traction case, by attempting an impression that a decision contrary to the wishes of the paper would not only be very unpopular in the community but likely to be met with active opposition; and, secondly, an encouragement to popular resistance to any order the court might make following such unpopular decision.

These purposes are alleged to have been effected by violent attacks on the parties to the case who were interested against the city, attacks calculated to influence public sentiment; by comment on the personality of the judge of the court and on proceedings in the case under him, tending to the impression that the court was liable to influence against the city out of proportion to the law and facts; by encouraging, through intensive comment and extravagant headings and other typ-

graphical embellishments, a plan for popular uprising against the traction company in spite of any order the court might make in the case; by misrepresenting, especially through prominent headlines, the action of the court through successive steps in the case; and by "featuring" attacks on the court from local organizations while the case was pending.

The proceedings concerning which publications are pleaded as offensive in the second and third counts were outgrowths of the traction case. It is alleged that these publications tended and were intended to embarrass the court in its consideration of the respective causes, by impugning the motives of the judge thereof and by attempting to belittle him in public estimation.

It is admitted that the paper in question containing these publications circulated to the extent of more than 50,000 copies daily in and about the city of Toledo, wherein sat the court in question and resided the judge thereof subject to comment in said publications. The order directing the district attorney to file the information and signed by the judge of the court recites the fact of his residence in the city of Toledo, and that, as a daily reader of the newspaper in question, the several publications had come to his personal attention.

Before entering into a more detailed description of the publications, it is proper to picture briefly the local situation and recent history of the city, as well as to outline the traction case referred to by title above, although the full force of the effect upon the paper's readers of the publication charged as offensive can be properly appreciated and gauged only by those who have seen the manner in which they were set forth and embellished from time to time with typographical exaggerations, and who, through residence in the city, are familiar with local conditions.

The testimony shows that Toledo has had a street railway franchise problem confronting it for more than ten years, and that agitation concerning it of the familiar extreme type had accompanied the attempt of every administration to deal with it, and that it had figured as the issue in five or six municipal electoral contests.

Franchises for some of the most important lines expired in 1910, and others, disintegrating the system, with March 27, 1914, although it was contended in the case, by both plaintiffs and the traction company, that they continued until October, 1915.

For years the News-Bee had violently opposed the local company which it had nicknamed the "Big Con." The paper's policy was three-fold—opposition to a franchise renewal, insistence on a straight three-cent fare, and for municipal ownership.

In the spring of 1913 a New York partnership, H. L. Doherty & Co., took over the management of the system and began negotiations in behalf of the company for a renewed franchise, meeting persistent and vigorous opposition from the News-Bee.

In the municipal election of 1913, all of the candidates promised three-cent fare, but those opposed by the News-Bee defeated those favored by it by a very large majority. The election amounted to a defeat for the incumbent administration, which, after the election, and

within 40 days of its vacation of power to the incoming officiary, and four months before the franchises expired, passed an ordinance called the "Schreiber Ordinance," to require the company to operate its cars, after March 27, 1914, at the pleasure of the city, at the maximum fare of three cents with free transfers, and also to pay a rental of \$250 per day for the use of the streets. Other terms were: An attempt to make mere continuance of operation after March 27th work a waiver of objections and an acceptance of the measure; and a direction to the city solicitor, in case of nonobservance by the company, to apply to an appropriate court for an alternative order of compliance or abandonment of the streets. No other provision was made for enforcement, nor did the ordinance specifically direct the company to cease its service even as an alternative to obeying the measure. The solicitor never applied for an order, as provided. The company very promptly signified that it would not follow the ordinance.

Monday evening, March 23, 1914, the city council defeated a motion to postpone the enforcement of the ordinance after the 27th for a reasonable time within which to determine the franchise question. The issue of the News-Bee of March 24 is the first pleaded in the information; the article in question occupying more than five columns under a heading extending across eight columns, the width of the paper, entitled: "Big Con Fights Three-Cent Fare in Federal Court." The article is preceded by a two-column wide condensation set up "boxed"—that is, with a rule line on all sides—entitled:

"Here's the street car tangle in tabloid; Thurstin (the city solicitor) promises to protect riders."

Preceding this a subhead in large type said:

"Thurstin Declares He Intends to Fight Until There's Nothing Left. Will Defend Any One Who Will Not Pay."

This statement is repeated in this form in one of the "tabloid" paragraphs in the "boxing":

"Solicitor Thurstin promises to protect those who are ejected from cars for refusing to pay more than three cents."

In the extended article, as a foundation for these headlines, is a two-line statement attributed to the solicitor that any car rider put off for refusing to pay more than three cents after Friday night will be "protected." In the same connection, the mayor is made to say that he will do all possible to assist the solicitor, "even," he said with a smile, "if I have to call out the reserves."

The article deals mostly with the proceedings before the council the night before. According to it:

"An audience of 400 interested men, women and children pack council chamber and hiss those councilmen who urge postponement of three-cent ordinance."

One of the older councilmen is reported to have urged moderation because of the intensity of public feeling, fearing "bloodshed very likely and everything else that goes with it" on Saturday, if the company refused to obey the ordinance until a court passed on it, and his

views are said to have provoked great disorder among the citizens present. The argument of another councilman for moderation was "met with jeers," and all through the debate "statements construed to lean toward the company were hooted." It was said that public interest in this meeting was so general that:

"The place was crowded to overflowing. No more could get in. Many had to stay out. * * * Men who had been in the franchise fight for a dozen years were there to see how these new councilmen would act in a crisis * * * Men from almost every walk of life were there."

The account of the meeting proceeds to remind the readers of "one memorable night ten years ago," and the intervening years of wrangling over the street car question now about to culminate in a victory for the people through the new ordinance to go into effect within the week.

In January, 1914, Doherty & Co. began an action in this court against the street railway company in the nature of a creditors' bill, asking that the equity of redemption in the company be conserved to the payment of a large judgment, and for the appointment of a receiver. Other allegations of the complaint incorporated the so-called "Schreiber Ordinance," alleging that to attempt to meet its terms would be to destroy the equity of redemption in the company because they were confiscatory. It is averred that the officers of the city of Toledo are advising that this ordinance will be in force after March 27, and are suggesting to the public that thereafter citizens should refuse to pay any fare in excess of three cents and should demand the right to ride at such a rate, and that, on the refusal of the agents of the company to accept such fare, the rate should be insisted upon to the extent of violence.

It is alleged that the company holds other franchises besides those assumed to expire with March 27, whose provisions will be seriously impaired by the city's attempt to enforce the ordinance in question.

A feature of the prayer was that, if the situation did not change before March 27, the city of Toledo might be made a party to the case and the ordinance tested.

During the first three months of 1914, negotiations for a new franchise were in progress between Doherty & Co as managers of the traction company and the city, and no proceedings were had in the case beyond the filing of papers until the forenoon of March 24, when, the action of the council the night before in refusing to extend the time from March 27 for the operation of the ordinance making action necessary from the standpoint of the company, supplemental pleadings were filed, setting up the developments to that time, and the motion to make the city a party, that an inquiry into the validity of the ordinance might be had, was pressed.

The judge of the court (Judge Killits) was then on duty in Cleveland, within the district. The proposed order to bring the city in and the application therefor were read to him over the telephone by the clerk and received the court's approval, with the direction that the

order be sent to Cleveland for signature. It was so sent immediately, was signed on the 24th, and received back in Toledo on the morning mail of the 25th, and was entered as an order at chambers as of the 24th. Arrangement was made between the parties to meet the court at Cleveland at chambers at noon on Thursday, the 26th, to present the motion for a temporary injunction.

The article of the News-Bee of the 24th, which told of the proceedings in council on the previous evening, started with an account of the filing of the papers that morning in this court, its initial sentence, after the customary "tabloid" statement, being:

"With Henry L. Doherty directing operations, the Big Con got busy early on Tuesday in its efforts to evade the provisions of the Schreiber three-cent fare ordinance."

Early in the article it speaks of the interview over the telephone with the judge, and the account of the council meeting the night before follows at length after the statement ascribed to the city solicitor with reference to the case. For a cartoon the traction company was represented to be "In the Last Ditch," and managing editor Howard, testifying for respondents, said that the "last ditch" was intended to mean this court.

Owing to the illness of the judge on the 26th, the hearing was passed until Saturday morning, March 28, at Toledo, when it was then had, and, for reasons pertaining to the record as it then was, on the 30th the motions were overruled, but the main case was not otherwise affected.

In the meantime, however, the traction company had filed a cross-bill and had joined with the plaintiff in a demand for a restraining order affecting the ordinance. This cross-bill repeats the charges that the city officials were publicly advising the people that individual citizens should take the enforcement of the ordinance into their own hands, and that any efforts by them individually in that behalf would be protected by the peace officers of the city.

The issue is also raised whether in fact the principal franchises to be affected by the Schreiber ordinance expired with the 27th of March; it being pleaded that they did not in fact expire until October, 1915.

March 25, being the day before that set for the hearing, the paper's front page contained a cartoon entitled "A Desperate Case," representing the "Big Con" as a very corpulent person in bed very ill, his attorneys and Mr. Doherty around him in great anxiety and very much caricatured; one of them explaining that, "We'd Better Call in Doc. Killits." The news article was headed, in big type extending across five columns, "*Car Riders May Ignore Order Barring Low Fare*," and continuing over two columns in which measure in the body was set. a subhead, "Plan Made to Test Schreiber Ordinance Immediately After Muny Ownership Meeting." Another subheading in the form of a "tabloid" paragraph was:

"Mass meeting of Municipal Ownership League at Memorial Hall, to be held Friday Night. Plan laid that Memorial Hall crowd shall remain in session until midnight, then swarm on cars and refuse to pay more than three cents."

The article, set in type across two columns, in detailing this plan begins:

"It has been planned, *restraining order or no restraining order by the federal court*, to test the strength of the three-cent-fare-all-day ordinance immediately following the closing of the meeting of the Municipal Ownership League in Memorial Hall on Friday night, unless, before that time, other counsel prevails. The Schreiber ordinance will become effective at midnight on Friday, or 12:01 a. m. on Saturday. That's the night the Municipal Ownership League is to hold its first meeting. It is planned to hold the crowd until midnight. Then the crowd is expected to offer three-cent fares on all the lines radiating from Memorial Hall, and refuse to pay more."

Full details of the proposition follow, with the information that the project is in charge of one of the city's councilmen at large, who, when asked, "What if in the meantime the federal court issues a restraining order preventing the city from enforcing the ordinance?" said:

"There comes a time in the history of men and nations when things go too far, I, for one, am willing to obey any reasonable injunction, but I will obey no injunction that takes away from the people of this city their rights."

Following, was this:

"It is intimated that at the meeting of the Central Labor Union of Thursday night resolution will be approved calling on all labor union men to attend the mass meeting on Friday night. These men *may furnish the sinew to see to it that three-cent fares are accepted by the conductors* after the new ordinance becomes effective."

The editorial page of this issue contained, in type larger than that of ordinary reading matter, a two-column wide denunciation of the "Doherty outfit," who need "very badly in their business * * * a franchise that will make the millions of water in their bonds and stock as good as money in the bank." It is entitled, "Municipal Ownership the Only Way to Street Railway Peace," and the plaintiffs in the Doherty Case are described as "arrogant franchise manipulators" who now begin "to smile sweetly at the people." They are said to complain that the company cannot operate for three cents because it "has to have a fare that will enable them to pay \$800,000 a year interest on watered bonds and then pay dividends on stock that is all water—every penny of it"; and that they seek a franchise which "carries with it the right to levy a street railway tax on the people of Toledo—not all of the people of Toledo, but merely those who don't own automobiles and have to use the street cars." Having thus treated of the plaintiffs in the action, the writer thus introduces the court before which they are suitors:

"And now the railway crowd has taken the franchise into the United States court. That means, practically, that the rights of the people of Toledo will be placed in the hands of a two-legged human being who happens to be a federal judge.

"Just what kind of a judge this particular judge may be, and just what kind of a two-legged human being he is, we don't know. But the fact that he is a judge, and a federal judge at that, doesn't make him any more or less of a man than he was before he went on the bench.

"So the people's rights here will depend largely upon how his mind works, and whether he thinks in straight lines or around corners. Anyhow, whether he is a great big man or a little bit of a man, he will have a whole lot to

say in finally determining the argument between the people of Toledo and the bond and stock gamblers and speculators."

The excuse for this editorial is to demand that the city employ, to assist the solicitor, attorneys "to impress the court" who equal in ability "the high priced legal talent that is for sale to the highest bidder" and employed by the "Big Con," and thus prevent, if possible, the latter from getting a "strangle hold" on the people in the courts.

In a written argument filed by counsel for respondents, this production is dismissed from consideration as "merely an intensely emphatic assertion" of the judge's human limitations.

Author-Respondent Cochran, disclaiming any intention to reflect on the judge's integrity, testified that he wrote it in language which the common people would understand, and in such a way as "to get the punch in" and to make the people take an interest in the case; that, although Judge Killits had held court in Toledo for nearly four years, he did not know whether or not he was a judge who would try cases exactly on the law, or be specially impressed by the professional standing of counsel for either party.

As part of the same editorial page appeared this:

"Holding court over the telephone is a new one, but, it seems to be a very satisfactory method of doing business."

March 26, being the day of the hearing, the paper carried a heading in type nearly an inch high and extending across the whole front page, "*Killits Upsets Low-Fare Order*," repeating the heading on another page to which the subsequent article was carried. For subheads, it said:

"*Holds Schreiber Ordinance Should be Suspended Until Hearing as to its Fairness. Instructs Marshal to have Deputies Ready to Enforce Ruling.*"

In the body of the article it is made very clear that the impression conveyed by these headline statements is *wholly false*, for it is said, what was a fact, *that there was no hearing in Cleveland; that the judge—*

"was ill in bed with a temperature of 102. He postponed the hearing until he could return to Toledo on Saturday. Judge Killits sent a five-page type-written communication, through Clerk Wilson of the local United States court, for the information of the people of Toledo."

The statement was published in full and was nothing more than a setting out of the respective rights of the city and the traction company when a franchise expires, and an appeal to the judge's fellow citizens to maintain order until the court could hear the question, expressing confidence that, notwithstanding what had been predicted of the meeting for Friday night, the good sense of the city would preserve order. Not a word can be found in it which even hints any conclusion as to the merits or demerits of the issue presented by the motions. The only possible foundation for the assertion of the heading was contained in a separate statement on page 5 of the issue, in which this was said of the court:

"In a brief statement from the bench here to-day, Judge Killits said *no formal order had been issued in regard to the Toledo car situation, but that*

one might be issued on Friday night if the situation warranted. The judge assumed the bench only for a few moments. He said: 'As a citizen of Toledo, I ask that both the representatives of the city and of the company approach these problems in the proper way. It is plain to me that there is a chance to settle these questions with honor to both sides. No reasonable man wants to be other than fair to the company and the company must be fair to the city. No formal order has been issued, but if conditions warrant it to-morrow night one will be issued.'

The same issue of the 26th contained this:

"Preparations are going on for an enormous mass meeting at Memorial Hall on Friday evening to deal with the street car situation. Leaders have been planning to hold the crowd until midnight and ask that they tender only a three-cent fare when they board the cars after that hour."

It is also reported that the Central Labor Union would advise labor union men to attend the meeting in force.

Besides, four editorials were published in this issue, one to the effect that "the people will have a sort of referendum vote as to whether they will pay three cents or five cents for a ride on the street cars"; another poking fun in a familiar way at persons prominently connected with the pending case, respecting the proposed meeting in Memorial Hall Friday night; another giving assurance that the police will not "use their clubs on car riders who refuse to pay more than three cents car fare after Friday," because Sam Jones, some time mayor of Toledo, once said that "*the law is only what the people will back up.*" The last was under the heading, "In the Balance," and was:

"The case of the rights of 200,000 common people versus the rights of some wealthy investors and speculators will now be placed in the balance by a judge of the United States court. Let substantial and not technical justice be done."

On Friday, March 27, the day before the ordinance was to be effective, it was announced that all parties urged that no violence be indulged that evening, but that the meeting for Memorial Hall that night would be held. The fact that the court hearing would not be until Saturday forenoon was announced. By way of cartoon, a double one was offered, labeled, "As we lose Kapp we get Lapp." One panel represented the marshal of this court (Lapp) proceeding in great haste towards Toledo, bearing a hand bag marked "Order from Judge Killits," although in fact there was no order; while the other depicted the public safety director of the city (Kapp), who was the head of the city's police department, in equal haste on his way to Philadelphia. Editorially, under the caption, "The Big Con's Attitude the Same Old Defiance of the People," set in large type, in double-column space, it was said, among other things:

"It is now a trespasser on many streets of Toledo, and will be on practically all of them by to-morrow morning. It has now rushed into the federal court to try to take from the hands of the people of Toledo the right to control their own streets, and to make terms under which the Big Con may use those streets."

That there was a lively possibility of much disorder on the expiration of the franchises there can be no question. The News-Bee's news article of the 27th spoke of "the anxiety about trouble Friday night" as

part of the situation; and "featured," with large headlines, that a sentiment that the city should not be disgraced by disorder was arising causing much protest against tendencies in that direction already noted in its columns. The fact that cots were being placed in the federal building to facilitate night service of United States marshals, if necessary, was the text of another article, with the announcement that officers in addition to those stationed in Toledo were to arrive from Cleveland to assist in preserving order. The paper had the enterprise to print the portraits of two of the local deputies in this connection. To avoid a chance for disorder the street car company notified conductors to carry persons free after Friday night who refused to pay more than three cents. In two days the free riders numbered more than 62,000.

Saturday's issue (March 28) published a news article in five columns on the situation, under a main headline across five columns: "Thousands Riding Free; Killits Hears Big Con Plea"—in which the order of the company is printed that persons be carried free rather than that conductors have any controversy over the tender of three-cent fare pending the court proceedings, and it was stated that the court was hearing the motions against the ordinance. For a cartoon in connection with the news article and relating to the attempt of the mayor to insist on a three-cent ride during the night, that officer is represented as saying "I'll pay no more than three cents," with Mr. Doherty advising the conductor that the mayor should be regarded as his guest. The title of the cartoon was: "Doherty—The Man Who Put Con in Conductor."

Monday evening the motions for a temporary injunction restraining the enforcement of the ordinance were denied, because the measure itself provided that it should be enforced through an order out of the state court for which the city solicitor was directed to and, it appeared, was about to apply. It was obvious that the reason advanced in this court for a temporary injunction, namely, that the ordinance was unreasonable, was available to the company to resist the solicitor's application for an order out of the state court to enforce it, and that, until the state court had found it enforceable because reasonable, the company could stand its ground against it and in such attitude was entitled to protection. The ordinance was neither self-enforceable nor operative without order of some court.

Although the court had specifically held that the city could summarily stop the use of the streets for traction purposes by the company, the same issue (March 31) of respondents' paper which carried the decision bore this editorial utterance:

"To the layman it appears peculiar that the city cannot stop the company's cars because the public is entitled to the service or requires it, but the company can stop the cars at once on expiration of its franchise rights, regardless of the needs of the people. Reminds us, somehow, of the elder Vanderbilt."

By answer respondents say that, if this may be construed as a misrepresentation of the court, "the error was unintentional."

Early in August, the main case being still on the docket of the court, the plaintiffs and the defendant traction company filed supplemental pleadings setting up the failure of the city solicitor to proceed, as it was

asserted he had agreed to do, to seek an order for the enforcement of the ordinance according to its provisions; that because of threatened disorder the company was carrying passengers free who insisted upon three-cent rides; that its losses in this behalf aggregated a thousand dollars a day; that its protests to the city were met with specific orders to the police of the city to require the company to carry passengers for three cents, with a policeman on each car for that purpose, if necessary; and that the city was threatening to compel the company to maintain a street car service under the ordinance and to restrain, by the use of the police force of the city, the removal of its cars from the streets.

Motions were renewed under these circumstances, supporting by affidavits the prayer of the pleadings in the case that an injunction be granted restraining the city from compelling the company to maintain service in the city under the Schreiber ordinance and from preventing the company from removing its cars from the streets and discontinuing its service. An affidavit filed before the hearing of these motions, and never denied, set forth the fact that to the date of the hearing the company had been compelled to carry free under these circumstances 8,000,000 passengers.

August 14, hearing on these motions was taken up. Testimony was then produced tending to show that the ordinance was confiscatory; that the company in fact, with the routing of lines then obtaining, could not carry passengers for three cents and pay bare operating expenses. On this showing, the city was directed to support the ordinance by testimony, and, at the city's request, the hearing was passed to September 8, that the city might be prepared. This was plainly, as shown by the record and the court's statement, the familiar situation of the sustention of the burden of proof by the side having the affirmative and the requirement upon the negative (here the city) to then produce its defense, yet the News-Bee treated it, in an article headed: "Test of Schreiber Ordinance in U. S. Court Sept. 8. Killits Puts Burden on the City"—as though the court were requiring the city to prove primarily its legislation to be valid. The impression so occasioned seems to have been the inspiration later of an inflammatory attack on the court by a local organization, out of which grew the attachment for contempt of John Quinlivan.

From August 14 to September 5 the court was allowed to escape the paper's attention. On the last-named date, this editorial paragraph appeared:

"If Judge Killits should be held in Canada while Henry L. Doherty is marooned in Wall street, what would we ever do? Still Peter Parker is always willing to give us good advice."

The Peter Parker referred to is admitted to be a citizen who had once been subject to much criticism, whereupon he left the city. Returning some time afterward, he had been a frequent writer of letters to the News-Bee on public questions.

September 6, the Socialist "local" of Toledo adopted resolutions relative to the pending case. On the 9th, while the court was hearing the case, the News-Bee published a portion of the resolutions in the following article:

"Socialists Call Big Con Trespasser."

"Toledo local of the Socialist party has adopted a resolution which refers to the street railway company as a trespasser in the streets, and claims no judge has legal authority to compel a city to insure a corporation profit. The resolution concludes:

"We contend that the present Schreiber ordinance is prior to, and above any judge or court made law. And we contend that no judge, federal or otherwise, has the right to unmake laws made by a duly elected legislative body. We contend further that the people of Toledo have by their votes sustained the Schreiber ordinance."

September 8 and 9, the motions were finally heard. On the last day the city, through the solicitor, admitted that the ordinance was unreasonable and impossible to be followed by the company without loss. The court then took the issues under advisement, stating distinctly that no decision would be handed down for two or three days, when we should have considered the objections to jurisdiction advanced by the city. It was also stated that, if the court should decide to restrain the operation of the ordinance, the enforcement of the order of injunction would be suspended for a short time to allow public feeling to cool.

Although it was plain that yet the court had taken no final action, that it was still considering its jurisdiction to act at all, the issue of the News-Bee of the 10th, containing an account of court proceedings on the 9th, was headed with the false statement in large type on the front page: "Low Fares Banned by U. S. Judge." The evening of this issue, at the regular meeting of the Central Labor Union, made up of accredited delegates from the numerous labor organizations of the city, a resolution was read by John Quinlivan, business agent of the union, denouncing the court for placing "the burden of proof of the Schreiber ordinance on the city," and recommending that preliminary steps be taken by the union for the judge's impeachment should he render a decision in the case adverse to the city. The issue of the News-Bee, September 11, contained an account of this meeting and the discussion of the proposed impeachment, under the heading: "Judge Killits is Criticized in Central Labor Union Meeting."

An attachment was issued September 11 for John Quinlivan; whereupon, in the first edition of the News-Bee of Saturday, the 12th, on the streets before the court's decision in the pending case, in the guise of printing the news of the proceeding against the labor organizer, the offensive and threatening language attributed to him was extracted from the body of the article and placed in different and more prominent setting, embellished with a rule border known as "boxing," as a distinctive feature of the front page, after this fashion:

"Killits Accuses John Quinlivan of Contempt."

"Basis of Charges Against Union Leader."

"These are the remarks alleged to have been made by John Quinlivan, and on which Judge Killits bases his contempt charges:

"The street car situation of Toledo is in the bands of a friend of the Rail-Light.

"Judge Killits has demonstrated from the first that he was at all times favorable to the Rail-Light.

"Any fair-minded citizen will see that when Killits placed the burden of proof of the Schreiber ordinance on the city that the city was going to be

the goat. The Central Labor Union should adopt stinging resolutions and let our federal friend know what we think of him.

"The burden of proof should have been placed on the Rail-Light. Killits and the press are preparing to hand the people a lemon. They are unfair to the people.

"Impeach Killits."

These publications conclude the foundation for the first count.

Under the second count, the information sets up that in issue of September 12, under the heading, "Quinlivan is Ready to Defend Killits Contempt Charges," the paper published an account of Quinlivan's attachment, in which it is said that "Judge Killits stated on Saturday that he would hear the case himself"; and that, on the 14th, again in a news article dealing with the same case, the statement was repeated in this form, "Killits has announced that he will hear the case"; and that, on another page of the issue of September 14, a communication, under the head, "In the Editor's Mail," was published, reading:

"The Quinlivan Case.

"To the Editor:

"Regardless of whether Judge Killits has or has not the right to sit in judgment in the Quinlivan case, it seems to me that the ethics of the affair would lead him to either appoint some other judge to hear the evidence, or better still, have some other authority make the selection. It stands to reason that such tactics on the part of the judiciary will not have a tendency to instill in us more confidence.

[Signed] Paul G. Dennie."

It was testified by Managing Editor Howard that this letter was written in his office by Dennie and edited and revised by him (Howard). And in the same issue, casting its utterances in prominent black-face type set across two columns, at the head of the editorial page, the paper said:

"Would it be contempt to remark that it is a peculiar situation where the officer who makes the charge, also considers the evidence, renders the verdict and imposes the sentence."

As the offering under the third count, it appears that a rule in contempt was issued out of this court for Harry J. Howard, managing editor of the News-Bee, directing him to show cause why he should not be punished for contempt for certain publications, including those set up in the second count and dealing with Quinlivan's case, and that said proceeding against Howard was pending when, with relation thereto, respondents published, as a feature of the first page of the paper for September 17, in larger type than that used ordinarily for reading matter, and across two columns this, with reference to the charge against Howard:

"The News-Bee and Judge Killits.

"As we see it the public interest in the contempt proceedings instituted by Judge J. M. Killits against the News-Bee and Managing Editor Howard, depends not so much on what the judge sees fit to do or not do, as it does upon how his action may affect the policy of the News-Bee.

"It has been the policy of this paper in the past to discuss frankly and fearlessly all questions of public policy and interest. And without regard to whether our statement of the truth, as we see it, pleases or displeases this, that or the other citizen—even though that citizen happens to be what is commonly known as a judge.

"We have no desire to influence the conduct of any judge in interpreting the law in any particular case. And we have no intention of permitting any judge of any court to influence our judgment in defending the public interest.

"We don't want to censor judicial decisions, and will not permit judicial censorship of the News-Bee's editorial policy.

"We have notions of our own about contempt of court. One of them is that nobody but the judge himself can inspire public contempt of the court over which he happens to preside.

"The people of this country, because of patriotic education from early youth, start out with respect for our federal courts. When that respect changes to contempt, it can be only because of the conduct of a judge or judges.

"We have said before that after all, Judge Killits is no more than a two-legged man like any of the rest of us. We repeat it for the sake of emphasis. No judge judges by divine right even though he holds his job for life.

"No judge is infallible or omnipotent. No physical or mental change takes place when he is lifted from the practice of law and placed upon the bench, that transforms him from a human being into a god.

"And what kind of a judge he turns out to be depends almost altogether on the kind of a man he was beforehand.

"We shall not discuss now the merits of this particular case. We do not discuss cases while they are pending, with any purpose of interfering with the administration of justice.

"We prefer to give every judge free rein to make either a Solomon or monkey of himself, if either be possible.

"But once the case is decided, we shall say and publish whatever we think best for the public good, whether it pleases or displeases any judge—even if that judge happens to be John M. Killits."

The News-Bee is published daily in several editions. On the 17th of September the foregoing article appeared in the so-called noon edition. About 1 o'clock of the 17th an order to show cause in contempt was filed against the Toledo Newspaper Company, Cochran, and Howard, based on the several publications, including the foregoing, appearing in the early edition of that day. Mr. Cochran testified that he was aware of the filing of this order and its scope as soon as it was filed, being at the courthouse at the time. Four subsequent editions of the News-Bee were published on the 17th, including its regular or home edition, each bearing the above editorial across two columns in the center of the front page, while in an adjoining column was, in each edition after the noon edition, an account of the fact that respondents were directed to show cause why they should not be punished for contempt for publishing, among other things, the identical writing. This order was superseded by the present information.

[1-4] The inquiry is direct, of course, whether the offenses charged to respondents are within the scope of section 268, Judicial Code (section 725, R. S.; Act of March 2, 1831), which reads, so far as it applies here at all, as follows:

"The said courts shall have power * * * to punish * * * contempts of their authority: Provided, that such power * * * shall not be construed to extend to any cases except the misbehavior of any person in their presence, *or so near thereto as to obstruct the administration of justice,*" etc.

The language respecting the proviso has been slightly changed from the original act, but it is plain that the revision has not made necessary

a different construction. It is settled that the statute is a limitation, through definition, upon the powers of inferior federal courts to punish contempts by summary process. *Ex parte Robinson*, 19 Wall. 505, 510, 22 L. Ed. 205, and cases citing it.

It is contended by respondents, upon authorities soon to be considered, that the statute was intended by Congress to, and does in fact, completely exempt newspapers from responsibility in contempt under all circumstances. This claim, and its support, are deemed worthy of fullest consideration.

But one federal case is known to us to be reported and decided prior to the act of 1831, but under the act of 1789, directly dealing with an alleged newspaper contempt; the act of 1789 providing power in the courts "to punish by fine or imprisonment at the discretion of such courts all contempts of authority in any cause or hearing before the same." We refer to the case of *Hollingsworth v. Duane*, Wall. Sr. 77, Fed. Cas. No. 6,616, in which the court, two judges sitting, held that:

"Any publication, pending a suit, reflecting upon the court, the jury, the parties, the officers of the court, the counsel, etc., with reference to the suit, or tending to influence the decision of the controversy, is a contempt of the court, and punishable by attachment."

Decisions to the same effect in state jurisdictions were not rare, and that this was a proposition undebatable at common law we believe will not be disputed, whatever may have been the uncertainty of the common law respecting mere libels on judges or attacks on the courts not connected with pending causes; and the act of 1879 undoubtedly was designed to clothe federal courts with common-law powers in this respect, although the Supreme Court, in *United States v. Hudson et al.*, 7 Cranch, 32, 3 L. Ed. 259, said:

"To fine for contempt, imprison for contumacy, enforce the observance of order, etc., are powers which cannot be dispensed with in a court, because they are necessary to the exercise of all others; and so far our courts, no doubt, possess powers not immediately derived from statute;"

—thus seeming to suggest that statutory authority was not necessary. Many subsequent decisions of the Supreme Court approving the Hudson Case, although holding that the act of 1831 acted as a limitation upon the exercise of the power, so decidedly affirm its inherency in a court of general jurisdiction as essential to the tribunal's very existence as to render it very doubtful if that court would support an act taking away the power altogether from one of this jurisdiction. *Ex parte Robinson*, supra; *Ex parte Terry*, 128 U. S. 289, 302, 9 Sup. Ct. 77, 32 L. Ed. 405; *Interstate Commerce Commission v. Brimson*, 154 U. S. 447, 489; 155 U. S. 3, 14 Sup. Ct. 1125, 15 Sup. Ct. 19, 38 L. Ed. 1047, 39 L. Ed. 49; *Ex parte Savin*, 131 U. S. 267, 275, 9 Sup. Ct. 699, 33 L. Ed. 150; *Eilenbecker v. District Court*, 134 U. S. 31, 36, 10 Sup. Ct. 424, 33 L. Ed. 801; *In re Debs*, 158 U. S. 564, 594, 15 Sup. Ct. 900, 39 L. Ed. 1092; *Bessette v. Conkey*, 194 U. S. 324, 327, 24 Sup. Ct. 665, 48 L. Ed. 997.

The case at bar demands a construction of just so much of the statute quoted. If respondents are responsible, it is because we must conclude

that, upon the whole case, the acts charged against them have the quality of misbehavior so near the presence of the court "as to obstruct the administration of justice."

At the outset we are relieved of the consideration of the constitutional guaranties of a free press, by the decision in *Patterson v. Colorado*, 205 U. S. 454, 462, 27 Sup. Ct. 556, 558 (51 L. Ed. 879, 10 Ann. Cas. 689), in which the court, speaking in a case of newspaper contempt, said of the guaranties in the first and fourteenth amendments:

"In the first place, the main purpose of such constitutional provisions is 'to prevent all such *previous* restraints upon publications as had been practiced by other governments,' and they do not prevent the *subsequent* punishment of such as may be deemed contrary to the public welfare."

The court holds that the rule which made criminal libel punishable despite the guaranty of a free press "applies yet more clearly to contempts." No case has been more generally cited with approval on this subject than *Respublica v. Oswald*, 1 Dall. 319, 1 L. Ed. 155 (1788), a case of interference by publication with judicial proceedings in a pending cause, in which, considering the constitutional guaranty, the court said that "it is impossible that any good government should afford protection and immunity" to those who abuse the privilege of a free press. The current of authority since to the same effect is unbroken.

The main proposition asserted by respondents, if valid, produces a startlingly absurd result. According to it, they are immune from responsibility for an attack upon an Ohio federal court under the construction, for which they insist, of section 268, Judicial Code, which conduct, if perpetrated upon an Ohio state court under precisely similar circumstances, would involve them in attachment for contempt under a state act of almost precisely the same tenor as that of the federal act, and passed by the Ohio Legislature in imitation of the latter (Ohio Act of 1834; section 5639, R. S.; section 12136, General Code of Ohio). The decision of *Myers v. State*, 46 Ohio St. 473, 22 N. E. 43, 15 Am. St. Rep. 638, to be discussed later, settles responsibility of newspaper editors and publishers under such circumstances in Ohio procedure, and, following *Patterson v. Colorado*, *supra*, which cites *Myers v. State* with approval, a conviction in the state court under the Ohio statute would be upheld by the Supreme Court of the United States.

It cannot be that statutes of substantially the same scope and language in two jurisdictions of the same geographical application should so vary in meaning and intent that one should have virility, with respect to a powerful public influence, to vindicate the highest public interest, while the other, in an application to the same kind of circumstances, should be impotent to sustain in any degree the same function.

Chancellor Kent, on an occasion hereinafter referred to, said that such a construction of the act offered by respondents was unreasonable. Nevertheless it is supported by direct authority. *In re Poulson*, Fed. Cas. No. 11,350, a Circuit Court case in 1835, in Pennsylvania, the judge sitting therein entertaining the same view of the law in *United States v. Holmes*, Fed. Cas. No. 15,383. In some measure, also, it is the view of the court in *Re May* (D. C.) 1 Fed. 737, 743; *Morse v. Montana Ore Co.* (C. C.) 105 Fed. 337; and *Cuyler v. A. & N. C. R.*

(In re Daniels) 131 Fed. 95, a decision by the District Court in the Eastern District of North Carolina.

We are confident that it may be made entirely clear, if we may be allowed time and space necessary, to show that this claim for the act's purpose is untenable; that Congress never intended to, and did not, immunize newspapers from responsibility in contempt for interference by improper comment on pending cases; and that a myth in this respect has grown up, having its origin wholly in the views of the court in the Poulson Case, *supra*, Baldwin, Justice, that being the first reported decision after the act of 1831. In understanding Justice Baldwin's views, it may be well to consider that he was a Pennsylvanian, from a state whose Legislature in 1809 had passed an act declaring that no newspaper comment, however invidious, concerning a pending case, should be construed into a contempt punishable by summary process. He says, in fact, in his opinion, without the slightest record to justify the assumption, that he believes Congress to have been influenced in the passage of the act of 1831 by the Pennsylvania statute. He laments:

"The court is disarmed in relation to the press; it can neither protect itself, or its suitors; libels may be published * * * without stint; the merits of a cause depending for trial or judgment may be discussed at pleasure; anything may be said to jurors through the press, the most willful misrepresentations made of judicial proceedings, and any improper mode of influencing the decisions of causes by out of door influence practiced with impunity. * * *

"The press is free, if not set to work in the presence of the court, or so near as to interrupt its business. The law does not prohibit any endeavor made to influence or intimidate a juror or witness, if corruption, force, or threats are avoided. Papers may be put into their pockets, conversation held with them, newspapers put into their hands, or statements made in relation to any matter in issue while they are actually impaneled. The court may regret and censure the practice, and perhaps admonish the party who thus tampers with a juror or witness, but can neither punish the offense nor prevent its repetition. The law has tied their hands. The judges must be passive. It is not for them to be the first to set the example of disobedience to the law, or attempt to evade plain enactments. * * *

"For the protection of parties, for their security of a fair and impartial trial and decision of their case on the evidence and law which apply to it, to defend them against the efforts of the press or of individuals to excite a prejudice in the minds of a jury, to induce them to find a verdict on out of door statements, or other means of perverting their judgments—no legal check is interposed."

There is much more of the same language in the Poulson Case, which finds its echo in a subsequent opinion of the same judge, being the second decision under this statute—United States v. Holmes, *supra*.

If this were the law, then indeed would an inferior court of the United States be largely shorn of "one of the attributes, one of the powers necessarily incident to a court of justice"—the power "of vindicating its dignity, of enforcing its orders, of protecting itself from insult." Eilenbecker v. District Court, 134 U. S. 31, 36, 10 Sup. Ct. 424, 33 L. Ed. 801.

That this court is not so impotent we are prepared to insist, notwithstanding the authorities cited, all of which clearly are influenced by these views of Justice Baldwin, which, on the record we shall hereafter produce, are surely erroneous. We digress, however, to note that one

of the two reasons given by Justice Baldwin in confirmation of his faith has disappeared with the decision in Savin, Petitioner, 131 U. S. 267, 9 Sup. Ct. 699, 33 L. Ed. 150. The second section of the act of 1831, now section 5399, Rev. Stat., made it a crime to "corruptly or by threat, or force, obstruct or impede, or endeavor to obstruct or impede, the due administration of justice," etc. Justice Baldwin said:

"This provision is in further confirmation of the view taken of the first section. It is a clear indication of the meaning of the law, that the misbehavior which may still be punished in a summary manner does not refer to those acts which subject a party to an indictment. To construe it otherwise would be to authorize accumulative punishment for the same offense. * * * The first (section) 'alludes to that kind of misbehavior which is calculated to disturb the order of the court.' * * * 'The obstruction of the administration of justice,' in the first section, refers to that kind of behavior which actually disturbs the court in the exercise of its function while sitting"—while, he proceeds to say, all other invidious acts, if reached at all, are under the second, or criminal, section.

But the Supreme Court, in the Savin Case, held that the federal courts, under this act, may punish summarily as contempt, under the first section, misbehavior which is also punishable by indictment under the second section of section 5399, R. S.

In the May Case, supra, the point decided was that a juror was in contempt for misbehavior near to the presence of the court when he visited a codefendant, under an indictment in which separate trials were had, at the latter's home, and there talked on the merits of the case on trial. The court said (1 Fed. 737, 742):

"The act does not define how near the court the misbehavior must be, nor the character of such misbehavior, and I think it may fairly be construed to extend to any misbehavior by a juror, in his capacity as such, wherever committed, since such misbehavior necessarily tends to obstruct the administration of justice."

There was clearly no occasion for the court to say (page 743 of 1 Fed.):

"The act was passed for the purpose of preventing the courts from interfering with newspaper comments upon trials."

In the Morse Case, supra, the decision was that a party aggrieved by improper newspaper comment pending his case was not precluded from urging its prejudicial influence on the verdict as a ground for new trial by a failure to ask for an attachment in contempt. As a nonessential part of the opinion's argument, the court expressed a doubt whether contempt would lie in the circumstances then before it.

The views, therefore, of Judges Brown and Knowles respecting this matter are pure dicta. The Daniels Case (C. C.) 131 Fed. 95, upon which respondents so strongly rely, will be considered later.

We would not venture to disagree with the construction of a statute by a justice of the Supreme Court, although sitting as a nisi prius judge, extended in an opinion so nearly contemporaneous with the passage of the act, unless fortified with very considerable support. Justice Baldwin's views are, as we shall see, plainly the control of whatever subsequent authority respondents are able to offer. They are so confident, comprehensive, and positive as to seem to have been uttered

ex cathedra. However, he bases them upon contemporary history, the record of which is as available to us for examination as in his time. This is not a situation where there has been a continuous and consistent construction for a long period; for, when we consider the authorities offered by respondents, all controlled by the Poulson Case, we find that all but one of them are pure dicta, and the other nearly if not quite so (*In re Daniels*, discussed *infra*); and when the principal reason relied on by Justice Baldwin for his holding, namely, that the criterion of "nearness" to the court's presence which resolves a misbehavior into a contempt is a physical or topographical propinquity to a sitting court, is considered, we find him supported only by what is seen to be but a dictum of Justice Field, in *Re Robinson*, *supra*, to be later considered, while it is controverted by very important series of decisions by *all the federal courts* down to the present time.

The Poulson Case is respectable because of the time of its decision and the eminent quality of the judicial mind which considered it. As to the first, if we may judge of the paucity of reported cases, the federal judiciary has not suffered many attacks of the character before this court, which might call its soundness into question. Of the second element of importance, it may be said that the infallibility of an inferior court decision is to be tested by the premises and the soundness of its reasoning.

Again, this decision does not gain strength because it is of a statute couched in ambiguous language (*Houghton v. Payne*, 194 U. S. 88, 99, 24 Sup. Ct. 590, 48 L. Ed. 888); for no ordinary construction of section 268, or of the original act, produces a hint that any category of behavior involving obstruction of justice is immune. It cannot be claimed, of course, that any right acquired by virtue of the construction in the Poulson Case will be divested if it is disregarded. Where no rights intervene, especially when the language is unambiguous, a question of construction of a federal statute is not judicially settled until the Supreme Court has spoken. *Wilson v. City Bank*, 17 Wall. 473, 21 L. Ed. 723; *Andrews v. Hovey*, 124 U. S. 694, 716, 8 Sup. Ct. 676, 31 L. Ed. 557.

The opportunity to go into the legislative history of an act whose scope is a subject of controversy is clear. We do not ignore that, generally, the statements of views of members of Congress, in debate, are not proper sources of the meaning of a statute (*United States v. Freight Association*, 166 U. S. 290, 318, 17 Sup. Ct. 540, 41 L. Ed. 1007); but the character of the debate, whether sentiment was divided or unanimous, the environment of a bill, its legislative vicissitudes, and pertinent contemporary history, may be considered (*Johnson v. Southern Pacific Co.*, 196 U. S. 1, 20, 25 Sup. Ct. 158, 49 L. Ed. 363; *Lincoln v. United States*, 202 U. S. 484, 498, 26 Sup. Ct. 728, 50 L. Ed. 1117; *Standard Oil Co. v. United States*, 221 U. S. 1, 50, 31 Sup. Ct. 502, 55 L. Ed. 619, 34 L. R. A. [N. S.] 834, Ann. Cas. 1912D, 734). In Johnson's Case the court went to the Congressional Record to ascertain "the mind of Congress" to assist it in construing the automatic coupler act, and, in the Lincoln Case, the division of sentiment over the

act of July 1, 1902, attempting to ratify executive dealing with the Philippines, was considered in interpreting that statute.

Especially might this court go to the legislative history of the act when it is asked to follow a construction violating, as that of Justice Baldwin seems to, several accepted canons of interpretation. A statute under construction should be harmonized with prior acts and decisions, if reasonably possible. *Blair v. Chicago*, 201 U. S. 400, 459, 26 Sup. Ct. 427, 50 L. Ed. 801; *Lincoln v. United States*, *supra*. The interpretation should be reasonable, and should be that which comports with the public welfare or public policy, as the Supreme Court applied the rule to railroads in construing the Sherman Act. *United States v. Freight Association*, *supra*, 166 U. S. at pages 320 et seq., 17 Sup. Ct. 540, 41 L. Ed. 1007.

In *Harris v. Runnels*, 12 How. 79, 86 (13 L. Ed. 901), the court said:

"It is a rule, if effects and consequences shall result from an interpretation of a statute contrary and in opposition to the policy which it discloses, * * * such an interpretation must be rejected."

Justice Baldwin would read into the statute an exception from its operation which is against public policy, and, in doing so, antagonizes the principle that a purpose in derogation of the common law must be, at least, visible.

In *Maxwell v. Dow*, 176 U. S. 581, 602, 20 Sup. Ct. 448, 456 (44 L. Ed. 597), the Supreme Court said that it is less material, in case of a constitutional amendment, to consult the legislative history of a measure, than when an ordinary bill or resolution is to be interpreted, but, even then :

"The safe way is to read its language in connection with the known condition of affairs out of which the occasion for its adoption may have arisen, and then to construe it, if there be therein any doubtful expressions, in a way so far as is reasonably possible, to forward the known purpose or object for which the amendment was adopted. This rule could not, of course, be so used as to limit the force and effect of an amendment in a manner which the plain and unambiguous language used therein would not justify or permit."

Wherefore, we submit, we may refer to the impeachment of Judge Peck, closing with his acquittal January 31, 1831, as the inspiration of the act in question. The act's genesis in that trial is historically conceded, and it is clearly discernible from the records of both the trial and the act's passage that, not only is an interpretation to wholly exempt newspapers from the measure's operation not sustained in any degree by utterances on the floor of either house of Congress, but is inconsistent with the whole current of debate. The charge against Judge Peck was based on the fact that, having in December, 1825, handed down orally an opinion *determining finally* a case then before him and reducing his judgment to a decree specifying the precise points upon which the court reached its determination, three months thereafter he published a written opinion, in which he confessedly traveled, not only outside of his oral delivery, but beyond the record of the concluded case, and that, because counsel in the case in print criticized the reasoning of the judge in this published opinion upon matters, as the judge himself confessed, not before him in the original hearing, he attached

the latter as in contempt of course, and imprisoned him, and disbarred him from practice for 18 months. For the facts now presented, an examination has been had of the Congressional Globe for the 21st Congress, of the journals of both Houses, of Gales and Seaton's Register of Debates, and of Benton's Abridgment.

The day after the House received the report of the failure of the impeachment (February 1, 1831), Mr. Draper, of Virginia, submitted the following resolution, which was agreed to without a division:

"Resolved, that the committee on the judiciary be directed to inquire into the expediency of defining by statute all offenses which may be punished as contempts of the courts of the United States."

What Mr. Draper had to say in explaining the purpose of this resolution is all the reported discussion had in either House on the subject after the Peck trial; wherefore we quote briefly: Saying that it was not his intention to discuss a question which had recently been much agitated elsewhere, he continued:

"I wish to know whether if I myself choose to go into the public newspapers to defend any vote I give here it be not competent for any man who thinks proper to do so to enter the same forum upon equal ground to show that my opinion is wrong."

And, following with an argument that it would not be contempt of the House if it were sought to criticize him under such circumstances, and that no other department of government should have protection denied to the legislative, he proceeded:

"Whenever an individual in office *lays aside his official capacity*, and endeavors by argument and reason to convince others that anything which he has done officially had been done properly, he has a right to be met by whomsoever, differing in opinion from him in any forum which he himself may select. * * * It may be said, sir, in opposition to the object of this resolution, that there will be difficulty in defining contempts of court. Though this may be true, we shall find no difficulty in defining what are not contempts. We can embrace, in any legal provision on this subject, many cases which are not contempts. We might say, for example, *that it would not be a contempt of court to express an opinion upon any decision finally made in court, etc.* We might declare that it should *not be a contempt of court in any one to say that a judge is not immaculate*. But the law ought to be so clear that every individual may be able to look to the statute book, and know whether, in any thing that he may do, he acts within the law or not." (The italics are ours.)

The proceedings of record thereafter were as follows: February 10, a bill (No. 620) "declaratory of the law concerning contempts of court," was orally reported from the judiciary committee by Mr. Buchanan, and, read twice, referred to committee of the whole House; February 28 read third time, and passed without debate, division, or roll call; March 1st passage of bill by the House referred to the Senate, and referred to the Committee on Judiciary; March 2 orally reported for passage with amendment by Mr. Webster, considered, read three times, and passed, without debate, division, or roll call; March 2, House concurred in Senate amendment, with an additional amendment, in which the Senate concurred, and the bill was passed. Nowhere is there recorded a statement of the nature of amendments, nor hint that anything more than formal attention was given to a subject which had been

thoroughly discussed in the Peck Case. The *Globe* does not contain a line on the subject after the introduction of Draper's resolution.

Going now, as we may (*The Delaware*, 161 U. S. 459, 472, 16 Sup. Ct. 516, 40 L. Ed. 771), to the debate in Peck's Case, if further light on the attitude of Congress out of which the act grew is demanded, we find that, when the resolution for impeachment was up for initial consideration in the House, Ellsworth, for the committee, directed attention to the fact that Judge Peck had "neither jurisdiction nor provocation; *he had finished the case, adjourned the court, and descended from his judicial station to that of an essayist of a newspaper.*" "Shall it be declared," said he, "to the American people that, *after a judge has given his opinion and dismissed the case*, he may arrest a citizen, drag him before his tribunal," and prosecute him for contempt?

When the matter was on for adoption of the report, Buchanan, making the principal argument, went into great detail to explain that the case was entirely concluded when the alleged contempt was perpetrated. He urged that, notwithstanding that the language of Blackstone and Lord Hardwicke "is sufficiently general to embrace other cases," the authorities either from England or America did not include any case in which the courts had attempted to summarily punish libels upon their proceedings "*except in causes actually depending.*" Continuing, he said:

"I shall not affirm that no case exists in which the courts of the United States ought to possess the power of punishing summarily for constructive contempts. If, whilst a cause is depending, particularly a case to be determined by a jury, an inflammatory publication should be made in the newspaper, touching the question to be decided, calculated to enlist public feeling in favor of the one party or prejudice it against the other, the court may possibly, under such circumstances, inflict justice upon the author." (Italics, here and elsewhere in this opinion, ours.)

In this connection he called attention to the law (passed in 1809) of Pennsylvania denying even this power to the state courts. A year later, closing the prosecution, he expressed a personal view that courts ought not have the right to punish summarily even libels respecting pending cases, however not urging the proposition as applicable against Judge Peck, but emphasizing again the fact that in the case before the Senate judicial functions had entirely ceased before Judge Peck attempted anything under criticism.

Other prosecutors whose addresses are preserved were McDuffie and Storrs. McDuffie, with great particularity, urged that the case had been concluded, that "*there was an end to the judicial functions of the judge as to that case,*" when he attempted to resent a published criticism of an "extrajudicial opinion." He asserted that no man of any sense would contend "that the judges of the United States had any power, any right to punish any libel, however flagitious, on any act of the court, *after it had been done, as a contempt.*"

Storrs maintained the position:

"That no free citizen could be punished by the summary process of attachment for *a libel or contempt against any court in a cause not pending in that court.* * * * and that the conduct of Judge Peck tended to break down all the securities and guards which the law had raised for the protection of the liberties of the American people."

There is *no intimation in any discussion* of intent to exempt newspapers from summary process in contempt *under all circumstances*.

It is worthy of note that two men of great influence, occupying opposite sides in the Peck controversy, handled this measure on its passage. Mr. Buchanan was chairman of the House judiciary committee. It would seem that, if he were asking Congress to follow Pennsylvania's example in completely immunizing the press, he would have produced a measure with little or no ambiguity in that respect. The record shows Daniel Webster to have been actively interested in Peck's trial. He voted with the majority of the Senate for acquittal. It seems very clear that, as chairman of the Senate committee in charge of the bill, he would not have recommended a measure to be interpreted as going away beyond the position of Peck's prosecutors, nor would others of the majority have allowed it to pass unchallenged.

Men notable in our history, in both houses, and who were from states whose courts then held, and still have, full common-law powers respecting contempts, interested themselves by vote and speech in favor of Judge Peck. It is unreasonable to claim that they would have been even silent, if this act was intended to put the press out of reach of its provisions, much less to have abetted such a proposition.

We must not forget that Congress, in entitling the measure "An act declaratory of the law concerning contempts," recognized a law already existing. The act does not confer new powers, nor does it limit powers theretofore actually enjoyed by the federal judiciary. It does not repeal the act of 1789. We loosely say that it limits the power, but the limitation inheres only in the definition which it provides. In declaring what the law is, Congress is but saying what it theretofore had actually been, and that any attempt to exercise the power theretofore had been unlawful, except in cases within some classification made by the act. Coming when it did, it must be taken as an expression of the view of Congress that facts analogous to those in the Peck Case do not constitute contempt as the law was and should be. There is nothing to suggest that the intention was to include in the limitation a range of misbehaviors relating to an entirely different state of facts, and infinitely more mischievous in their effect to obstruct the administration of justice.

We must assume that, in refusing the suggestion of Draper that it be categorically set out what situations shall not be within the summary power of the court, Congress intended the act to be construed in particular cases to meet particular conditions. Surely, if a great and influential agency for public direction and education, capable, in licentious hands, of directing courts to follow popular passion, were intended to be rendered absolutely immune by this act, the situation demanded that the Legislature should, and we have every reason to insist that it would have made such intention plain, at least by general language unmistakable in meaning. That it did not, under circumstances, excludes the thought that such was its intention.

The court, in the Poulson opinion, makes against its own conclusion in saying (page 1207 of 19 Fed. Cas.):

"On the trial (of Judge Peck) the law of contempt was elaborately examined by the learned managers of the House of Representatives and the counsel for the judge. It was not controverted that all courts had power to attach any person who should make a publication concerning a cause *during its pendency*, and all admitted its illegality when done while the cause was actually on trial. *It had too often been exercised to entertain the slightest doubt that the courts had power, both by the common law and the express terms of the Judiciary Act, § 17 (1 Stat. 83), as declared by the Supreme Court, to protect their suitors by the process of attachment.* With this distinct knowledge and recognition of the existing law, it cannot be doubted that the whole subject was within the view of the Legislature; nor that they acted most advisedly on the law of contempt." (Italics ours.)

If we follow the decision, then, we are forced to say that Congress, in declaring what the law is and had been, in intention and in effect worked a revolution of the law, condemned an application that theretofore had been undebatable, and, in compassing this intentional upending of principles which not only federal courts were applying to the satisfaction of everybody, but which no state Legislature at that time had attempted to change except Pennsylvania, language was used requiring strenuous effort at construction in order to get even a glimmer of such a purpose. We submit that upon the whole view it is more probable that Justice Baldwin's opinion was influenced by the Pennsylvania law, than that Congress was moved by it to work an awkward and obscure imitation.

Finally, to close this part of our opinion, we quote from a court whose state early adopted the federal act to be applied to its own courts. Saying (*State v. Galloway*, 5 Cold. [45 Tenn.] 326, 330 [98 Am. Dec. 404]) that the local statute was similar to the federal act, Poulson's Case is thus criticized:

"It is altogether probable that the *breadth of expression* employed by Judge Baldwin, to declare the immunity of the press, may require limitation, in case the matter published be of a character, and vicinity to the court, so as fairly to bring it within the class prescribed by the Code, which consists in 'the willful misbehavior of a person so near to a court as to obstruct the administration of justice.' See Poulson's Case, cited and commented upon in 1 Kent's Commentaries, 301."

The comment in Kent's (second edition) was in a footnote by Chancellor Kent himself, who characterized the law as interpreted by Justice Baldwin, to be *unreasonable* "in leaving the suitor unprotected at the moment when he stands most in need." Evidently the Tennessee court agrees with the chancellor.

Judge Jones, in *Ex parte McLeod* (D. C.) 120 Fed. 130, 137, 138, 139, put the matter very clearly in discussing the act of 1831. He says, with reference to the particular phase now before this court:

"It is questionable, to say the least of it, whether Congress intended to take away from the courts the existing common-law power to punish, as for a contempt, improper efforts, in the guise of published statements or comments, pending the trial of a particular case, to secure judgment therein, in obedience to the dictates of passion or prejudice, or to thrust other ulterior considerations before the tribunal, against which justice and the law seeks to guard judge and jury in the trial and decision of causes. * * *

"As we have seen, the chief purpose of the statute 'declaratory of the law of contempts of court,' approved March 2, 1831, which is now codified in section 725 of the Revised Statutes (U. S. Comp. St. 1901, p. 583), was to pre-

vent the punishment, as for contempt, of what were really only the exercise of free speech and liberty of the press in criticizing judicial officers and acts, and chronicling the doings of the courts. * * *

"We cannot, in the absence of words forcing that conclusion, impute any design to Congress, in dealing with an evil exercise of the power, to destroy also the existing right to exert this power for good, in upholding the purity and independence of the courts. The words do not demand such a construction, and to give them effect would deny powers very essential to courts in 'the administration of justice.'"

It is urged that the statute should be construed literally because of its penal character. It should be construed narrowly as defining the limits of a summary power, but the construction should consist with the important function which that summary power serves; it should be given its reasonable intendment. *United States v. Antikamnia Co.*, 231 U. S. 654, 658, 34 Sup. Ct. 222, 58 L. Ed. 419. The fact that it deals with a power inhering in courts independent of the Legislature, one essential to the execution of their duties and the maintenance of their proper authority, is an important factor of construction. The interpretation should not be so narrowed as to emasculate the very function it declares. *United States v. Shipp*, 203 U. S. 563, 575, 27 Sup. Ct. 165, 51 L. Ed. 319, 8 Ann. Cas. 265. The proper construction, it seems to us, is to leave a power reasonably consistent with a freedom in the courts to consider and determine causes uninfluenced by any agencies except the law and the facts properly brought to their attention.

We are cited to the case of *Ex parte Robinson*, 19 Wall. 505, 22 L. Ed. 205, and to that part of Judge Fields' opinion which, paraphrasing the statute, says:

"As thus seen, the power of these courts in the punishment of contempts can only be exercised *to insure order and decorum in their presence*, to secure faithfulness on the part of their officers in their official transactions, and to enforce obedience to their lawful orders, judgments, and processes." (Italics ours).

In this case Robinson sought to be relieved from an order disbarring him for an alleged contempt. It will be seen that the order did not result from a finding upon a rule on him to answer to a charge of tampering with a grand jury witness, which was the first charge, but was occasioned by an alleged indignity offered the court directly in its presence. Page 507 of 19 Wall. (22 L. Ed. 205).

The court below did not pass upon the rule at all, nor does Judge Field say anything more (19 Wall. page 511, 22 L. Ed. 205) about the alleged offense of Robinson respecting the witness than that the grand jury's report does not make a case. The case therefore does not turn upon an interpretation of the statute in this particular before us. The peremptory writ to restore him to the bar was awarded: First, because disbarment cannot be made a punishment for mere contempt; and, second, because the power to disbar can be exercised only after notice has been given and opportunity for defense. When this case is examined and the situation disclosed, it will be seen that there was no occasion for Justice Field to say, "As thus seen, the power of these courts in the punishments of contempts can only be exercised *to insure order*

and decorum in their presence," etc., if he meant by that that only that misbehavior which operated to a physical interruption, disturbance, or delay in the performance of judicial duty as a court was actually sitting, was within the first classification of the act. If this case is to be given the effect claimed for it, we are justified in insisting that the action of the Supreme Court in refusing review to McCaully (*In re McCaully*, 198 U. S. 582, 586, 25 Sup. Ct. 805, 49 L. Ed. 1172), to be discussed hereafter, is equivalent to an overruling of Judge Field's holding. *Ex parte Robinson* has been cited by the Supreme Court in possibly a dozen cases, and at times quoted from, touching its relation to the law of contempts, but in none has the Supreme Court adopted the narrow construction of this first classification of the act given in this excerpt from Justice Field's opinion.

In *Ex parte Wall*, 107 U. S. 265, 2 Sup. Ct. 569, 27 L. Ed. 552, in which mandamus was refused to restore to the bar Wall, who had been disbarred for participation in a lynching, Justice Field, in a dissenting opinion, quotes his *Robinson* decision to the point that the proceeding should have followed the analogy of the law of contempt, and that therefore Wall could not have been disbarred before indictment and conviction for an act which did not take place in the actual presence of a sitting court; but his reasoning was not followed by any associate.

In *Sharon v. Hill* (C. C.) 24 Fed. 726, Justice Field himself seems to have gotten away from his earlier notion that an interruption of a court's "order and decorum" was essential to contempt proceedings, for, sitting with Judge Sawyer, in that case, he orally delivered an opinion upon one phase, saying, "Mr. Justice Sawyer will explain for the benefit of counsel the statutes of Congress," and then heard Judge Sawyer say that the action of Mrs. Hill in threatening a witness with a revolver when an examination was in progress *before a commissioner* was a *contempt of the Circuit Court* within this first classification.

And the Supreme Court itself has taken issue with Justice Field's dictum in the *Robinson* Case in *Savin, Petitioner*, supra, for there it is held that an effort to corrupt a witness outside of the courtroom, although in the corridors of the court, under circumstances which had no relationship to a physical interruption of the court proceedings, was within this clause of the act. And a study of its attitude toward the facts in *Cuddy, Petitioner*, in the same volume (131 U. S. 280, 9 Sup. Ct. 703, 33 L. Ed. 154), suggests that the court in that case, had it been necessary, would have gone as far as did Judge Brown in *Re May*, supra, to hold that an attempt to corrupt a juror remote from the place of the court's sitting and at an hour out of court would also be within the section.

In *McCauley v. U. S.*, 25 App. D. C. 404, an attachment against the respondent under that part of section 268 under consideration here, for attempting to corrupt a juror at his place of business one-half mile from the courthouse and two days before the trial of the case in which the juror was to sit, was sustained; the court saying that:

"The question is not one of geography or topography, or propinquity or remoteness, but of direct influence upon the administration of justice. * * * Bribery of a juror or the intimidation of a witness pollutes the foundations of justice at their source, and reach at once to the very seat and shrine of

the administration of justice, whatever be the place where the formal act is done. Under such circumstances, the court is wherever the juror or the witness is, and there is no question of locality in the case."

The jurisdiction of the court in that case, under the statute, was the sharply contested question, and motions for leave to file petition for writs of habeas corpus and certiorari were *denied by the Supreme Court*. 198 U. S. 582, 586, 25 Sup. Ct. 805, 49 L. Ed. 1172.

We feel that these considerations dispose of *In re Robinson*, so far as the dictum of Justice Field is attempted to be applied here.

We now come to the case which respondents deem very important, *Cuyler v. Atlantic & N. C. R. R. Co.* (*In re Daniels [C. C.]*) 131 Fed. 95, although the facts there are not comparable to the situation here, and we would not say that, upon its facts, it was not correctly decided. The respondent was charged with having criticized severely, *after the fact*, the appointment of a receiver by the District Court of his state. So far as the opinion seems to be in any way inconsistent with the conclusion we reach here, it is found to be based upon Justice Field's attempt to limit the operation of the statute in *Ex parte Robinson*, *supra*, and upon the Poulson Case. The citations from Kent and Rapalje made by Judge Pritchard depend for their authority upon the Poulson Case alone.

The note from Kent's Commentaries is but partly quoted. It is wholly based on Justice Baldwin's decision, and we have elsewhere further considered the note and Chancellor Kent's view of the Baldwin interpretation. Likewise Rapalje supports his text statement, that the act deprived federal courts "of the common-law power to protect," by the process of attachment, "their suitors, witnesses, officers, and themselves, against libels of the press," concerning a pending trial, *by no other authority whatever* than Poulson's Case. See Rapalje, Contempt, p. 72. If therefore we are justified in not following *In re Poulson* and the dictum of Justice Field in *In re Robinson*, we may disregard *In re Daniels* as an authority for the proposition that newspapers are immune under all circumstances.

But the Daniels Case cannot be construed as denying the application of the statute to facts such as appear in the case at bar. Indeed, Judge Pritchard says (131 Fed. 99):

"There may be instances where the publication of editorials or other matter in newspapers would bring the author within the limitations of the statute. For instance, if a newspaper editor should publish an article concerning a trial which was being considered by a jury, and should send a copy of the paper containing such article to the jury, or a member thereof, during the progress of the trial, for the purpose of influencing them in their deliberations, it would present a question whether such conduct would not be misbehavior in the presence of the court, or so near thereto as to obstruct the administration of justice."

It is criticism of the judge of a court because of his official conduct, aspersions personal to him and unafflicting a pending matter, and not tending to obstruct the performance of official duty in hand, affecting the administration of justice in general only and indirectly in that court as a mere libel of the judge, which Judge Pritchard very properly decides is not covered by the statute. Such is the plain meaning of the

language of the opinion (131 Fed. page 98), it was so construed by the author of the first paragraph of the syllabus to the report (131 Fed. page 95), and such construction, only, harmonizes with that portion of the opinion we have quoted above.

In the case before us, no interpretation of section 268, Judicial Code, is insisted upon against respondents which is essentially different from that allowed by Judge Pritchard in the foregoing quotation. The immediate possible effect on the administration of justice in a pending case is no clearer in a circumstance such as he imagines, than that obtaining in the circumstances in the instant case. A concession that a publication out of court *may be* the occasion of summary process under the first clause of the *proviso* of the section is all that is contended for against the present respondent, so far as the law is concerned.

We are confident that the foregoing considerations, to which, perhaps, we have given too much time, justify us in denominating as mythical and legendary the view that Congress intended *complete immunity* to the press from summary process under all circumstances.

An eminent judge of this circuit, whose industry and clarity of thought and expression always illuminated a subject under his full consideration (Hammond, J., in U. S. v. Anonymous, 21 Fed. 761, 768), expressed the correct view, we think, of the act of 1831, respecting its effect on the press, in saying:

"It is generally understood that the object of that statute * * * was to enlarge the liberty of criticisms by the press and others by curtailing the power to punish adverse comments upon the courts, their officers and proceedings, *as contempts which tend to impair respect for the tribunal, and thereby obstruct the administration of justice.*"

That is to say, the power is *curtailed*, not wholly destroyed, so that criticisms which tend to reflect generally upon the court, either by libeling the occupant of the bench, or by criticizing proceedings and processes, but which have no tendency to affect a cause under consideration, are not reached by the statute, although they may, in a general way, obstruct the administration of justice, particularly through fostering a disrespect for the tribunal. Examination of cases arising under statutory limitations no broader than those of the federal act, and in which respondents were discharged, show that it was precisely this criterion which relieved them. State v. Edwards, 15 S. D. 383, 89 N. W. 1011; In re MacKnight, 11 Mont. 126, 27 Pac. 336, 28 Am. St. Rep. 451; Dunham v. State, 6 Iowa, 245; Storey v. People, 79 Ill. 45, 22 Am. Rep. 158; and other cases. This is undoubtedly the only sound conclusion to be reached after a study of the act, and vindicates alike the liberty of the press and the right of a court to consider any cause before it "free from outside coercion or interference" specially directed to such pending cause.

The only view to be taken of this act consistent with its history, its relation to the accepted law of the time, and with the inherency in every court of a power of protecting its suitors and itself, is that taken by the Supreme Court of Virginia in Carter v. Commonwealth, 96 Va. 791, 32 S. E. 780, 45 L. R. A. 310:

"That although the United States statute of 1831 carefully enumerates the subjects for which courts may punish summarily for contempt, that enumeration is so comprehensive as to afford complete protection to the courts in the performance of their duties."

And so Judge Hammond says, in the case cited (21 Fed. 761):

"The courts will find that the Legislature has not taken away any valuable power, when these statutes are properly understood. * * * The mere place of the occurrence may not be an absolute test of that question, and it may depend on the character of the particular conduct in other respects beside the place where it happens. * * * Whenever the conduct * * * ceases to be general in its effect, and invades the domain of the court to be specific in its injury, by intimidating, or attempting to intimidate, with threat or otherwise, the court or its officers * * * while in the discharge of their duties as such, if it be constructive because of the place where it happens, because of the direct injury it does in obstructing the workings of the organization, for the administration of justice in that particular case, the power to punish it has not yet been taken away by any statute, however broad its terms may apparently be."

Following United States v. Anonymous, federal authorities are consistent in applying the principle that the criterion whether a given act is "so near the presence of the court as to obstruct the administration of justice" is not in the physical propinquity of the occurrence to the court, but abides in the degree of approximation the act attains in affecting an immediate duty before the court; that there may be invidious acts or misbehaviors occurring remote from the physical presence of a sitting court, in place or time or both, yet so direct in their tendency to affect the administration of the court's duties in a pending cause as to be an obstruction thereof, and, consequently, within the statute. It is the quality of obstruction to the administration of justice that measures the propinquity of the act to the court. This was Judge Brown's idea of the law in *Re May*, *supra*; and it must have caused the Supreme Court to refuse a review of *McCaully v. United States*, *supra*. *Sharon v. Hill*, *supra*; *United States v. Patterson* (C. C.) 26 Fed. 509; *In re Brule* (D. C.) 71 Fed. 943; *Ex parte McLeod* (D. C.) 120 Fed. 130; *United States v. Carroll* (D. C.) 147 Fed. 947; *United States v. Zavelo* (C. C.) 177 Fed. 536; *Kirk v. United States*, 112 C. C. A. 531, 192 Fed. 273; *In re Steiner* (D. C.) 195 Fed. 299, 303; *United States v. Huff* (D. C.) 206 Fed. 700.

As the Supreme Court, in the *Savin Case*, *supra*, destroyed one of the two reasons given by the court for the *Poulson* decision, so the authorities just cited, as the facts of the respective cases are examined, unanimously take issue with Justice Baldwin's other and more important reason, and justify the conclusion we have given in the preceding paragraph. Of these the opinions of Judge Gilbert, for the Eighth Circuit Court of Appeals (*Kirk's Case*), and of Judges Jones and Grubb (the *McLeod* and *Huff* Cases), cover the ground so completely relative to the proper interpretation to be placed on the provision that the misbehavior must be "*so near*" to the court's presence "*as to obstruct* the administration of justice" that it were supererogation to say more.

We call attention to Judge Gilbert's language (192 Fed. page 277, 112 C. C. A. page 535) as expressing precisely the view we hold of the

statute's exact purpose respecting newspaper comment, that it was and is "to limit the power of federal courts to punish as for contempt criticisms of judicial decisions or judicial officers." We hold respondents here for a criticism neither of a judicial decision nor of a judicial officer, but for publications affecting prejudicially proceedings in a pending case. The distinction is plain between an *ex post facto* comment on a decision, or a mere libel of a judge, on the one hand, and, on the other, an effort by publication to affect the consideration of a case pending its decision, or to excite prejudice against an anticipated decision. We agree entirely with Judge Grubb's theory that no legitimate distinction may be drawn, to limit the application of the statute, between that kind of obstruction to the administration of justice, respecting a pending cause, which involves the relation of jurors, witnesses, and examiners to the court, on the one hand, and matters affecting the judge of the court in his relation to the case, on the other.

In the Huff Case the sitting judge received at his house a letter calculated to affect his official action respecting a pending case. If this case is correctly decided, and Judge Grubb's reasoning is convincing, then newspaper criticism tending to affect the relation of judge and parties to a pending cause must be equally within the statute, for there can be no controlling distinction, to apply the statute in one case and to avoid it in the other, between a written attack on the judge reaching him in the privacy of his home and one spread broadcast, by the thousands of duplications, under the eyes of his fellow citizens as well as under his, in his home city wherein his court is held.

The modern law of contempt by publication is precisely that for which we are contending here as applicable to this court and as not abrogated by the statute. Bishop's New Criminal Law, §§ 259, 260, 261; Bailey, *Habeas Corpus*, c. 7; Oswald, *Contempt*, pp. 91, 92, 97; Rapalje, *Contempt*, § 56; 9 Cyc. 20. No state, except Pennsylvania and Kentucky, in all the years since Peck's trial, has attempted by legislation to put the press in a class by itself as privileged to interfere with the administration of justice in a pending case. No case is reported, except those criticized above, in which newspaper comment tending to embarrass the court with reference to a pending cause, and not being a mere libel on the judge, is not held to be punishable summarily as a contempt. Century Digest, Decennial Digest, American Digest, Title, "Contempt."

We will discuss but a few of the more important cases for the light they afford. The authorities they cite need not be repeated in this opinion. It is obvious that cases which decline to admit the province of a Legislature to limit a court's power by definition of what shall be considered to be an attachable contempt, such as the important case of *State v. Frew*, 24 W. Va. 416, 49 Am. Rep. 257, are not valuable as authority, so we consider some of those only which apply statutory provisions.

Oregon and Washington by statute make "disorderly, contemptuous, or insolent behavior toward the judge while holding the court, tending to impair its authority, or to interrupt the due course of a trial or other judicial proceeding" attachable. In each state it is held that publica-

tions tending to embarrass the court in the consideration of a case before it are within the operation of this language. *State v. Kaiser*, 20 Or. 50, 23 Pac. 964, 8 L. R. A. 584 (in which the respondent was relieved only because it was adjudged that he did not publish of a pending cause); *State v. Tugwell*, 19 Wash. 238, 52 Pac. 1056, 43 L. R. A. 717.

In Iowa the statute provides for summary punishment of "contemptuous or insolent behavior toward such court while engaged in the discharge of a judicial duty which may tend to impair the respect due to its authority." Under this provision the summary punishment of an editor was sustained for publishing an article ridiculing one of the parties and denouncing the witnesses in a pending trial. *Field v. Thor nell*, 106 Iowa, 7, 75 N. W. 685, 68 Am. St. Rep. 281. The court said:

"The language of the statute does not require us to adopt a construction which will cripple the administration of justice, and deprive parties and the state of the hearing of causes unmolested by extrinsic influences, whether within or without the actual presence of the court. * * * The question arises, then, whether the court may, by contempt proceedings, protect witnesses from denunciation and intimidation by the public press, and the jurors from the influence created thereby. * * * We have discovered no authority denying the power of the court to punish as contempt an act which tends to impede, embarrass, or obstruct it in the discharge of its duties."

In Nebraska contempt may consist of "any willful attempt to obstruct the proceedings, or hinder the due administration of justice in any suit, proceeding or process pending before the courts." It is settled in that state that "a publication regarding a cause, during its pendency in court, which tends to corrupt or embarrass the administration of justice, and to produce a prejudice in the minds of the public with respect to the merits of a cause," is punishable within the statutory description. *Percival v. State*, 45 Neb. 741, 64 N. W. 221, 50 Am. St. Rep. 568; *Rosewater v. State*, 47 Neb. 630, 66 N. W. 640; *State v. Bee Publishing Co.*, 60 Neb. 282, 83 N. W. 204, 50 L. R. A. 195, 83 Am. St. Rep. 531.

In North Carolina it is provided (section 648, N. C. Statute) that direct contempts shall consist "in disorderly, contemptuous or insolent behavior committed during the sitting of any court of justice, in the immediate view and presence of the court and directly tending to interrupt its proceedings, or to impair the respect due to its authority." The Supreme Court of the state (*Ex parte Schenck*, 65 N. C. 368) held that this statute did not restrict the constitutional power of the courts, and, in an elaborate and recent opinion (*Ex parte McCown*, 139 N. C. 95, 122, 51 S. E. 957, 2 L. R. A. [N. S.] 603) held that an assault upon the judge of the court, at the latter's boarding place and during the evening recess of the court, was within the statute; this altercation having reference to a case as to which judicial function had not ceased.

We have already referred to the view of the Supreme Court of Tennessee as to the applicability of the statute of that state to a case like this at bar. Georgia also has a statute in imitation of the federal act. In *Baker v. State*, 82 Ga. 776, 9 S. E. 743, 4 L. R. A. 128, 14 Am. St. Rep. 192, a suitor, whose case was not yet on trial, who in the courtroom, in the presence of several of the venire for the term, five or seven minutes before court was to convene for the morning, persisted

in discussing his case with the judge, was found to be in contempt within the statute. In *Wynn v. City & Suburban Ry.*, 91 Ga. 344, 17 S. E. 649, it was held in face of the contempt statute, that it was not error for the trial court to say in its charge to the jury in a personal injury case that it proposed to attach for contempt the publisher of a newspaper improperly commenting on the pending case.

We have noted that Ohio has a contempt statute on the lines of the federal act. In *Steube v. State*, 3 Ohio Cir. Ct. R. 383, 2 O. C. D. 216, the meaning of the words "misbehavior in the presence of the court, or so near thereto," etc., in the statute (section 5639, R. S.; section 12136, General Code Ohio; Act of 1834) was under specific interpretation. In a case where a stranger to a case on trial had, at recess and at a place five blocks away from the courthouse, assaulted an attorney in the pending case because of his connection therewith, the court held the statute applicable, holding:

"Whatever acts are calculated to impede, embarrass, or obstruct the court in the administration of justice, are considered as done in the presence of the court."

The McCown, Baker, and Steube Cases are cited to support the departure of the federal courts from the narrow interpretation of the federal act found in Poulson's and Robinson's Cases, and have no other importance, not being newspaper cases; but Ohio does furnish a case closely parallel to the instant proceeding. In *Hale v. State*, 55 Ohio St. 210, 45 N. E. 199, 36 L. R. A. 254, 60 Am. St. Rep. 691, it was held that the act of 1834, now section 12136, G. C. Ohio, could not be regarded as limiting powers inherent in the court of common pleas, as that was a court created by the Constitution; but in *Myers v. State*, 46 Ohio St. 473, 22 N. E. 43, 15 Am. St. Rep. 638, the court did not consider the statute in any other way than as controlling the common pleas court, and expressly found the publication involved to be within it. The statute (then section 5639, R. S., now section 12136, G. C.) provided summary punishment of "a person guilty of misbehavior in the presence of or so near the court or judge as to obstruct the administration of justice." Myers had been jointly indicted with another for certain election forgeries, and had been given a separate trial. Pending the trial of his codefendant in the city of Columbus, Myers caused to be published an article in the Cincinnati Inquirer attacking the trial court with reference to the case. The Supreme Court said (46 Ohio St. page 490, 22 N. E. 44, 15 Am. St. Rep. 638):

"The publication came within section 5639, Rev. Stats. * * * It is true that the article was not written, nor was it circulated by the respondent, in the presence of the court. Indeed, it was written in the city of Cincinnati, though dated at Columbus. But the publication was in the courtroom, as well as elsewhere. It was intended to have effect, and did have effect, in the courthouse at Columbus, and the writer was just as much responsible for that effect as though he had in the courtroom itself, and while the trial was progressing, circulated and read aloud the article, or uttered the libeling words verbally."

It was a fact shown in that case that the paper in question circulated generally in the city of Columbus. The court reasoned that it is because the publication evinced an intention "to insult and intimidate

the judge, degrade the court, destroy its power and influence, and thus bring it into contempt; to influence the people against it; to lead them to believe that the trial then being conducted was a farce"; and because it had a tendency, "when read by the judge, to produce irritation, and, to a greater or less extent, render him less capable of exercising a clear and impartial judgment"—that it "tended directly to obstruct the administration of justice in reference to the case on trial," becoming therefore a contempt of court. The court further said:

"The statute clearly authorizes, as did the common law, courts to punish summarily, as contempt, acts calculated to obstruct their business."

This case is not only important as construing a statute in terms quite like that controlling this court, but as settling the law of the local jurisdiction within which respondents' offensive publications were had. It is plain that, had respondents been convicted of criminal contempt of a state court under circumstances such as those before us, they could get no relief from federal authority. *Patterson v. Colorado*, supra.

Three cases from very respectable state courts may be selected to support, if support is needed, the argument of the Supreme Court of Ohio that offensive publication tend directly to obstruct justice. In *People v. Wilson*, 64 Ill. 195, 211, 16 Am. Rep. 528, the dictum in *Stuart v. People*, 3 Scam. (Ill.) 405, under a statute giving a court power "to punish contempts offered by any person to it while sitting," was approved and the holding followed that:

"In this power would necessarily be included all acts calculated to impede, embarrass, or obstruct the court in the administration of justice. Such acts would be considered as done in the presence of the court."

This case is not reversed by *Storey v. People*, 79 Ill. 45, 22 Am. Rep. 158, for the latter was decided not only under different state legislation, but dealt with a publication relating to a past court transaction.

In *Telegram Newspaper Co. v. Commonwealth*, 172 Mass. 294, 52 N. E. 445, 44 L. R. A. 159, 70 Am. St. Rep. 280, it is held that, in a publication which "amounts to a contempt of court because it interferes with the due administration of justice in a cause before the court, the contempt is analogous to a contempt in the presence of the court."

In *State v. Howell*, 80 Conn. 668, 69 Atl. 1057, 125 Am. St. Rep. 141, 13 Ann. Cas. 501, the court, in holding that proof is not necessary that the offensive article was read by jurors, said:

"A sentiment favorable or unfavorable to one of the parties to the case may be made to so pervade the community as to reach the courtroom and the triers and interfere with the fair and impartial performance by the latter of their duties."

Finally, on this subject, *State v. Myers* was cited with approval by the Supreme Court of the United States in *Patterson v. Colorado*, supra, to the point made in that opinion (205 U. S. 463, 27 Sup. Ct. 558, 51 L. Ed. 879, 10 Ann. Cas. 689), that:

"What is true with reference to a jury is true also with reference to a court. Cases like the present are more likely to arise, no doubt, when there

is a jury and the publication may affect their judgment. Judges generally, perhaps, are less apprehensive that publications impugning their own reasoning or motives will interfere with their administration of the law. But if a court regards, as it may, a publication concerning a matter of law pending before it, as tending toward such an interference, it may punish it as in the instance put. When a case is finished, courts are subject to the same criticism as other people; but the propriety and necessity of preventing interference with the course of justice by premature statement, argument, or intimidation hardly can be denied."

Of the cases above considered, Tugwell's, Rosewater's (*Omaha Bee*), Myers', and Patterson's were each instances where the misbehavior was alleged to have been with an intent to embarrass and influence the court in the performance of its duty. We are unable to find applicable to the language of the federal statute (section 268, Judicial Code) any reasonable construction which will relieve respondents in this case for the consequences in contempt for improper comment on a pending cause which involved the parties in the several proceedings reviewed.

It is nothing that no federal court in a reported case has ever hitherto so applied the statute. The language of this measure does not exclude its application to newspapers, and one court of appeals in a dictum has suggested that it may be so applied, as we have seen, in *Re Daniels* (C. C.) 131 Fed. 95, 99. We may employ the language of the Supreme Court of Nebraska (*State v. Bee Publishing Co., supra*) in partial explanation of the absence of reported federal cases, that:

"Courts have not often called publishers to account for constructive contempts, because it has rarely happened that a public journal, wielding any considerable influence, has deliberately employed outlaw methods in attempting to control judicial action."

Or that of the Supreme Court of Iowa (*Field v. Thornell, supra*), that it seldom occurs "that an honorable journalist so far forgets his self-respect as to trespass upon the rights of the judiciary or seek to control or improperly influence its conclusions."

On this subject, the Supreme Court of Colorado noted (*People v. Stapleton*, 18 Colo. 568, 33 Pac. 167, 23 L. R. A. 787), with respect to newspaper contempts, that:

"It is a matter of common observation that the courts of this country are reluctant to exercise the extraordinary power vested in them."

We hope that it will occur to those who may take an interest in the instant case that the fact that an endurance of the News-Bee's uncommon treatment of the case pending in this court was sustained for nearly six months, before action was taken to call it into question, is some evidence of a reluctance, on the part of this court, to exercise its extraordinary power in contempt.

It needs no argument that this case has all the incidents of a criminal proceeding, and that defendants can be held only after competent evidence with the unequivocal deductions from the facts proven thereby disclose their guilt beyond a reasonable doubt.

The defenses interposed are: (1) A want of jurisdiction to entertain any of the causes or proceedings concerning which the several alleged publications were uttered. (2) that these publications were all

within respondents' privilege as fair and proper comments and accounts of matters of public interest. (3) That none of the publications tended to embarrass the court in any way or to obstruct the administration of justice. (4) A disclaimer of intention to produce any such result.

Want of jurisdiction is asserted to have existed to hear the Doherty Case for any purpose because of the claim that the city was not a proper party thereto, wherefore the issue respecting the ordinance could not be heard and determined by this court. This is that line of defense peculiar to the first count.

In the matter of the second and third counts, it is claimed that the court had no jurisdiction over the Quinlivan proceedings because the latter was sought to be held under an order bearing the title of the traction case, wherefore no jurisdiction was had to attach either the present respondents or Howard for contempt with reference to the Quinlivan Case nor respondents for comment on Howard's Case. It is also offered in evidence, but not pleaded, that no affidavit had been filed to support the court's order citing Howard for contempt.

We do not understand the practice to be settled that the judge of a court needs an affidavit to precede a citation for contempt the facts supporting which are matters of his own personal cognizance. *Ex parte Wall*, 107 U. S. 265, 2 Sup. Ct. 569, 27 L. Ed. 552.

Respecting the point that the Quinlivan order was in the original equity case by title, counsel seem to misread the case of *Gompers v. Buck Stove & Range Co.*, 221 U. S. 418, 31 Sup. Ct. 492, 55 L. Ed. 797, 34 L. R. A. (N. S.) 874. The proceedings under the Quinlivan order are not brought into the record by respondents, and, of course, it will not be presumed that there were therein any of the fatal weaknesses found by the Supreme Court in the Gompers Case; for we do not understand the court to find the issue of the rule under the title of the equity case to have been a matter so serious as to destroy of itself jurisdiction. Under the authority of *In re Kaplan Bros.* (Third Circuit Court of Appeals) 213 Fed. 753, 130 C. C. A. 267, which discusses in this particular the Gompers Case, jurisdiction of Quinlivan was not lacking for this reason.

On this defense we are referred then finally to the status of the traction case, and it seems to be respondents' theory that, if jurisdiction of that case were absent, it was entirely safe for any one to indulge a line of conduct respecting it and proceedings attempted in it which might be unsafe as in contempt if jurisdiction were present. No extensive argument is now necessary upon the question that this court had jurisdiction of the traction case. There is nothing in its record to indicate collusion to cast a fraudulent jurisdiction. The plaintiffs were citizens of another state. Their right to insist on the preservation of their debtors' equity of redemption against confiscatory assaults cannot be doubted. That the enforcement of the ordinance would be to waste the traction company was a triable issue, and that such was a fact the city admitted after a contest. Plaintiffs, as well as the company, had a right to contend that the franchise did not expire at the time when the city sought to apply its day by day ordinance, and that therefore to enforce the ordinance would be to impair a contract. That the city could not

compel the company to continue its service, whether the latter wished to or not, is a justiciable proposition; likewise, the further insistence that the city could not prevent the company from removing its cars from the streets after the expiration of its franchise. That, even after expiration of a franchise, rights remained in a traction company to use the streets in a reasonable way, subject to reasonable conditions imposed by the city, until the city should summarily direct such use to cease, was decided by the case of *City of Detroit v. Detroit United Railway*, 172 Mich. 136, 137 N. W. 645, and in that particular this case is in no wise affected by the decision of the Supreme Court of the United States, affirming the Supreme Court of Michigan, reported 229 U. S. 39, 33 Sup. Ct. 697, 57 L. Ed. 1056.

One incident affecting jurisdiction counsel overlook: The ordinance did not provide specifically that, as an alternative to the rates of fare, the company should abandon the streets. Had it done so, there would have been no justiciable question, for the measure would have been self-enforceable, and, however confiscatory and impracticable the rate, within the power of the council to pass, for, with the power to order the company off altogether, the council might couple with the exercise of that power the alternative of an unreasonable condition for continuing service. There was in the case, then, not the question of what the rate should be, which is a legislative and therefore a nonjusticiable question, but what the condition of use should not be, which is a proper subject for judicial inquiry.

These considerations are sufficient to confer jurisdiction. *Cleveland v. Cleveland City Ry. Co.*, 194 U. S. 517, 24 Sup. Ct. 756, 48 L. Ed. 1102; *Blair v. Chicago*, 201 U. S. 400, 26 Sup. Ct. 427, 50 L. Ed. 801; *Siler v. Louisville & Nashville Railroad*, 213 U. S. 175, 29 Sup. Ct. 451, 53 L. Ed. 753; *Louisville Trust Co. v. Cincinnati*, 76 Fed. 296, 22 C. C. A. 334; *Carroll v. C. & O. Coal Agency Co.*, 124 Fed. 305, 61 C. C. A. 49; *Pennsylvania Co. v. L. E., B. G. & N. Ry. Co. (C. C.)* 146 Fed. 446.

It is entirely clear, however, that this issue cannot be collaterally raised. Jurisdiction is a judicial question present in every litigated case. Sometimes it is too plain for contention. Where there is doubt, it is to be decided by the exercise of exactly the same judicial functions operative in case of any other legal proposition. It is preposterous that, when it is an actively controverted issue, a newspaper has more liberty with the court or a chance that jurisdiction may finally be found wanting, than it would enjoy if some other legal inquiry were the subject of consideration.

Comment reflecting on a court respecting a case before it is contempt of a different character from that involved in disobedience to an order of court. As to the latter, of course, want of jurisdiction to make the order is a complete defense to attachment for disobedience. *In re Sawyer*, 124 U. S. 200, 8 Sup. Ct. 482, 31 L. Ed. 402. On this subject the Supreme Court of Colorado says, in *Cooper v. People*, 13 Colo. 337, 378, 22 Pac. 790, 802, 6 L. R. A. 430, 443 (a newspaper contempt case):

"But were we to concede that the jurisdiction of the district judge in the premises was doubtful, the position of respondents would not be materially different; for, if substantial doubt on this subject exists, pending the solution of this doubt, in good faith, and in a proper manner, the orders and proceedings of the court or judge are entitled to the same consideration as when no such objection is made. As we have said in another case, days of patient and careful investigation are sometimes necessarily consumed before the want of jurisdiction becomes apparent; and an admission that during this investigation witnesses may decline to testify, interlocutory orders may be disobeyed, and the proceedings may be treated with public contumely, would operate to deprive the court of power to determine the very point of jurisdiction itself."

The record of the Doherty Case shows that the judge gave the question of jurisdiction careful investigation, holding it for consideration until long after the facts had suggested the court's duty if it were present. We need say no more on this defense. The last word was said by the Supreme Court in United States v. Shipp, 203 U. S. 563, 573, 27 Sup. Ct. 165, 166 (51 L. Ed. 319, 8 Ann. Cas. 265). There it was objected, on grounds similar to those urged here, that respondents could not be held in contempt of the Supreme Court for permitting the lynching of a prisoner whose petition for writ of habeas corpus had been denied by the local federal Circuit Court and who was prosecuting an appeal to the Supreme Court. The court said:

"But even if the Circuit Court had no jurisdiction to entertain Johnson's petition, and if this court had no jurisdiction of the appeal, this court, and this court alone, could decide that such was the law. It and it alone necessarily had jurisdiction to decide whether the case was properly before it. On that question, at least, it was its duty to permit argument and to take the time required for such consideration as it might need. * * * Until its judgment declining jurisdiction should be announced, it had authority from the necessity of the case to make orders to preserve the existing conditions and the subject of the petition, just as the state court was bound to refrain from further proceedings until the same time."

The argument that the publications in question do not tend to obstruct justice proceeds wholly on consideration of each as an isolated act. Much, of course, of the matter pleaded in the information, is entirely beyond criticism, and we conceive that the pleader is not insisting otherwise. Other matters are, at least, disagreeable, and with this quality are of some importance only as light-giving parts of the *res gestæ*. Others are, at least, technical breaches of the paper's privilege which, if but isolated lapses from proper comment, a court should not hastily take under consideration; but, as parts of a series on the same subject and in the same line of offensive criticism, they severally gain in force. Others still are individually so strong that each carries its own power for mischief.

The rule is that, when there is no ambiguity in the language, intent to effect what the language tends to effect is presumed against a sworn disclaimer of such intention. *Ex parte Nelson*, 251 Mo. 63, 157 S. W. 794; *In re Chadwick*, 109 Mich. 588, 67 N. W. 1071; *Fishback v. State*, 131 Ind. 304, 30 N. E. 1088. Of course, the question of ambiguity is to be decided by considering the context and, to some extent, the *res gestæ*. *Henry v. Ellis*, 49 Iowa, 205. Respondents should be held for what appears in their paper of any issue pertinent to the

subject under inquiry, and a full understanding of what is said in one place may be attempted by referring to what was elsewhere in the issue said on the same subject, and, if that subject is one discussed by the paper over a period of time, what is said in one issue may have an interpretative effect respecting matters appearing in other issues. A proceeding for newspaper contempt partakes of the incidents of any other action for defamation, and other publications on the same subject before and after the date of that declared on may be offered for interpretation, at least, on the matter of *quo animo*, as in libel. *Post Publishing Co. v. Hallam*, 59 Fed. 530, 8 C. C. A. 201 (Sixth Circuit Court of Appeals); *Van Derveer v. Sutphin*, 5 Ohio St. 293; *Larrabee v. Tribune Co.*, 36 Minn. 141, 30 N. W. 462; *Commonwealth v. Damon*, 136 Mass. 441; *Enos v. Enos*, 135 N. Y. 609, 32 N. E. 123; *Thibault v. Sessions*, 101 Mich. 279, 59 N. W. 624; *Cushing v. Hederman*, 117 Iowa, 637, 91 N. W. 940, 94 Am. St. Rep. 320; *Bee Publishing Co. v. Shields*, 68 Neb. 750, 94 N. W. 1029, 99 N. W. 822.

In a disbarment case in which the question of libel was involved, the Circuit Court of Appeals for the Sixth Circuit (*Thatcher v. United States*, 212 Fed. 801, 810, 129 C. C. A. 255) says of the claim that the publication was proper:

"The argument that it is not libelous or is not untruthful depends upon the mistaken view that it cannot be condemned if skilled dialecticians can point out how each sentence or half sentence, standing alone, is not necessarily inconsistent with the facts. It is impossible to consider such a publication from that standpoint. It was drafted by Mr. Thatcher and his associates, skilled in the nice use of language and in the leaving of pegs whereon they might hang technical justifications; it was prepared and published to be read by and to influence a class of the community not skilled in these things, and which would take it to mean what it seemed to mean; and it must be read against its composers with the same meaning which they intended its readers should draw. * * *. It cannot be considered as if it had been put before an audience of lawyers who would not be misled by its absurdities, or as if composed by laymen who could be excused by their ignorance."

Tested by this appropriate rule, no ambiguity attends some of the publications separately considered, and none of those upon which the court makes a finding herein have that infirmity, when treated as respective parts of a series on the same subject, and when the light from circumstances known and commented on by respondents' paper is given them. The background against which they all stand, and which develops their force and capacity for mischief, is the excited state of public feeling pictured in the News-Bee's account of the council meeting of March 23, and the intense public interest in the traction case of which respondent Cochran testified.

The traction case stood then, March 24, under a handicap involved in asking consideration of a question upon which a large part of the community in which the court sat had arrived, assisted by respondents, at so definite and insistent a judgment that any suggestion, even official, of moderation of temper, and any argument seeming to favor the plaintiffs, met with public objurgation.

That this situation, without more, offered some embarrassment to the court is quite obvious and could not have escaped as shrewd an observer and as experienced a newspaper man as respondent Cochran,

and it is not easy to follow with sympathy his disclaimer that the subsequent publications of his paper, some of which he wrote, had no purpose to add to that embarrassment.

They were surely capable of the mischief attributed to them in the information. It is not material that a definitely formed intention to that end was ever held by respondents, if the utterances were recklessly made or in pursuit of a journalistic policy seen to be against public policy when persistently followed. However, so far as any interpretation of them respecting intent is necessary beyond their language—and we think none is—aid is had from the two chief witnesses for the defense, respondent Cochran and Managing Editor Howard. The former said that the paper's policy was to print all the news under an "implied contract" with its patrons to that end, that he himself wrote, not for lawyers and dialecticians, but for a "lot of human beings and to make them understand"; that he "wanted to get the punch in there so it would get to them and make them think" and to "keep up the public interest"; that if he had not been writing down to the people, but for lawyers, his "language might have been more ladylike." He complacently admits that he uses a vernacular which conveys special meanings to the particular class he aspires to lead. Mr. Cochran and, through him, the corporation respondent which gives him responsibility to speak for it, cannot complain if here the rule in *Thatcher v. United States* is applied, and that their language, profuse use of staring type, and other peculiarities of expression, not forgetting that, with reference to the traction case, perversions, distortions, and prevarications respecting court proceedings are not neglected, are considered in an effort to see what "punch" got to their readers, what thoughts the latter were sought to think, what meanings they were intended by respondents to draw. Mr. Howard testified frankly in line with Mr. Cochran, and further said that the paper endeavored to emphasize, by repetition and otherwise, the salient features of the day's happenings; and that is his explanation for the triple repetition of the stated purpose of the city solicitor to exceed his official duty in protecting those individuals who should stand upon their assumed rights to ride for three-cent fare, although the question had been relegated for judicial determination. He admitted that some of the publications were intended to comment upon proceedings had in the pending case, notably the editorial on holding court over the telephone, which, he said, was the paper's comment on a circumstance which the paper considered to be a vital crisis in the case. It doubtless had not occurred to Mr. Howard that the only possible effect of the court authorizing by telephone the entrance on the 24th of March of an order of whose tenor the judge was well informed, and which he actually signed on that day and caused to be returned as signed to be filed at the beginning of business on the subsequent day, was to give the city of Toledo a day's extra notice of the fact that it was to meet the attack of the plaintiffs. No possible prejudice ensued, and, if the time were critical for the city, the court, in the action which was so unfavorably commented upon by respondents, gave it an additional time in which to prepare.

Reluctantly, however, Mr. Cochran was finally forced to admit that in times of great public excitement, affecting a case pending before a court, a paper is not privileged to print as matter of news a matter which may be seen reasonably to add to that excitement. The justification, however, through a right to print the news, does not exonerate respondents from responsibility here for any of the editorial comments complained of; for no one of them can be considered to be "news." Assuming, considering the intensity of the situation manifest Tuesday morning, March 24, that it was proper as a matter of news, and, in the same article which carried the statement that the court was asked to pass on the fare question, to announce that the city solicitor would protect any one who chose to exercise his private judgment in the matter—an action which would be manifestly beyond the solicitor's official authority—why, if to state a matter of news were the only motive, should this absurdity be mentioned four times and be made the subject of two headlines, and why, in that connection, was it necessary to publish the fact of the mayor's indorsement?

Again, if it were desirable as a matter of news to state that a mass meeting was proposed for Friday with an anarchistic afterpiece, the most ordinary consideration of the delicate position in which the intensity of public feeling placed the court would, it seems, have forbidden the incendiary extravagances of headlines, repetitions, and sensational treatment which marked, to the point of advertising with the paper's approval, the announcement of the project to hold a mass meeting Friday night in Memorial Hall "restraining order or no restraining order by the federal court, to test the strength of the three-cent fare all day ordinance." And, if a public duty were felt to demand, in the same issue which so elaborately advertised this proposed test of the ordinance en masse, that the city increase its professional representation in the court lest the "franchise manipulators" get a "strangle hold" on the people by unduly impressing the court with their "high-priced legal talent," there was no reasonable or respectable call to carry the argument into an unmistakable reflection on the court.

Of course, editorial utterances of a newspaper are voluntary—no consideration for a timely presentation of current events constrains the manner of expression of editorial opinion. Hence it may be observed that, if respondents were not committing their paper to the public disorder feared for Friday night, it was with amazingly bad judgment that they chose to say, editorially, on the 26th, that the police would not use their clubs on recalcitrant car riders that night, indorsing in that connection apparently the alleged opinion of Sam Jones that "the law was only what the people will back up."

The manner, too, in which news matter is treated in the writing, is, of course, purely a question of editorial policy. So it is submitted that, if the News-Bee were intending to respect the tribunal to which the question was referred, it was a most unfortunate use of terms to say of the members of the Central Labor Union in attendance at the Memorial Hall meeting:

"These men may furnish the sinew to see to it that three-cent fares are accepted by the conductors."

This statement was not a matter of news. It was merely an expression of opinion by the writer as to the source from which physical force to accomplish the purposes in question might be derived. It was doubtless a case of "getting in the punch."

It is seen, then, that to a situation already highly inflamed the issues of the 24th, 25th, and 26th of March of respondents' paper do nothing less than offer additional fuel: (1) Through an assurance, March 24, made so often and so plainly as not to be overlooked, that he who contributed to the disorder feared for Friday night would be protected by the city's law officer. (2) By advice, on the 25th, to those of its readers who were disposed, by the announcement of official protection given in the previous issue, to take the law into their own hands, that they will have mob support as the result of a meeting in Memorial Hall called for specific action, "restraining order or no restraining order" from a court whose judge is so temperamentally and mentally uncertain that its decrees, if unpleasant, are entitled to questionable respect. (3) By, on the 26th, bracing timorous readers, who hesitate to join the crowd, with the admonition that they may not fear restraint from peace officers of the city, nor be deterred by lingering respect for law and authority, because, forsooth, the time has come when law is just what public passion, aroused by such publications as these, deems for the time being should be respected.

No innuendo is needed to suggest the tendency of these publications. They are unambiguous toward an unmistakable addition to the burden of both suitors and court taken on when the motions were filed. The language is not susceptible of two interpretations—it tends in no direction save that charged in the information.

Respondents cannot escape responsibility for the evident tendency of their publications by proof of the truth of their statements. *Globe Newspaper Co. v. Commonwealth*, 188 Mass. 449, 74 N. E. 682, 3 Ann. Cas. 761. Newspapers have more than the truth to think about; they must consider the effect of stating the truth.

Besides the satirical and reflective comment over "holding court over the telephone," admitted by Editor Howard to voice the paper's disapproval of the court, there is another case in which there is an acknowledgment that an intention existed to reflect on the court. After the case for the plaintiffs had been heard, August 14, with testimony that the ordinance was confiscatory, the court, on application of the city, considerably gave it more than three weeks to make its proof in support of the ordinance, adjourning the hearing until September 8th.

On September 5 respondents uttered the satirical editorial note coupling Judge Killits with plaintiff Doherty and classifying the two with one Peter Parker, a former butt of the News-Bee's satire. Counsel for respondents, in the written argument in support of their demurrer, justify this publication in these words:

"We do not believe that this expression of confidence that the people themselves were able to handle the street railway situation without the assistance of the courts was in any way unwarranted."

The spirit of this comment is the keynote of the explanation and interpretation for every publication in question, for it is entirely the spirit of the testimony in this case given by respondent Cochran. It has the same flavor of suggestion that the court, in deigning to permit the traction suit to enter its dockets, was trenching upon the prerogatives of respondents to settle the controversy. We are able to understand now the extravagances of expression, the lurid typographical exaggerations, the misrepresentation of the court in headline after headline, and in text and editorial, the consistently unfriendly attitude against the court. For more than ten years, as they say, respondents have fought the Big Con, and it should not now be that the latter should enjoy the resource of the courts unmolested—respondents, as the self-appointed guardians of the people, had reached a verdict on the traction question which should not be disturbed by the judiciary.

It must be conceded that the headlines of the issues of March 26, August 14, and September 10 convey information at variance with that of the news articles which, respectively, follow. It is urged, by way of defense, that each headline should be considered in connection with the enlarged article. March 26, the line, "Killits Upsets Low Fares," set in type exactly the size and style of the capital letters of the title to the paper, extending clear across eight columns of the paper, is the feature of the front page. The body of the article makes it plain that the statement is entirely false, as nothing is there told, nor did anything in fact happen, which tends intelligently to make that headline a truthful statement. The same may be said of the headlining of the other two issues referred to.

But we are told that whatever uncertainty or error abides in this extravagant headlining is corrected by the truthful news account underneath. It is a naive defense that the veracity of an extended news account should be accepted as an antidote to the prevarication in the headlines in large type, from which the paper's reader gets his first impression of the facts reported and, doubtless, in many instances, his abiding interpretation of the full account which follows. Granting the right to "get the punch" in the writing and to emphasize the "salient features" of the case, respondents are still held to a responsibility to state the truth when they comment on the court's proceeding in a pending case.

Of course, if these false headline statements were but isolated offenses, or if they could be referred to mere blundering in "make-up," the court's duty to pass them in silence would be obvious; but they accord too clearly with the entire policy of the paper, they take their places too plainly in the file of consistently invidious comments on the court respecting the pending case, not to be considered as reflecting respondents' attitude toward the court and the cause. They join the more detailed and elaborate offensive publications to connote an intention to control the issue in the traction case, or, at least, in case the court's decision does not meet the wishes of respondents, to render it of doubtful value to the prevailing party.

Undoubtedly, one of them, that which said, August 14, "Killits Puts Burden on the City," inspired Quinlivan's attack on the court.

His discussion before the Central Labor Union, September 10, on the proposition to suggest impeachment of Judge Killits in case he decided the traction issue against the city, was based on the impression he held that the court had "placed the burden of proof of the Schreiber ordinance on the city." Nowhere else than from the misstatement of fact of the News-Bee could he have obtained such a notion, and this circumstance meets the claim that respondents' publication did not tend to embarrass the court. It is also worthy of note that this labor union meeting was held on the evening of the issue of the News-Bee containing the headline statement, in letters over half an inch high, "Low Fares Banned by U. S. Judge," over an article which told that the court had not yet reached a decision. It was in fact that day announced from the bench, but not published by respondents, although respondents had a transcript of the statements of the court and have introduced that transcript in evidence in this hearing, that the question of jurisdiction to issue an injunction was not yet decided; the city having admitted the fact that the ordinance was confiscatory and consequently void.

We may here note the curious fact that the Socialist thought, as shown in the resolutions which Mr. Howard testifies he edited for publication on September 9, ran in the same verbal channels with that of Editor Cochran. March 27, the latter wrote editorially that the Big Con "is now a trespasser on many of the streets of Toledo"; while, September 6, the Toledo Socialist Local, according to Mr. Cochran's paper, "adopted a resolution which refers to the street railway company as a trespasser in the streets." This may be a mere coincidence; but, as in case of Quinlivan's attack upon the court, it seems more likely to have been inspired by Mr. Cochran's production.

Newspaper criticism of a party to a pending cause respecting the same has always been considered as misbehavior tending to obstruct the administration of justice, even when unaccompanied by the slightest reflection on the court itself, except in those infrequent jurisdictions wherein the press has been completely immunized. That principle operated solely in some of the cases we have cited, such as *Globe Newspaper Co. v. Commonwealth*, *State v. Howell*, and *Henry v. Ellis*. They proceed on the principle that a court has a paramount duty to protect suitors from anything which will interfere with a fair consideration of their rights. It was this, doubtless, which prompted Chancellor Kent to say that, "in leaving a suitor unprotected at the moment when he stands most in need," Justice Baldwin's interpretation of the federal act of 1831 was unreasonable. The court, in *Cooper v. People*, 13 Colo. 366, 22 Pac. 799 (6 L. R. A. 429), *supra*, says:

"Parties have a constitutional right to have their causes tried fairly in court, by an impartial tribunal, uninfluenced by newspaper dictation or public clamor."

It follows that any newspaper comment which tends to make the position of a litigant difficult before the court hampers the efforts of the court to adjudicate the issue fairly and dispassionately. In this light, the News-Bee's editorials of March 25, entitled "Municipal Ownership, the Only Way to Street Railway Peace," and of March

27, "Big Con's Attitude is the Same Old Defiance of the People," and the cartoons, "At the Last Ditch," and "A Desperate Case," because each tends unmistakably to deride or denounce plaintiffs in the pending case, with reference thereto, and therefore tends to further inflame public hostility to them, are of themselves instances of behavior which could have no other direction than to render more difficult of performance the duty of this court toward those who rightfully had appealed to its consideration.

It is unnecessary to argue at length that the editorial referring to Quinlivan's case, of September 14—"would it be contempt to remark that it is a peculiar situation where the officer who makes the charge also considers the evidence, renders the verdict and imposes the sentence"—was meant to be contemptuous. Its language, form of expression, the typographical prominence—across two columns, in heavy, black-faced type—leave no room for doubt. The repetition, in the news columns of that date, of the statement made on the previous issue-day, that "Killits has announced that he will hear the case himself"—an announcement which, if true, was not important enough for immediate repetition—obviously was to lay a foundation for this editorial and for the Dennie letter, which was also plainly in contempt. Mr. Howard, in receiving the Dennie letter, recognized by editing it that it was offensive, for he testifies that he said to Dennie, after he (Howard) had edited it, "If you will stand for it in this form, I will use it." These publications tended, without ambiguity, to weaken whatever effect a punishment of Quinlivan after conviction might properly have by way of vindicating the court's right to an unhampered consideration of the issues submitted to it in the traction case.

The so-called "declaration of independence," the two-column, front page editorial of September 17, republished in several issues after a rule had been entered on respondents for uttering it, and which is the basis for the third count of the information, is likewise too plainly an offensive—purposely so—attack on the court respecting a pending case to be within any privilege possible to an orderly imagination. The justification offered in written argument is too grotesque to be regarded as serious. It is, in substance, that, having been accused of an offense, a right inhered in respondents to try the question out first in their paper with sundry reflections on the quality of the tribunal which assumed to entertain the charge. Of course, this defense begs the whole question. It would be just as good if the News-Bee had been sued for libel or its editor indicted by some grand jury. In either of these cases, by the same reasoning, the paper, in advance of the trial, would have the right to berate the other party, lampoon the grand jury, discuss the evidence and abuse the judge of the court. And, as respondents have no greater right to use their newspaper in their own behalf when under charges than in behalf of any other citizen, if their argument is good the paper and its publishers and editors are immune from punishment for any interference with a pending proceeding which they please to offer. If we have come to this pass, the courts may as well take permanent vacations and allow all litigable questions to be settled in editorial sanctums. Mr. Cochran said of this editorial that it was

"primarily intended to make the people of Toledo understand that, no matter what happened to me, no matter what any court might do, that it was not going to change the policy of the News-Bee;" that it was written to let his readers know that it was not intended "to let any judge edit the News-Bee or lay down its editorial policy," that is to say, that the News-Bee will hold its chosen course in defiance of any court; as between the court's right to undisturbed consideration of issues before it and Mr. Cochran's "editorial policy," the latter has precedence under all circumstances. This is insolent egotism becoming rabid.

Instead of criticizing the publications, September 9, of the Socialist resolutions, condemning court interference with the Schreiber ordinance, and, September 11, of the proceedings of the Central Labor Union discussing impeachment if the city should lose the traction case, counsel suggest that respondents should be complimented, because that action operated to relieve these organizations of something which they should "get out of their systems," and that, by publication, at the end, "they could see what nonsense and foolishness it was." By precisely the same reasoning, everything respondents themselves said of the court and the suitors before it, however invidious or offensive, could be excused, because that behavior would be but a process of eructation—a relief from some disturbance of respondents' systems. This defense is more ingenious than impressive. If these utterances were not so clearly in line with respondents' own original attacks on the court respecting the case, they might be overlooked, perhaps, on the ground suggested. It has already been noticed that both the Socialists and the labor agitator received inspiration for their outbursts from respondents. There is some responsibility on those who administered the poison which disturbed these systems. As it is, the same editorial precaution which suggested editing the Socialist criticism had better have been exercised to their exclusion altogether if respondents would not bear responsibility for them as reflecting the paper's own views. One who gives currency to defamatory matter is himself liable (25 Cyc. 574; Olmsted v. Brown, 12 Barb. [N. Y.] 657), and newspapers cannot escape on the theory that they are entitled to print the news (25 Cyc. 405), although this court, in matters of contempt, at least, would not incline to apply this principle very rigidly, if the publications were free from the appearance that they served the paper's "editorial policy" of defamation. In this connection, it should be observed that what is considered reprehensible in the publication of the account of the Quinlivan matter, in the early edition of the News-Bee of September 12, appearing before the entry of the court's order in the traction case, is not the fact itself that the paper saw fit to print the news and the substance of the charges against Quinlivan, but that, in line with its policy to emphasize and give prominence to what it considers the impressive things in the items of news, respondents extracted from the news article the threatening and contemptuous language of Quinlivan and presented it with special typographical emphasis.

In our findings hereafter stated we omit some publications which counsel for the government insist are predicates for a charge of contempt. We pass them over principally to give respondents the benefit of every doubt. Unless a publication plainly tends to affect the admin-

istration of a pending case, our conception of section 268 requires that it be not considered a misbehavior, no matter how aggravating or unfair it may be. An extreme instance is the editorial of March 31. The motion for a temporary injunction was denied on March 30, with a written opinion, of which the News-Bee was furnished a copy and from which, in its issue of March 31, it published extracts; yet respondents unmistakably perverted the court's position in their editorial comment. That the court's position and the paper's comment thereon may be more clearly considered together, we set out here in parallel a paragraph from the opinion and the editorial:

Opinion.

"That the company may run its cars from day to day without the city's consent and charge fare because its service is a public necessity, * * * but the city may at any time summarily deprive the company of the use of the streets except to salvage its property and the company may stop its cars at any time."

Editorial.

"To the layman it appears peculiar that the city cannot stop the company's cars because the public is entitled to the service or requires it, but the company can stop the cars at once on expiration of its franchise rights regardless of the needs of the people. Reminds us somehow of the elder Vanderbilt."

The subject in the opinion was but briefly considered, epitomizing the features of the court's unofficial statement in which, in more detail, it was declared:

"That the company can only operate after the expiration of its franchises at the city's sufferance, and its right to do so ends abruptly when the city acts through a new franchise or by imposing reasonable terms for a continued day by day use or other by means at the city's command."

This statement was published in full in the News-Bee March 26.

It follows, from these facts, that an only possible explanation for the editorial reflection on the court abides either in a willful oversight of the respondents' own files and documents coupled with an intention to belittle the tribunal, or in the employment of a willful perversion of the truth in a persistent intention to degrade the court. For it there can be no legitimate excuse. Strictly speaking, however, this unjustifiable comment cannot be said to tend to obstruct the administration of justice because it deals with a completed act of the court; wherefore it is within the favor of the decision in 131 Fed. (the Daniels Case), which case, in our judgment, at the most decides no more than this. In the case before us, however, the publication has an important function as an illuminant of the respondents' attitude towards the court respecting the traction case generally to exhibit the animus inspiring prior and subsequent publications which the court finds to be contemptuous. Respondents recognize the difficulty of excusing or even explaining this editorial. They deny any intention to reflect on the court, but its cynical tone, aside from its reference to the elder Vanderbilt's well-advertised views of the public, belies the disclaimer. They acknowledge they had reference to the court's opinion, but insist that they intended to refer at the same time to the claims put forth by the traction company. They say that, to the extent that it "does not correctly state the decision of the court, the error was unintentional." Unfortunately for their defense, the sneer at the court is based entirely on the misrepresentation,

and its tenor harmonizes altogether with that of every other comment made respecting the case.

We agree entirely with the view of the court in *Stuart v. People*, 3 Scam. (Ill.) 395, which counsel for respondents are assiduous to call to our attention, to the effect that:

"An honest, independent, and intelligent court will win its way to public confidence, in spite of newspaper paragraphs, however pointed may be their wit or satire, and its dignity will suffer less by passing them by unnoticed, than by arraigning the perpetrators, trying them in a summary way, and punishing them by the judgment of the offended party."

This was said in a case where there was a specific finding of fact that the sole alleged offensive publication had no tendency to obstruct the administration of justice. We would, and in this case did, go further and say that a court ought not to be swift to notice newspaper quips or careless or even untruthful reporting of its proceedings, even if superficially they reflect upon it respecting a pending case. Much better should it overlook such matters and trust to the good sense of the community it serves to secure for it the respect to which it may be entitled. On this principle we might have left unconsidered some other publications for which respondents are now held, had they not been plainly respective parts of a series of offenses.

But a court may carry forbearance so far and depend so long upon the good sense of the public to protect it from the embarrassment of repeated and persistent attacks as to become contemptible for weakness. Especially would this point be reached when, as here, the attempt to undermine the court is made by appeal after appeal to the selfish interests of the public in the outcome of the case, in which the public is repeatedly told that it is the only party whose rights are entitled to a particle of respect. In this matter the record shows that the court endured the News-Bee's attacks upon suitors before it and upon the court itself, and carried all the embarrassment inevitable from these publications, for nearly six months before moving to vindicate its independence. If longer patience than that would have been a greater virtue, it surely would have been at the same time a weakness of public service.

The right to freely comment on judicial conduct is not involved in this case. Such a right is unquestioned; just as plain as the corollary that the courts have a right—the people have a right—to expect newspapers to fairly criticize the courts, to argue their criticisms from truthful, not false, premises. Under these fair and honorable circumstances, it is true, as Judge Taft said to the American Bar Association, of which counsel are at pains to remind us, that "the opportunity freely and publicly to criticize judicial action" is of vast importance, for one reason that:

"It is the only practicable and available instrument in the hands of a free people to keep * * * judges alive to the demands of those they serve."

One is unable to find, however, in this right, any excuse for hampering the administration of justice by unfair comment on the court and by stirring up hostile sentiment toward the court and suitors therein respecting a pending case.

There is another supreme public interest which the right to freely criticize judicial action is to serve, not to destroy, of which the court, in *Cooper v. People*, 13 Colo. 377, 22 Pac. 802 (31 L. R. A. 429), *supra*, speaks:

"Every citizen has a profound personal interest in the enforcement of the fundamental right to have justice administered by the courts, under the protection and forms of law, free from outside coercion or interference. It is doubtful if anything else can be mentioned of greater importance than this right to society and the state; and it is not too much to say that the responsibility of the journalist for its enforcement is, because of the vantage ground he occupies, second only to that of the judge."

The right to criticize judicial action, of which Judge Taft speaks, is the right to remind courts of their function to determine issues before them free from any external influences of any character, not a right by unjustifiable criticism and comment and palpable appeals to public passion to impose external influences upon the tribunal.

Without affecting the present case, we may adhere, also, to the views announced before a recent meeting of the American Bar Association, which counsel for respondents very carefully call to our attention, wherein the distinguished speaker said:

"May I not ask you gentlemen whether the time is not now ripe for the judges themselves to take greater pains to explain to the public the situation they now occupy; in some way * * * to let the public understand what is going on in the courts, the great purpose of the courts, the great objects to be attained?"

The suggestion is acceptable, truly, but to follow it courts must have an honest medium of communication with the people. Judges may write opinions and file them; thereafter they must trust to the press. That newspaper, however, which maltreats a court, as did the *News-Bee* of March 31, in founding upon a palpable misrepresentation of this court's traction opinion of March 30 a sneering reflection on the court's fairness, and whose headline custom yields so many false impressions as this record shows, is not a very promising medium for a judge's explanation to the people of the position the court occupies respecting a matter of public interest. In spite of appearances, we are certain that the sardonic humor in counsel's reminder of this address was unintentional.

We are unable to accept at its face value the claim in testimony, offered possibly in mitigation, that the offenses complained of were committed in a zealous, self-effacing effort to serve the people. There are not wanting in the atmosphere of this case grounds for suspecting that the boasted interest in the people was commercial, not unselfish and patriotic; that the "implied contract" to give the people all the news was violated in the publication of manifest untruths and unmistakable reflections on the court and parties before it, not in excessive zeal for the public welfare, but willfully to foster local prejudices, so that the resultant distrust of authority might be coined into dividends; that these equivocations and, at times, downright prevarications, were played as salient features, and cast in extravagant headlines and special boxings, to stimulate an interest which would increase circulation, give excuse for extra editions, and catch more pennies.

According to Mr. Cochran's testimony, four municipal elections were carried by candidates supported by the News-Bee and in line with its traction policies, and yet the power to settle the franchise question was never exercised; the issue was always on hand to be the subject for furid rhetoric and violent invective. It is open to question whether, at least since 1910, with the state law protecting the people through a referendum, the News-Bee's city hall could not have brought the question to an answer. The city had the exhaustive report of its chosen expert, and the votes in council as shown by the passage of the Schreiber ordinance. It does not strain the imagination to see, in the "Big Con," the perennially unsettled traction question, and the vogue for three-cent fare, assets for respondent's business, whose value might greatly diminish, if not entirely vanish, if allowed to be coolly and dispassionately considered in a local court in plain view of an *undisturbed* community. The intelligence of those connected with the paper is too obvious to permit confidence that they entertain a genuine feeling that any interest the people had in the solution of the question justified editorial conduct which had no other direction than to make it less and less easy for the people to see clearly just what their fair and reasonable interest was. They would not say, of course, that, no matter how cordially the "Big Con" was disliked or whatever the cause of the dislike, the honest people of Toledo desired anything else than fair treatment of it and from it. No one of an honest mind can reasonably deny that each publication in question directly tended to impassion those who relied on the News-Bee for impressions of men and events, and that thus such readers became measurably disqualified from judging what was fairly due either the city or the company, or whether the public's agents were faithful to their obligations.

Obviously, also, much of the testimony is shrewdly directed to a probable future claim that the court in this case aims to curtail the freedom of the press. Mr. Cochran's comments on the purpose of his "declaration of independence" leave no doubt here. Emphatically, a free press is an indispensable asset to liberty; but a licentious, unscrupulous press is a liability. Thomas Jefferson, while yet President, wrote to John Norvell that:

"It is a melancholy truth that a suppression of the press could not more completely deprive the nation of its benefits than is done by its abandoned prostitution to falsehood."

An unreliable newspaper is no friend of the people. Jefferson said of such that a man who never looks in one "is better informed than he who reads them, inasmuch as he who knows nothing is nearer the truth than he whose mind is filled with falsehood and errors."

The principle this court is applying here is not one which curtails in the slightest the liberty of respondents to publish anything they please, but it is the salutary doctrine, always recognized and indispensable to good order, that they must respond for a baleful use of that freedom. *Robertson v. Baldwin*, 165 U. S. 275, 281, 17 Sup. Ct. 326, 41 L. Ed. 715. Nor is there in this case any assertion of a special power in the court over the press. A newspaper is merely a private affair, the activity of persons as amenable to the laws as individuals in other voca-

tions, and the editors of newspapers—mere human beings, too—have no greater privileges than the writers of private letters or the circulation of common gossip. The power of a court over a newspaper is the same in quality, no greater and no less, as that affecting any other enterprise. A court is but a public agency—the people themselves in organization for a special purpose—to which newspapers are responsible when in the wrong, as any other human activity. The court, in *People v. Stapleton, supra*, say:

"Thoughtful citizens know very well that there is far more danger to our institutions, and far more danger to the rights of the people, and especially to the rights of litigants, to be apprehended from the power of the press over the courts, than from the power of the courts over the press."

The lynching of Johnson at Chattanooga, March 19, 1906, was preceded within four hours by an inflammatory article in a local newspaper under a "scarehead." As a result, officers of that city were before the Supreme Court and the whole community was in disgrace. *United States v. Shipp*, 214 U. S. 386, 29 Sup. Ct. 637, 53 L. Ed. 1041. Recently, Leo Frank's was a case also where apparently public hysteria, stimulated by hyperbolic newspaper discussion of the charge against him, supplanted due process of law and made the court holding his life in the balance a contemptible thing, a failure as the administrator of justice.

That Toledo should be disgraced, as other cities have been, by street car riots, on Saturday, March 27, was rendered impossible by the action of the traction company in allowing free rides. Whether rioting would otherwise have occurred is pure speculation. Members of the city council predicted it as early as the 23d, and the News-Bee itself says there was "much anxiety" on the subject. It is entirely obvious that its own behavior on March 24, 25, and 26 gave reasonable occasion for anxiety, because it offered the greatest encouragement to those who were disposed to defy law and order to exercise their proclivity when the franchises expired.

As no sophistry avails with intelligent persons to argue out of these publications their tendency to arouse distrust and dislike of the court, so, equally, no sophistical declamation should be allowed to cloud the issue of this case. It is not to muzzle the press, to "edit the News-Bee," to create a "fear" of this court, or its judge, to prevent which Mr. Cochran says, in his testimony, was the purpose of his "declaration of independence," but to define and to insist on the right of this court to transact the business intrusted to it without molestation or the embarrassment of improper influences, whether newspaper suggestion, criticism, intimidation, or what. It is to assert "the right of every litigant to have his case heard free from baneful external influences sought to be executed from selfish or other improper motives."

This court is dealing here with "palpable acts of journalistic lawlessness, calculated to weaken the independence of the court and destroy confidence in its judgment. To justify them is to deny the supremacy of the law, and assert the doctrine of newspaper absolutism. To admit that publishers may promote their interests in pending litigation by resorting to methods not available to others is to strike down our much-

vaunted principle of 'equality before the law,' and to declare that journalists, who chose to become malefactors, are a privileged class and entitled as such to go unwhipped of justice. But the law recognizes no such distinction. It accords to publishers, says Chancellor Walworth, 'no rights but such as are common to all. They have just the same rights as the rest of the community have, and no more.' *King v. Root*, 4 Wend. (N. Y.) 113 [21 Am. Dec. 102]." *State v. Bee Pub. Co.*, *supra*.

[5-7] It is urged that it is neither averred nor proven that any of the publications involved ever came to the attention of the judge of the court. In our judgment, this is nothing. The question is not, did the misbehavior embarrass the court or obstruct justice in either of the directions alleged, but whether they were calculated—tended—to such results. It is not what respondents actually accomplished, but what they intended and tried to do, for which they should be held. Attempts to commit crimes are themselves crimes. Besides, the order for an information, offered and received in evidence without objection, recites that each of the publications were seen by the judge as a daily reader of the News-Bee. In cases of this kind it is competent for the court to take judicial notice of pertinent facts which come within the cognizance of the judge's senses. *Myers v. State*, 46 Ohio St. 473, 492, 22 N. E. 43, 15 Am. St. Rep. 638.

Yet the record shows some obstruction of justice referable to respondents' conduct. In fear of the results of the encouragement to anarchy, of defiance to constituted authority, for Friday night, March 27, which the News-Bee had given in its issues for the three previous days, the traction company allowed free riding, to its great and unjustifiable loss, as clearly appeared when the city admitted the confiscatory character of the ordinance in whose behalf the News-Bee advertised the meeting in Memorial Hall, "restraining order or no restraining order." The situation, to which respondents' behavior undoubtedly contributed, impelled the court's special endeavors to allay public feeling and, to accommodate the public temper, caused it to delay the operation of a just order for three days. The proposition for unlawful action Friday night, which the News-Bee exploited March 25, brought additional work to the administrative officers of the court, of which the paper itself speaks.

After the events, it is safe speculation to say that all of these fears were needless, but at the time, as the paper admits, anxiety existed; whether foolish or not is beside the question. However that feeling may be characterized, respondents' behavior was a prominent factor in its creation. We need not go beyond the articles from the News-Bee admitted in evidence in this case to learn that the court had its attention turned to some of these things to its annoyance when the issues in the case were under its consideration.

Counsel for respondents ask the court to consider it a virtue in respondents that, Friday, March 27, their paper printed a news article, under the heading, "All Urge Peace in the Car Contest." This article has as one of its opening paragraphs this:

"With a crisis in Toledo's 12-year fight for three-cent fare only a few hours away and the people aroused as they seldom have been through the long years of struggling against the Big Con, all parties to the controversy—company, city and federal court—pleaded on Friday for no rioting or trouble after midnight, when the three-cent all day ordinance becomes effective."

This sentence has four propositions, only one of which makes for peace: There is a crisis after "long years of struggling"; the people are thoroughly aroused; although the court has to hear the question, the ordinance is effective nevertheless at midnight; all parties—three, two of whom have been the object of the News-Bee's attacks— plead for good order, save the News-Bee and those whom it essays to lead.

The paper merely states a matter of news, its "editorial policy" for the last three days is not changed. On the contrary, its cartoonist pictures the head of the city's safety department hastening out of town, thus giving point to the editorial assurance of the day before that the police will not "use their clubs on car riders who refuse to pay more than three-cent car fare after Friday," and Mr. Cochran breaks out in more two-column wide, large type, editorial "punching," advising his followers that the Big Con is a "trespasser" which has "rushed into the federal court" to wrest control of the streets from the people; that its attitude is "the same old defiance of the people"; that its past conduct gives no assurance that it will live up to its promises; and that it operates for "the financial gain of foreign bondholders and stockholders."

Under these circumstances, the amount of credit due respondents for merely printing the news that others than the News-Bee "pledged on Friday for no rioting or trouble" is not very large. The article is noticeable for proof that "the anxiety about trouble," of which the paper elsewhere speaks, had become somewhat general since Monday night, when councilmen first gave it voice. Mr. Cochran himself seems to have been affected, for he says in testimony:

"I asked the boys—I asked them: 'There is danger of any trouble here?' They said: 'Absolutely none, unless it may be a little scrap on the rear end of a street car.'"

Because of this showing, analysis is difficult of the state of mind which, in answer to his counsel's question as to ground for fearing violence, prompted him to answer: "I don't know where it came from, but it must have been in Judge Killits' imagination."

It is not a task on imagination to see the possibility of numerous scraps on back platforms with "the people aroused as they seldom have been through the long years of struggling," if the full Memorial Hall project, so extensively advertised and apparently indorsed by the News-Bee, had been carried out, and some hundreds of men, with Mr. Cochran's denunciations of "stock gamblers and speculators, trespassers, arrogant franchise manipulators," seeking a "strangle hold" in the courts on the people, and the impassioned oratory of 15 speakers, stirring their souls, had rushed the cars that night. An experienced newspaper man like Mr. Cochran knows something of the psychology of a mob, and knows, of course, that one "little scrap" would be an insignificant, casual, individual matter; but a score or more at the

same time, and as the sequence of inflammatory appeals, and thus becoming action in concert, would amount to a riot. The publications in the News-Bee unquestionably tended to the production of just such a concert of action. From such a situation to destruction of property, and even loss of life, is but a step, as historical experience shows.

The Quinlivan incident also was thrust upon the court in direct sequence to respondents' misrepresentation, and, as we have hitherto suggested, the identity of language between the Socialist resolution, edited and published in the News-Bee on September 9th, and its own characterization of the "Big Con" as a suitor in this court, suggests that the Socialist insult to the court was inspired by respondents' conduct.

We take this occasion to reiterate former expressions of gratitude to counsel that they have apparently assisted this cause to proceed altogether as one affecting the court as an agency of the people, and not at all as a matter of private concern to the individual who, as a part of the court, happens to occupy the bench for the time being. It is power emanating from the Constitution and laws, and, consequently, derived from the people, which this court exercises; therefore, an insult to it, an attempt to belittle or degrade it or to thwart the exercise of its functions, is an affront to the people themselves and in no way a personal matter between the alleged offender and the judge. Our conception of section 268 of the Judicial Code agrees thoroughly with that of counsel for respondents, to this extent, at least: Those who would degrade this case to the level of a mere personal controversy between the respondents and the judge of this court do so either through sheer ignorance or through a pitiable incapacity to understand how public service may be impersonally rendered, without which there can be no faithful performance of official functions, or because of willful perversion of facts plain to an honest and open mind. As far as possible, to emphasize the impersonality of this proceeding we have, to counsel's knowledge, proceeded with utmost deliberation and accommodation to every convenience of respondents, and if in any place there is the slightest failure in respect to any interest of the respondents, it has not been due to any lack of scrupulous endeavor that nothing should be left undone to make a record complete as to any right they should have.

While, of course, after Mr. Cochran's testimony of his years of continued active interest in the News-Bee as its editor in chief, and his admission that for four years his paper had industriously chronicled the proceedings of this court, we may not accept as reliable his claim that in writing his editorial of March 26 he was merely indulging in reasonable speculation respecting the quality of the court as a factor yet unknown to him, he might, as far as we know, have truthfully said that nothing had theretofore transpired which had established an unfriendly relation between the latter and the News-Bee.

In this connection, it may be observed that all of the publications of the first count were uttered before the court had indicated any view which by the wildest imagination could be considered to be at odds with the News-Bee respecting the Schreiber ordinance or as to

anything else connected with the traction case. The court was never called upon to decide the controversy that the measure was confiscatory, for that fact was admitted by the city, and its admission was not resolved into a court finding until after respondents had uttered all of their publications from March 24 to September 12, inclusive. We are bound therefore to consider that the offenses embraced in the first count were not inspired by any feeling against the judge of the court, but were wholly the fruits of a policy obsessing respondents, which would brook no interference with their self-appointed task to settle the traction question on terms entirely their own.

This court, however, has no right to allow an endeavor to be impersonal to enfeeble its judgment of the character of respondents' offenses, and, if therefore we seem to have indulged in strictures of characterization, it is because the crime of respondents is so clear, the tendency of their acts so demoralizing to a state of society which, needing some organization for the settlement of its controversies, needs therewith confidence in its judicial tribunals, that there is no alternative but unequivocal condemnation.

Again, we are not helped to any soft words by any act of respondents since attention was called to their offenses. Mr. Cochran somewhat flippantly says, speaking of both tirades whose authorship he owns, that they were not occasions when he felt that his thoughts should be couched in "very nice, ladylike language," and the air of his entire testimony is that of one whose attitude toward the court and the question of its right to try the traction case free from the News-Bee's interference is still precisely that which formed the "editorial policy" responsible for any of the publications we have to consider. It is very plain that he justifies every outrage of his paper, is still under the obsession of an unweakened confidence in his editorial impeccability, and, with difficulty, entertains a compassionate disdain for any one failing to accord to him, as his privilege, the right to speak the final word upon all questions, even to advising the people what a court should or should not do and to what extent they should respect or obey its decrees. There is nothing apologetic in his manner or disposition. If he disclaims any intention to reflect on the court, it is not born of any thought that he may have overstepped, but seems to be the product of pity for the mind that sees in his acts anything to be criticized. We may also regard the witness Cochran as reflecting the present attitude toward the court of the corporation which still intrusts to him the responsibility of speaking for it, wherefore it would be idle for the court to employ mellow terms in discussing respondents' offenses.

We have made separate findings of fact adjudging respondents guilty on all three counts and for the publications of March 24, 25, 26, 27, and August 14, September 5, 9, 10, 11, 12, 14, and 17, and we come now to the difficult task of fixing an appropriate penalty. Congress has not seen fit to fix a maximum; but, in the alternative of fine or imprisonment, punishment is left to the sound discretion of the court. The case before us is unique. The books do not afford another where the court, respecting a pending case, was subjected to a con-

tinual and prolonged bombardment as here. Many reported newspaper cases are extant but the offenses were for single publications, or, at most, three or four; here there are a score and more. In no other case was the court a target for months. Also, but one other case is reported (State v. Bee Pub. Co., *supra*) where, as here, a newspaper began on the court before the latter had taken any action at all, and in that Bee Case there were not joined, as here, to attacks on the court, efforts to stir up popular opposition to the court's findings, nor was there misrepresentation of court proceedings. The rule is for the offense to follow some action by the court. For instance, in Myers' Case an indictment had been found; in Patterson's, Tugwell's, and Rosewater's, respectively, the publications were inspired by partisan resentment at holdings by the court; but here the court had been absolutely voiceless in the subject-matter of the contempt when the News-Bee proceeded editorially to belittle its judge and gave inspiration to those who would defy it. Even after the first expression from the court had been in favor of the issue for which the News-Bee contended, its decision was misstated and the prevarication made the premise for a most deliberate and offensive slur. The incidents of the first count especially precede and disclose an intention to anticipate court action. In the language of another court, the publications "were directed solely to actions to be taken and conclusions arrived at in the future, and it was undertaken by this reprehensible method to prejudice the mind of the public and extort a particular decision in a case then pending for determination." It is notable that the publications under the second and third counts are substantially challenges to the court. The publications which we condemn are separately contempts, some of them aggravated, and in series they intensify the offensiveness of each other, until, in the aggregate and cumulating their tendency, they call for punishment for which no adequate precedent exists. In connection with the cold-blooded, uninvited character of respondents' course, a deliberate employment "of outlaw methods in attempting to control judicial action," we ought not lose sight of the fact that respondents are still recalcitrant, putting before the court a defense which affronts intelligence; for, where it is not puerile, as where jurisdiction to hear the traction case is denied, it is definitely unreasonable, in that it asks for a construction of respondents' language which contravenes all rules of interpretation and invites the court to concede to the press rights which would make it more than a "Fourth Estate" and would give it power to indirectly control one of the three approved departments of our government.

If there were no other publications for the court to consider than those of the midweek of March, an offense sufficiently serious to warrant a large fine would be present. March 24: The traction company is trying to "evade" its obligations by taking its case into the federal court, but the city solicitor will "protect" any individual who takes the law in his own hands nevertheless. March 25: The judge of the court is an uncertain quantity, liable to be unduly impressed by the "high-priced legal talent" sold to the "Big Con," and therefore to furnish the latter with a "strangle hold" on the people; but it is planned that the people shall board the cars in large numbers on Friday night after listening to 15 speakers in Memorial Hall, and by aid of "sinew"

furnished by union labor compel the conductors to accept three-cent fares, "restraining order or no restraining order by the federal court." March 26: While the judge of this court is holding "in the balance the case of the rights of 200,000 common people versus the rights of some wealthy investors and speculators," preparations are going forward for the mass meeting in Memorial Hall to be assisted by union labor, and the police will not "use their clubs on car riders who refuse to pay more than three-cent car fare" that night, because the law is "only what the people will back up." This is preaching, advocating, anarchy. No sophistry of argument, no ingenious theory that the people of this city were interested in the case in the manner of "stockholders of a large corporation" entitled to receive reports of their business, suffice to gloss over the seriousness of this sort of thing, and it would be no less anarchistic if jurisdiction in this court to hear the traction case were palpably, unequivocally absent. These are not merely the result of reportorial inefficiency and enthusiasm, for the editor in chief, himself, gave them some personal attention.

For these reasons, a sound discretion calls for the imposition of a substantial fine upon the respondent corporation, and thus in some measure cause to be returned to the public part of the profits made from a circulation stimulated by appeals to selfish individual interests and by encouraging distrust of the faithfulness of public agencies.

The respondent Cochran is also specifically found guilty of criminal contempt, as charged in the information; but, after all, we must consider him as an employé of the real offender, merely an instrument—willing, it is true—of its unlawful conduct, not a principal. In one of his screeds he had something to say of lawyers who sell themselves to the highest bidder. We doubt whether he who sells a facile pen to a corporation that the latter, from the prostitution of his ability, may prosper through exciting prejudices against the country's institutions, is qualified to cavil on this subject. If he were a principal instead of a mere employé, or were this a second offense, the court's duty to send him to a jail or workhouse might well be exercised; but here, we think, justice will be secured by making the Toledo Newspaper Company bear the substantial responsibility for the acts of those whom it hires, and by imposing on the servant, Cochran, in this, his first offense toward this court, at least, a fine in a nominal amount, that he may have a final judgment from which to prosecute review.

The Supreme Court, in *Re Chiles*, 22 Wall. (86 U. S.) 157, 169 (22 L. Ed. 819), has held, under the statute upon contempts which we apply, that, in cases where the end sought is to vindicate the court's authority, the court must judge for itself the nature and the extent of the punishment with reference to the gravity of the offense. A corporation can be punished only by a fine. The gravity of the offense is certain; there can be no graver public crime than to attempt, in the manner here, to extort from a court a particular decision, or to work to poison the minds of citizens against the only organization which society has yet been able to devise for the settlement of its controversies. The assumed failures of courts to do "substantial and not technical justice" are not to be prevented by attempting to make them subservient to gusts of popular passion, or, through falsely reporting their proceedings, dis-

torting the facts before them for determination and lampooning unpopular suitors, by encouraging a mob spirit toward them.

The discretion which abides in a court to determine what amount of fine will be proper punishment in a given case involves an effort in ascertaining what sum will actually work a penalty under all the circumstances, including the financial condition of the offender; for it is obvious that a small amount might be a greater burden on one offender than many times that sum to another. The consideration here is to vindicate the court's independence by the imposition of a fine that will mark the importance of the issue as well as to punish. If we could feel that respondents were satisfied of the court's right to exact respect from them in the premises, and hence that they were finding in the court's condemnation alone some measure of punishment, the disposition would be to make that fact compensate for a large part of an otherwise proper fine. But this case closes with a feeling that they are as obdurate as ever, have learned nothing since their last publication, and may refrain in future from repeating their offenses only because of probable consequences, and not through a sense of justice to the court.

It is a matter of common knowledge in this community that the respondent corporation is exceedingly prosperous, which fact is also indicated by its statements under the act of August 24, 1912. The financial condition of one under conviction may be looked into, that the court may be advised of what would be a punitive fine, and be enabled to exercise an intelligent discretion. Under the decisions in *Hale v. Henkel*, 201 U. S. 43, 26 Sup. Ct. 370, 50 L. Ed. 652, and *Wilson v. United States*, 221 U. S. 361, 31 Sup. Ct. 538, 55 L. Ed. 771, Ann. Cas. 1912D, 558, we may require the corporation to produce its books in an inquiry. We hesitate, however, to exercise this inquisitorial power here, and prefer to act definitely in the light the court already has. It is, accordingly, adjudged that the respondent the Toledo Newspaper Company pay a fine of \$7,500 and the costs of this proceeding. A writ of execution is awarded, but the same is stayed until March 15, 1915. On or before that time the respondent corporation may apply to the court for a modification of this sentence, on the ground that it is excessive considering the present financial condition of the corporation and the rate per cent. of its profits on its investment during the months of March to September, inclusive, of 1914. After an inquiry in this behalf, had on such application, a modification of sentence will be made as the facts then exhibited justify. The respondent Cochran is fined \$200, and he is ordered to stand committed to the jail of Lucas county, Ohio, until this fine is paid. Execution of the order of commitment is suspended until April 15, 1915, to enable him to perfect a record for a review of the judgment against him, at which time, if proceedings in error have been begun, a further suspension pending review will be granted. Execution of judgment against respondent corporation will also be granted pending proceedings for review, whether the sentence is modified on its application or not.

NOTE.—Since both the opinion and order in this case were written, we have noted a press report of a decision by the judge of a state court affirming the constitutionality of section 11343—2, General Code of

Ohio (Act of April 26, 1911, p. 95), providing that the publication of "a fair and impartial" report of certain court proceedings and documents filed therein shall be privileged under certain circumstances. Whether that act does or does not control this court in a case of this character, we have given it application in this case, as will be noted where the opinion deals with the publication by the respondents, September 12, 1914, of the charges against Quinlivan.

On the presentation of a motion for a new trial, respondents in this case withdrew their complaint as a ground for new trial that the fine against the respondent the Toledo Newspaper Company was excessive.

CROWN ORCHARD CO., Inc., v. DENNIS et al.

(District Court, D. South Carolina. January 21, 1915.)

No. 124.

1. COURTS ~~262~~—**UNITED STATES COURTS—JURISDICTION—STATE LAWS.**

The federal courts are compelled to observe the distinction between actions at law and suits in equity, and, when sitting in equity, can take jurisdiction under the express provisions of Rev. St. § 723, only where there is no plain, adequate, and complete remedy at law, and this jurisdiction cannot be enlarged or extended by state statutes or procedure.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 797, 798; Dec. Dig. ~~262~~.]

2. COURTS ~~367~~—**UNITED STATES COURTS—STATE LAWS AS RULES OF DECISIONS.**

In construing a deed to standing timber in South Carolina, if the courts of South Carolina have adopted a rule of construction applicable to such deed, it must be followed by the federal courts, subject to certain limitations.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 958, 959; Dec. Dig. ~~367~~.]

3. LOGS AND LOGGING ~~3~~—**SALES OF STANDING TIMBER—REMOVAL.**

A deed to all standing timber on certain land in South Carolina of a specified size reserved to the grantor the right to use timber for ordinary plantation purposes, but provided that this should not include the right to clear the land, and provided that the grantees should have eight years in which to cut and remove the timber, and that, if it was not cut and removed within that time, it should have such additional time as might be desired for cutting and removing it, and in such case should pay interest on the original purchase price year by year in advance. The grantor was to pay all taxes on the land and timber. It was the mutual understanding that the cutting was to commence within eight years, and that, if the timber was not all cut off within that time, the grantees should have such additional time as was necessary to cut off the remaining timber, and that the grantor wanted to clear the land and open it to cultivation. Held, that the deed did not give the grantees an indefinite time to remove the timber, but only the time fixed, with a reasonable extension thereof to complete the cutting and removal; and hence it was not entitled, in a suit, to enjoin the removal of the timber by one of the grantor's heirs claiming under a deed from the other heirs to a decree extending the period for removing the timber 25 years, especially in view of the burden which this would place on the owners of the land, the lack of mutuality in the contract which gave the grantees the option of paying interest and obtaining an extension or stopping payment and leaving the owner without remedy, the uncertainty in the terms of the contract, and the impracticability of enforcing the contract by reason of the inability to distinguish at the expiration of 25 years between timber covered by the contract and timber not so covered.

[Ed. Note.—For other cases, see Logs and Logging, Cent. Dig. §§ 6-12; Dec. Dig. ~~3~~.]

4. LOGS AND LOGGING 3—SALES OF STANDING TIMBER—EQUITABLE RELIEF.

Where the cutting and removal of the timber was not commenced within the eight years, the court would not grant a reasonable time thereafter to cut and remove it, but would leave the grantee to its remedy of law, especially where it appeared that the owners of the land were solvent.

[Ed. Note.—For other cases, see Logs and Logging, Cent. Dig. §§ 6-12; Dec. Dig. 3.]

5. LOGS AND LOGGING 3—SALES OF STANDING TIMBER—CONSTRUCTION OF CONTRACT.

In construing deeds to standing timber, the intention of the parties should be ascertained and enforced as in the construction and enforcement of other contracts.

[Ed. Note.—For other cases, see Logs and Logging, Cent. Dig. §§ 6-12; Dec. Dig. 3.]

6. LOGS AND LOGGING 3—SALES OF STANDING TIMBER—CONSTRUCTION OF CONTRACT.

A grant of standing timber, while executed in respect to the grant, is executory with respect to the cutting and removal of the timber.

[Ed. Note.—For other cases, see Logs and Logging, Cent. Dig. §§ 6-12; Dec. Dig. 3.]

7. SPECIFIC PERFORMANCE 120—EVIDENCE—PAROL EVIDENCE.

While, in the absence of fraud or mistake, parol evidence is not competent to contradict or alter a written contract, when specific performance is sought the court may hear evidence, in order that it may be in possession of every fact and circumstance attending the negotiation and execution of the written agreement, to enable it to so mold its decree, that justice and right may be awarded.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 384-386; Dec. Dig. 120.]

In Equity. Bill by the Crown Orchard Company, Incorporated, against William H. Dennis and others, for an injunction, etc. Bill dismissed.

The bill, answer, and proofs make the following case:

The complainant is a corporation created and organized February 19, 1912, under the laws of the state of Virginia, with a maximum capital stock of \$15,000. Its principal office is at Crozet, Albemarle county, Va. "The purposes for which it is formed are to acquire, hold, lease, manage, operate, develop, cultivate and control real estate, improved and unimproved, and the appurtenances thereto; to grow orchards of all kinds, nursery stock, general farm products, live stock and poultry; to acquire and operate plants for the manufacture of cider, vinegar, canned goods and all by-products of fruit, vegetables and farm products; to build and operate warehouses, storage houses and cellars of all kinds; to construct, maintain and rent any other buildings, either on lands owned by the company, or on the property of others for the betterment of its property, or any part thereof; to buy and sell timber and lumber of all kinds; to manufacture barrels, crates, boxes or any other articles that may be necessary or convenient in the conduct of the foregoing business; to sell nursery stock, orchard, mill, farm and manufactured products; to act as agent for others for the sale of any or all of the above goods and property and to buy and sell any and all articles of personal property and merchandise, and to transact all business and to do all other things incidental thereto, which may be necessary and convenient in the judgment of the board of directors for the purpose of the company." It is also given power to borrow money, issue its bonds therefor, and execute mortgages and deeds of trust to secure the same. Certificate of Incorporation, Plaintiff's Exhibit 5. The defendants are residents and citizens of the Eastern District

of the state of South Carolina. The amount in controversy, exclusive of interest and cost, exceeds the sum of \$3,000.

On May 5, 1903, E. J. Dennis, the ancestor and predecessor in title of defendants, being seised in fee of a tract of land, lying and being situate in Berkley county, S. C., known as "Fair Springs," upon which he then resided, containing 660 acres, together with his wife, A. H. Jennings, executed a deed to Freeman S. Farr, trustee, in which he conveyed to said Farr, trustee, his heirs, executors, administrators, and assigns, in consideration of the sum of \$1,500, "all the timber of every kind and description, both standing and fallen, of ten inches stump diameter and upwards, twelve inches from the ground at the time of cutting," on said tract of land, reserving the timber "on five acres immediately around dwelling house." He also reserved "the right to use any timber from the said tract for ordinary plantation purposes connected with the said land; this reservation, however, not to include the right to clear the said land or any of it." By said deed was granted to Farr, trustee, "a permanent right of way 62 feet wide upon and across the tract or tracts of land described as aforesaid and all contiguous land, to be selected and located by the said party of the second part, his heirs, executors, administrators, or assigns, whenever and wherever so desired, to be used for a permanent railroad, or tramway, or for any permanent branch railroad or tramway, together with the following exclusive rights and privileges to be exercised at any and all times during the continuance of this contract, at the pleasure of the said party of the second part, his heirs, executors, administrators, and assigns, namely, to enter freely upon said above-described tract or tracts of land," etc. The purposes for which these easements are granted are to locate and establish rights of way over said land and contiguous lands, for ingress and egress at any and all times for men, teams, and vehicles; to cut and make roads over said lands: to build, construct, maintain, and operate railroads, tramways, cart and wagon ways, across said lands, on such routes as may be selected by said second party; to establish and maintain stables and other fixtures or buildings on said land; and to do any and all things that may be necessary or convenient for the cutting, handling, hauling, and removing of the timber, as aforesaid, from the aforesaid tract or tracts of land, and for the transportation of any other timber and articles, of every kind and description, that the second party may desire to transport over the said roads, or any of them. The right and power is also given to cut such small timber from the land as the party of the second part may, in his judgment, deem necessary to build and operate the railroads, tramways, buildings, fixtures, and structures during the continuance of the contract, or with the right to remove all such railroads, tramways, etc. Following the habendum clause in the deed is a covenant of warranty.

"Second. That the said parties of the second part, his heirs, executors, administrators and assigns, shall have, and the same is hereby granted to them, the period of eight (8) years, beginning from the date hereof, in which to cut and remove said timber from the said land, and that in case the said timber is not cut and removed from said land before the expiration of said period, then that the said second party, his heirs, executors, administrators or assigns, shall have such additional time as may be desired for cutting and removing said timber, but in the last-mentioned event the said second party, his heirs, executors, administrators, or assigns, shall, during the extended period, pay interest on the original purchase price above mentioned, year by year, in advance, at the rate of six per cent. per annum." The owner of the land further covenants that he will pay all taxes now due, or that may become due, on said land and timber, and upon his failure to do so the party of the second part may do so and have a lien on the land therefor. "All covenants, stipulations and agreements herein assumed, or undertaken by either party to this contract, shall be binding upon their respective heirs, executors, administrators or assigns, and all benefits and advantages herein provided for, either of the said parties, shall accrue to their respective heirs, executors, administrators or assigns, as the case may be." The deed is signed by the grantors and grantee, and duly proven and registered.

On September 23, 1904, the said Freeman S. Farr, trustee, conveyed and assigned the timber conveyed in said deed, together with the timber on 58 other tracts, to the Oneida Timber Company, a corporation created by and organized under the laws of South Carolina. He also transferred all such rights of way, etc., and "rights to time for removing such timber, or any of it, and rights to extend such time," to said timber company. It is recited in said deed that said Freeman S. Farr held said timber as trustee and conveyed the same to said company by way of executing the trust.

On June 30, 1910, the Oneida Timber Company conveyed said timber, together with a large number of other tracts of standing timber, to the Midland Timber Company, a South Carolina corporation. While the language of this deed is not so explicit in the description of the right to the time granted and extension thereof transferred, it may be taken as sufficient for the purpose of vesting in the grantee all of the rights in that respect, owned by, or vested in, the grantor.

E. J. Dennis died intestate prior to the 29th day of April, 1911, leaving his wife, the defendant A. H. Dennis, to whom, together with his children, the other defendants, the land, upon which the timber conveyed was standing, descended. No portion of said timber having been cut or removed on or prior to said 29th of April, 1911, the Midland Timber Company, by R. L. Montague, its general manager, delivered to defendants "E. J. Dennis and his two sisters and mother (A. H. Dennis) and brother" a paper writing (Defendants' Exhibit 1), in which the execution of the said deed to Freeman S. Farr, trustee, is recited, and that by sundry mesne conveyances all of the timber rights, rights of way, privileges, and easements had been conveyed to said Midland Company and reciting further that: "Whereas the said Midland Timber Company desires to exercise its rights under the said deed to extend the time in which to cut and remove the said timber, and to use and enjoy the aforesaid timber rights, ways, privileges and easements according to the terms of said deed of conveyance for a period of twenty-five years. That said Midland Timber Company notified the said parties, owners of said land, "that, it desires twenty-five years additional time, after the 5th day of May, A. D. 1911, within which to cut and remove said timber and to use and enjoy the said timber rights, ways, privileges and easements, during which extended period, or so much of the same as may be used for such purposes, it hereby agrees and binds itself, its successors and assigns, to pay interest at the rate of six per cent. annum, year by year, in advance, on the original purchase price of fifteen hundred dollars, as provided in and by the said deed, and in pursuance thereof it hereby tenders and offers to pay to the said A. H. Dennis individually and * * * heirs at law of the said E. J. Dennis, Sr., deceased, the sum of ninety dollars (said sum being six per cent. on the original purchase price of fifteen hundred dollars) for the first year of said period of twenty-five years; that is to say, from the 5th day of May, 1911, to the 5th day of May, 1912. It is, however, expressly understood that this notice of the intention and purpose of the said Midland Timber Company to extend the time within which to cut and remove the said timber and use and enjoy the said timber rights, ways, privileges and easements, as aforesaid, is not intended, nor shall it be taken, to limit, in any manner whatever, the grant in fee simple of the permanent and exclusive right of way as is set out in the aforementioned deed of conveyance executed by E. J. Dennis, Sr., and A. H. Dennis to Freeman S. Farr, trustee." The defendants refused to accept said tender, claiming that the period for cutting and removing said timber expired on May 5, 1911. There is evidence tending to show, but contradicted by defendants, that on May 5, 1911, the Midland Timber Company, by its general manager, tendered to defendants the interest on the sum of \$1,500, which was refused. Defendants do not deny that they claimed, and have at all times claimed, that the time for cutting and removing the timber expired May 5, 1911. No further tender was made by the Midland Timber Company. On June 28, 1913, the Midland Timber Company executed to complainant, the Crown Orchard Company, a deed reciting a present consideration of "fifty-eight thousand six hundred and forty-two and $\frac{50}{100}$ dollars to it, in hand paid, at and before the sealing and delivery of these presents, by

the Crown Orchard Company, Inc.," conveying to complainant the timber, timber rights, etc., on seven tracts of land, aggregating 7,000 or 8,000 acres, including the land upon which the timber in controversy, conveyed by Dennis to Farr, trustee, is situate. No part of the recited consideration was paid; there was an agreement by which the Crown Orchard Company was "to pay for the timber as cut." The timber on the Dennis land was estimated, by complainant's witness, on September 2, 1909, to be of the value of \$4,850.

The bill was filed herein January 28, 1914, and at that time complainant paid to the clerk of this court, in legal tender, \$270, and on May 5, 1914, \$90, which is held by him in the registry subject to the order of the court. Complainant owns no land in South Carolina, and no other timber than that conveyed in the deed above mentioned. It owns several hundred acres of Orchard land in Albemarle county, Va. Complainant's president was told, before taking the deed, that defendants "refused the tender of the extension money." Neither the Midland Timber Company nor complainants have ever operated a mill nor engaged in cutting timber—never made any effort to cut defendants' timber. The evidence shows that the Atlantic Coast Line Railroad Company runs within a quarter of a mile of the Dennis land. About 300 or 400 acres of the Dennis land is capable of being cleared and cultivated. The timber "is easy to get out—could be cut in one year—with small mill."

On December 24, 1913, the defendants, other than W. H. Dennis, executed a deed to said W. H. Dennis, conveying the standing timber of the "Fair Springs" tract for a recited consideration of \$2,000, giving to him the period of four years within which to cut and remove same. Defendant W. H. Dennis entered upon said land, and placed a small mill thereon, and began cutting the timber, and was so engaged when enjoined by an order of the court in this cause. The testimony in regard to other matters is more or less conflicting.

Montague & Montague, of Richmond, Va., L. D. Lide, of Marion, S. C., and Octavus Cohen and Smythe & Visanska, all of Charleston, S. C., for complainant.

W. P. Pollock, of Cheraw, S. C., and B. A. Hagood, of Charleston, S. C., for defendants.

CONNOR, District Judge (after stating the facts as above). The case was argued both orally and upon very full briefs by counsel for both parties; in view of the far-reaching effect of the final result upon valuable property rights, and the conflict found in decided cases and judicial opinion, I have given the several phases of the case very careful consideration. The historical development of judicial thought regarding sales of standing and growing timber, wherein an immediate removal was not contemplated by the parties, is interesting, but not at all times uniform. The decisions of the courts, expressing such judicial opinion, have been more or less modified to meet modern conditions surrounding such sales, the development of the milling business, and seeking to give effect to the intention of the parties.

[1] In the investigation of decided cases, care must be had to ascertain whether they are actions at law or suits in equity. It will also be observed that in many cases found in modern reports the courts have, under the Code Procedure, administered both legal and equitable remedies in the same action, whereas this court is compelled to observe the distinctions prescribed by the federal Constitution and statutes respecting actions at law and suits in equity. This court, sitting in equity, can take jurisdiction only when there is no plain, adequate, and complete remedy at law. Rev. St. § 723; 4 Fed. Stat. Ann. 530. The ju-

risdition of this court cannot be enlarged or extended by state statutes or procedure. Scott v. Neely, 140 U. S. 106, 11 Sup. Ct. 712, 35 L. Ed. 358. The relevancy of these principles will appear as we proceed with the development of the case. Plaintiff rests its right to relief in equity upon certain propositions clearly stated and forcibly argued.

[2] 1. In construing the terms of the deed and its several parts, the construction of deeds containing the same, or essentially the same, terms, by the court of South Carolina, must be followed by this court. This proposition is correct, subject to certain limitations, where it is shown that the courts of South Carolina have adopted a rule of construction applicable to the deed upon which plaintiff relies.

[3, 4] 2. In South Carolina it is held that a conveyance of standing timber, without condition, vests the absolute title to the timber in the grantee, and the courts will not read into such deeds an intention on the part of the parties that the timber is to be cut and removed in a reasonable time, but the grantee has, in such cases, an indefinite time to cut and remove the timber. "This," it is insisted, "is settled in South Carolina."

To sustain this proposition, plaintiff relies upon the decision in Knotts v. Hydrick, 12 Rich. (S. C.) 314, and Wilson Lumber Co. v. Alderman, 80 S. C. 106, 61 S. E. 217, 128 Am. St. Rep. 865. It therefore becomes necessary to examine these cases. Knotts v. Hydrick was an action at law. Wilson Lumber Co. v. Alderman was a civil action in the nature of a suit in equity, seeking an injunction, by the grantee of the timber, against the owner of the land, restraining him, or his subsequent grantee, from cutting the timber. The decision was rested clearly and solely upon the authority of Knotts v. Hydrick. Conceding to these decisions their full authoritative value, defendants insist that they do not apply to or control the decision of the instant case, because, in the deed from Dennis to Farr, trustee, a time is fixed within which the timber is to be cut and removed, and that the distinction between cases in which such limitation is found and those in which there is no such limitation is recognized by the Supreme Court of South Carolina.

In Flagler v. A. C. Lumber Corporation, 89 S. C. 328, 71 S. E. 849, the Hydrick and Wilson Lumber Co. Cases were relied upon by the defendant. In that case the timber "12 inches stump diameter, and upwards, 12 inches from the ground at the time of the cutting, now standing and being upon the land described," was conveyed. The deed contained a clause giving to the grantee a time limit of ten years from the time the grantee began cutting and removing the timber, with an extension clause "from year to year" by paying 6 per cent. interest each year on the purchase price. The learned judge, writing for the court said:

"It will be noted that neither in the case of Knotts v. Hydrick nor Wilson Lumber Co. v. Alderman was there an attempt made in the deeds to limit the right of the owner of the timber to any given period of removal, * * *, and all this court held was that, in the absence of such limitation upon the right of removal, such right of removal continued to exist in the owner of the timber. In other words, the deeds under construction failed to show, by anything on their face, any intention on the part of the parties thereto of limiting the right to remove."

In the Flagler Case the court found, upon the face of the deed, that the parties had made "an attempt to limit the time in which removal can be made." It is further said:

"It is enough to say that the words used in the contract were absent in Knotts v. Hydrick and Wilson Lumber Co. v. Alderman; nor were any provisions of similar import found in either of those cases; and we are therefore of opinion that they do not control the case now under consideration."

The judge proceeds to discuss the question as to the construction of the deed then before the court as open, and "to examine the authorities as to what the law is." He begins an examination of the contract for—

"what light it gives as to the intention of the parties, for in the last analysis their intent is the controlling factor in the construction of the deed, provided the instrument furnishes the evidence of the intent; and here it is to be borne in mind that, whilst the deed in the words used is at first such words as ordinarily convey a fee-simple title, the deed is signed by both the grantor and grantee, and the reason for this lies in the fact that the parties intended to bind each other to certain obligations; upon the grantor, the passing of title to the grantee, and upon the grantee, not only the right to remove, but, in a qualified sense, the duty also of so doing. A time limit * * * was evidently in contemplation."

After discussing the contention of the defendant, he says:

"So it would follow that there would be nothing to prevent the grantee from indefinitely holding the land in its original condition; * * * and in the meantime the land would remain incumbered and unfit for cultivation. And during this long period the grantee was to pay taxes, not only on the land, but on the timber as well. Was this contemplated by the parties? We think not. Some lesser period of time must have been in the minds of the grantor and grantee. What this lesser period was the agreement fails to show. What rule does the law supply in such a case?"

After discussing a number of decided cases from other jurisdictions, the conclusion is reached:

"That both by the inherent reason of the thing, as well as by authority, the true rule is that wherever it is apparent in a contract that the parties had in view some time for the commencement of the removal of the timber, which intent was not embodied in the terms of the contract, that the law will presume and will enforce that such commencement of the removal of the timber shall be within a reasonable time from the date of the contract."

This decision points out clearly the distinction between the terms of the deed in that case and in Hydrick and Wilson Lumber Company Cases, and states that these cases are not controlling authorities in cases where the terms of the deed or contract indicate an intention to place a time limit on the right of removal—that in such cases a reasonable time will be given for removal.

The principle or rule of construction announced in the Flagler Case is uniformly approved and applied in every other case which has come before the Supreme Court of South Carolina, with the single exception of Timber Co. v. Prettyman, 97 S. C. 247, 82 S. E. 484. This case will be examined and its authoritative value considered later on.

In McClary v. Atlantic Coast Lumber Co., 90 S. C. 153, 72 S. E. 145, the extension clause in the deed is in the identical terms found in the

Dennis deed. It is expressly held, upon the authority of the Flagler Case, that:

"Such deed, though a valid conveyance of the fee, passed a qualified or determinable fee only; the grantee or his assigns being required to commence the removal of the timber within a reasonable time, as viewed by the parties when the contract was signed." *Atlantic C. L. Lumber Corp. v. Litchfield*, 90 S. C. 363, 73 S. E. 182; *McSwain v. Atlantic Coast Lumber Corp.*, 96 S. C. 155, 80 S. E. 87.

The decisions of the South Carolina Court are, as I understand them, in harmony with those of a large majority of other courts. The authorities are collected and discussed in *Young v. Camp. Mfg. Co.*, 110 Va. 678, 66 S. E. 843. Among the cases cited by the learned president, writing for the court, may be noted, as of special application, *MacRae v. Stillwell*, 111 Ga. 65, 36 S. E. 604, 55 L. R. A. 513; *Adkins v. Huff*, 58 W. Va. 645, 52 S. E. 773, 3 L. R. A. (N. S.) 649, 6 Ann. Cas. 246; *Hill v. Hill*, 113 Mass. 103, 18 Am. Rep. 455. The conclusion reached by the court is clearly thus stated by Judge Keith:

"Looking to the whole deed—and all of its provisions must be considered in order to arrive at its proper construction—we are of opinion that it was not the intention of the parties to give an absolute and unconditional title to the timber, but only such as was cut and removed within the time limited by the deed, and such extensions thereof as the grantee was entitled to demand upon a fair construction of the deed, or as might be agreed upon between the parties."

The language of the deed under consideration in that case was very similar and in essential respects identical with that found in the deed from Dennis to Farr, trustee. Judge Keith calls attention to the "incidental rights" which passed under the deed creating burdens, easements, and privileges which he says "impose such burdens upon the land of the grantors as greatly to diminish, if not indeed to destroy, its value." The learned counsel for complainant vigorously attacks the soundness of this decision, insisting that it violates the principles of the common law, and that the learned court "fell into error" by treating the deed as a transfer of personal property, following the decisions of courts which hold that standing timber is personality. The well-considered discussion of the authorities and the principles involved create, in my mind, the conviction that the learned judge, with his uniform care and thoroughness of investigation and consideration, did not fall into the error suggested. There is nothing in his language to indicate that he overlooked the almost uniform holding of the courts that standing and growing trees were real estate. It is true, as said by the learned counsel, that from the time of Lord Coke, in *Liford's Case*, 11 Coke, 46, courts have held that a conveyance or reservation of standing trees, with no limitation as to the time within which they should be removed, conveyed or reserved the trees and an interest in the soil sufficient for their growth, etc. 1 Washb. Rev. Prop. 16. Such was the holding in *Knotts v. Hydrick*, supra; *Robinson v. Gee*, 26 N. C. 186; *Baxter v. Mattox*, 106 Ga. 347, 32 S. E. 94; and many other cases cited in the well-prepared briefs of counsel.

It is manifest that, while judges so held, they recognized the fact that practical difficulties were presented in working out a practical remedy

for enforcing the right. This is illustrated by the process of reasoning resorted to by the court in *Robinson v. Gee*, *supra*. A reservation in fee simple was made of "all the sawmill, pine timber on the land standing and being, or which may hereafter stand or be on the said land," or any part thereof, with full and absolute privilege of egress and regress in and upon the said land at all times, for the purpose of cutting or taking away the said reserved timber. The court said that:

"When any of the trees and saplings by full growth became timber, fit to be used at the sawmill, then there would be a cesser of estate in those trees, by the owner of the land, and a use in the timber trees would spring up and vest in him, whoever he was, who could deduce his title under the said reservation, with a perpetual license to enter and cut and carry away the timber."

This was an action at law. It is quite impossible to reconcile many of the decisions found in the adjudged cases and much of the reasoning on which they are based.

[5] It can, however, be safely said that, in the construction of timber deeds, the courts have adhered to the elementary principle that the intention of the parties should be ascertained and enforced, as in the construction and enforcement of other contracts. It is equally well settled that, where an indication of intention to limit the time within which the timber was to be cut and removed was found, and the period for cutting and removing was uncertain, the court would infer that both parties intended that it should be done in a reasonable time, and in this I understand the South Carolina court is in harmony with the uniform current of judicial opinion. Complainant insists that, conceding this to be true, a time limit is fixed by the terms of the deed in this record (that is, "as long as may be desired"), and that this language has been held by the Supreme Court of South Carolina to give to the grantee of the timber the right to fix the time, which right the court cannot control. To sustain this contention, it relies upon the recently decided case of *Midland Timber Co. v. Prettyman*, 97 S. C. 247, 81 S. E. 484. The learned counsel stresses the language of the court: "When the parties speak for themselves, the court cannot imply." Defendants urge upon the attention of the court the peculiar facts in, and history of, this case, insisting that it does not constitute a rule of property binding upon this court in the disposition of this case. The record, which has been filed by counsel, discloses the following facts: The Atlantic Coast Lumber Company took from Mrs. Heape, the owner of a tract of land, a deed for the timber, the terms of which, in respect to the description of the timber, was the same as in the deed from Dennis to Farr, trustee. The period fixed for cutting and removing the timber was ten years, with an extension clause in the identical language found in the Dennis deed. The Midland Timber Company acquired the title and rights of the Atlantic Coast Lumber Company. At the expiration of the ten years, no timber having been cut or removed, the timber company made a tender of the interest on the purchase price, giving notice that ten years' additional time to cut and remove the timber was desired. This was refused. Repeated tenders were made, with like refusals on the part of the owner of the land. The Midland Timber Company entered into a contract to sell, and Prettyman to buy, the timber and rights claimed

under the deed from Mrs. Heape. The timber company tendered a deed to Prettyman, demanding the purchase price, the payment of which was refused, upon the ground that it was not entitled to the extension of time demanded or to any extension. The Midland Timber Company and Prettyman submitted the question to the court, in an action without controversy, upon an agreed state of facts. The circuit court held that the title of the timber company was valid and adjudged that Prettyman execute the contract by taking the deed and paying the purchase money. From this judgment Prettyman appealed. The Supreme Court, without deciding the question presented upon the record, remanded the case with instruction to make Pearson, the then owner of the land, a party to the record. This being done, the controversy was submitted to Judge Spain, who rendered a decree for the plaintiff, and this, upon appeal, was affirmed; the Chief Justice, for a majority of the court, adopting Judge Spain's opinion without discussion, Justices Hydrick and Fraser concurring. Mr. Justice Watts dissented. Judge Spain's decree does not mention, or in any manner refer to, the rights of Pearson, the owner of the land; he simply directs that Prettyman pay the purchase money and accept the title. While Judge Spain was of the opinion that the language of the deed was unambiguous and left no room for an implication that the parties intended to limit the time "desired" to "a reasonable time," yet he is equally explicit in finding that the time demanded was reasonable; hence the decree may be sustained upon that finding, although it would not seem that he so intended. It is probable that as Pearson, the owner of the land, was party to the record, noted exceptions to the decree, and joined in the appeal, he would be bound by the decree, although it makes no reference to his rights. With all possible deference, I am unable to interpret the decision as a departure from the principle announced in the Flagler and other cases, enforcing the reasonable time rule when the deed indicates such to have been the intention of the parties, although the language of Judge Spain, adopted by the court, is capable of such construction. Conceding pro hac vice that the decision in Prettyman's Case is the last declaration of the law of that case, by the Supreme Court of South Carolina, and giving to it its full authoritative value, I am of the opinion that it is not controlling authority in this court upon the pleadings and proofs before me. *Burgess v. Seligman*, 107 U. S. 20, 2 Sup. Ct. 10, 27 L. Ed. 359. It will be observed that Judge Spain says that the extension clause, in the deed before him, identical with that in the Dennis deed, upon the authority of *Alderman v. Wilson*, 71 S. C. 64, 50 S. E. 643, "conferred a privilege or option, and did not affect the rights which had already been granted."

The deed before the court in *Young v. Camp*, supra, was, in respect to the extension clause, in the identical language as in the deed in this record. Judge Keith says, in respect to the effect of this language:

"There seems to be a little diversity among the cases, most of them holding to the effect that the purchaser has no title to any timber which is not cut [and removed] at the expiration of the time specified therefor, although a very few hold that the title to the timber in such case is still in the purchaser, but that the right to enter for the purpose of cutting and removing it is lost thereby"

The court of West Virginia, in *Adkins v. Huff*, *supra*, after discussing the several lines of thought on this question, says:

"By the great weight of authority, it is determined that no right or title exists in the grantee after the expiration of the time specified in the deed or contract."

The court, in the Camp Case, *supra*, held that, upon a fair construction of all the parts of the deed, the defendant was entitled to a reasonable time, after the expiration of the fixed period, to cut and remove.

[6] It is uniformly held that, while the grant of the trees, coming within the description, vested a present interest in that respect, the contract is executory; but, in respect to the period fixed for removal and the extension of such time, the contract is executory. *Bunch v. Lumber Co.*, 134 N. C. 116, 46 S. E. 24. This is, of necessity, the correct interpretation of the contract, giving to it a twofold character. In respect to the grant of the timber, nothing further remains to be done by either party; in respect to the cutting and removal within the time fixed, if free from ambiguity, the license is irrevocable; in respect to the extension of the time, when the grantee is to pay an additional amount, as in this and many other cases, interest on the original purchase money, it is executory—an option on the part of the grantee to pay the interest and a promise on the part of the grantor, upon his doing so, to extend the time. When the terms of the contract in regard to the time of extension are uncertain, the court will infer that the parties intended that the timber shall be cut and removed in a reasonable time; and this is a mixed question of law and fact, usually to be decided by the jury, in the light of competent and relevant testimony.

We are thus brought to the consideration of the facts disclosed in the record. Complainant prays that the court enjoin defendant W. H. Dennis, who is the only one of the defendants interfering with or cutting and removing the timber. It is not alleged, nor is there any suggestion, that the other defendants have cut or removed any timber, or threaten to do so. As to them, neither the allegations nor proof show any equity for injunctive relief. The only decree which can be asked against them is that they specifically perform the executory contract of their predecessor in title. If complainant is entitled to this decree, it follows that defendant W. H. Dennis, who justifies under the deed from his codefendants, should be enjoined from continuing to cut and remove the timber. While there is no specific prayer for specific performance as against the defendants, under the general principles of equity pleading and practice, the prayer for general relief entitles the complainant to such relief as, upon the proofs, it shows itself entitled. The witnesses were examined before me orally, and the merits of the controversy fully disclosed.

[7] While it is elementary that, in the absence of allegations of fraud or mistake, parol evidence is not competent for the purpose of contradicting or altering a contract, reduced to writing, it has been well settled, since the decision by Sir William Grant, M. R., in *Woolam v. Hearn*, 7 Ves. 211, 2 L. C. Eq. 410, that:

"When equity is called upon to exercise its peculiar jurisdiction by decreeing specific performance, the party to be charged is let in to show that, under the circumstances, the plaintiff is not entitled to have the agreement specifically performed." Bispham, Eq. 381.

This is not upon the theory that, in such cases, the court reforms the written agreement or corrects the mistake, although it is within its power, and is sometimes done, and specific performance of the agreement, as reformed or corrected, decreed. The true ground upon which the parol testimony is admitted, on the part of the defendant, is that specific performance not being a matter of absolute right but of sound judicial discretion, the chancellor should be in possession of every fact and circumstance attending the negotiation and execution of the written agreement, to enable him to so mold his decree that justice and right be awarded.

"When the terms of a written contract have been ambiguous, so that, adopting one construction, they may reasonably be supposed to have an effect which the defendant did not contemplate, the court has, upon that ground only, refused to enforce the agreement." Note to Woolam v. Hearn, supra.

The well-settled principles by which courts of equity are governed, in enforcing specific performance of executory contracts, is recognized and enforced by the courts of South Carolina. The recent decisions upon this question are cited by Mr. Justice Watts in his dissenting opinion in Timber Co. v. Prettyman, supra. Marthinson v. McCutchen, 84 S. C. 256, 66 S. E. 120. See, also, Rexford v. Southern Woodland Co. (D. C.) 208 Fed. 295, where the South Carolina cases are cited: Bispham's Eq. 371 et seq.

The uncontradicted evidence in this record shows that, at the time of making the contract and signing the deed, Gen. Dennis and Mr. Boatwright, who represented Mr. Farr, after examining the property, "discussed the matter fully as to how long they should have to get this timber off of the land; and it was clearly understood that they should have eight years, and, if all of the timber was not cut off the property before the expiration of eight years, that they should have such additional time as was necessary to get off the remaining timber." They were to commence cutting within eight years. That was the mutual understanding. Most of the land on which the timber is standing is pine land "very fine pine land." The parties, at the time of making the contract, "discussed the question of opening up the land to cultivation. Gen. Dennis said that he wanted to clear the land. He was a farmer as well as a lawyer. * * * It was understood that he wanted to open up the land." Gen. Dennis, with his family, resided upon the land, about one-third of which was cleared. It appears from the record that he had five children. Their ages are not stated; but it appears that they have all reached their majority. The age of Gen. Dennis is not stated, nor are we informed as to the date of his death, except that it was prior to April 29, 1911. In ascertaining the intention of the parties, in respect to the time within which the timber was to be cut, it is necessary to, so far as possible, put ourselves in their position, with reference to the subject-matter of the contract, and their

relation to it. From this viewpoint, it is proper to note the terms of the deed and contract with respect to the effect their enforcement would probably have upon the uses to which the land, upon which the timber is standing, would be put, and the condition of the family, in its relation to the land and the owner. These are all relevant facts. It is manifest that neither of the parties understood that the land was being sold, or permanently so incumbered as to practically destroy its value for the purpose of dwelling upon or cultivating it. It is impossible to underestimate the effect upon the value of the land for sale, or any other purpose, by the extensive, burdensome, and almost unlimited easements upon and rights to its use by the grantees of the timber. In the unlimited discretion of the grantee, or his representatives and assigns, the right to use the land was subject to be practically destroyed. If, as the complainant contends, these burdens are without limitation as to time, the owner cannot himself, nor can his grantee, nor his heir at law, clear an acre of the land, nor could it, at his death, with any degree of safety, be divided among his children, or made of value to them as dwelling places or for purposes of cultivation. He and his children became little more than tenants at sufferance, with their rights, both in respect to time and extent of the use thereof, subject to the uncontrolled and uncontrollable "desire" of the grantee and his representatives or assigns. When we look to the status of the parties, it is proper to consider that of both the grantor and grantee. It is evident, from recitals in the deeds in evidence, that Farr was buying up large quantities of timber in the section of the state in which this timber was situate, for the purpose, either by himself or through a corporation, in which he was, or expected to be, interested, of manufacturing it into lumber. There were very large mills at Georgetown, S. C. It is clear that he was not purchasing for indefinite holding as an investment. This timber, together with timber purchased at approximately the same time and in the same and adjoining counties, was, within a few months, conveyed by Farr, trustee, to the Oneida Timber Company. Is it not an almost irresistible conclusion in the light of the existing conditions, that both parties contemplated that the timber would be cut and removed within the time fixed and, if necessary, a reasonable extension thereof, to complete the cutting and removal? This conclusion is strengthened, if not removed from the domain of doubt, by the uncontradicted testimony of the only living witness to the negotiation and execution of the contract, at least the only one introduced. From this viewpoint, the language of Judge Keith is both appropriate and convincing. He says:

"We cannot think that the grantors ever intended to confer any such right upon the grantee; and that it would be unreasonable to hold that it was intended to confer upon the Camp Manufacturing Company a right to cut and remove within a wholly indefinite period the timber which it had purchased." *Young v. Camp, supra.*

It is uniformly held that, when specific performance of an executory contract is enforced, "the agreement must be mutual. Its terms must be certain and its enforcement must be practicable." Bispham, Eq. 377. Measured by either test, the complainant is confronted with difficulties.

The grantee and his assigns come under no obligation to pay the interest "year by year." They may at any time, at their election, stop the payment and leave the owner of the timber without remedy; if the timber becomes of less value, or is destroyed by fire, or, for any other cause, the complainant does not deem it to its interest to continue the payment of the interest, it is under no legal obligation to do so.

In *Marble Co. v. Ripley*, 10 Wall. 339, 359 (19 L. Ed. 955), Mr. Justice Strong says:

"It is a general principle that when, from personal incapacity, the nature of the contract, or any other cause, a contract is incapable of being enforced against one party, that party is equally incapable of enforcing it specifically against the other." *Soloman v. Sewerage Co.*, 142 N. C. 439, 55 S. E. 300, 6 L. R. A. (N. S.) 391.

The complainant is a Virginia corporation, with but small capital stock; has no property in South Carolina; is not engaged in cutting timber; has no facilities for doing so. Defendants are required to pay all taxes both on the land and timber.

"What is meant by mutuality is that the contract must be of such a nature that performance on both sides can be judicially secured." 26 Am. & Eng. Enc. 32.

Taking complainant's expression of its "desire" for time to cut and remove the timber as 25 years, would it be reasonable, just, or equitable to incumber the title of defendants, the heirs of their ancestor, and, in all probability, their heirs, with the burden fixed upon the land by the decree which complainants seek?

The contract must be certain in its terms. The language of the Dennis deed is uncertain. It is suggested that an unlimited time is given or, at best, a time of which complainant is the sole judge. It is next suggested that the time is "year by year"; that is, that, by the payment and acceptance of the interest "year by year," the extension is granted for the current year. It is, however, in this case said that the agreement is to extend for a reasonable time, the extent of which is to be fixed by the grantee, at the expiration of the first period of eight years. Adopting this view, complainant, at that time, gave notice that it "desired" 25 years, carefully reserving, however, the right to the easements in fee simple, etc.

Without pausing to discuss the reasonableness of either of these views, it is sufficient to say that there lurks, in the terms of the contract, painful uncertainty. Assuming, however, that these difficulties are passed, the enforcement by the court must be practicable. The timber conveyed is described as "all the timber of every kind and description, both standing and fallen, ten (10) inches stump diameter, and upwards, twelve inches from the ground, at the time of cutting." The deed bears date May 5, 1903. By what practicable method, at the expiration of 25 years, is the timber standing on the land at the date of the deed to be distinguished and separated from that which has germinated since that date is not suggested. What timber the owners of the land may, during all of these years, cut and remove, because not included in the description, not on the land at the date of the deed, must of necessity be equally uncertain. It is expressly provided that he is not to

"clear" any of the land. The length of time required for trees, of the various kinds found upon such lands, to grow to the size suitable for cutting into merchantable lumber, is dependent upon various conditions—the fertility of the soil, moisture, drainage, seasons, and others equally uncertain.

Without undertaking to speculate in regard to these uncertain elements, it is manifest that to decree specific performance of the contract, as interpreted and asked by complainant, would be to introduce elements of uncertainty which would insulate and isolate the entire tract of land from any valuable or useful purpose during a quarter of a century, without a single compensating advantage to its owners. *Marble Co. v. Ripley*, *supra*, in which, for other reasons, the court refused specific performance because it was impracticable—the time during which performance was to run; change in parties; the fact that the court would be called upon to determine elements of uncertainty. In such cases the parties are left to their remedy for breach of the contract by an action at law for damages.

There is, however, another view of this record which is entitled to consideration. The time fixed for cutting and removing the timber expired May 5, 1911. On April 29, 1911, the Midland Timber Company, then owner of the timber and timber rights, served written notice on the defendants, demanding an extension of 25 years, with a tender of the interest, which was refused, and on May 5, 1911, another tender was made and again refused; defendants insisting that the time for cutting expired on that day. No further tender was made or action taken by the timber company until June 28, 1913, when it executed a deed to complainant undertaking to convey the timber and easements. This deed recited, in explicit terms, the payment of a large sum of money as the consideration upon which it was made. In truth nothing was paid, nor did complainant come under any obligation to cut any portion of the timber at any time. It simply promised to pay for the timber "as cut." No tender was made or action taken by complainant until January 28, 1914, when this bill was filed and \$270 paid into the clerk's office for the benefit of defendants. It is of interest to note the purposes for which complainant was chartered and organized, as set out in its charter. It is very doubtful whether, upon a fair construction of its charter, the contract with the Midland Timber Company, and the contract which it proposes to make under the decree, sought in this case, is not *ultra vires*. It is quite manifest that no such contract was in the contemplation of the incorporators at the time of taking the charter. The real motive prompting its action is frankly stated by Mr. Montague, to secure a standing in this court.

It is suggested that the decision of the case of *Midland Timber Co. v. Prettyman*, *supra*, was not anticipated. Without pausing to discuss or decide the objection urged by defendants that the transaction is a fraud upon the jurisdiction of this court, it is manifest from the admitted facts that the complainant does not come into the court with any very meritorious claim upon its consideration or demand for the exercise of its extraordinary power to grant either injunctive relief or specific performance. It voluntarily comes into a contract after, as it al-

leges, defendants had breached its terms, with full knowledge of this fact. It claims under a deed containing a recital not true in fact. It assumes no obligation either to the timber company or defendants, permits a year to pass without notifying defendants of its assumed relations to them, and then files its bill invoking the equitable power of the court. The timber which it claims to own, and for which it has not paid a dollar, was worth, September 3, 1909, \$4,850. The complainant fails to produce the contract with the Midland Company, although requested to do so. It will also be noted that the defendant the Midland Timber Company "owns 186,000 acres of timber land and is still very actively in business." The stockholders and officers of the two companies appear to be, to a large extent, the same persons. In McCable v. Matthews, 155 U. S. 550, 15 Sup. Ct. 190, 39 L. Ed. 256, Mr. Justice Brewer says:

"A decree for the specific performance of a contract for the sale of real estate does not go as a matter of course, but is granted or withheld according as equity and justice seem to demand, in view of all the circumstances of the case."

Among the reasons assigned for refusing a decree was that it was "a purely speculative contract on the part of plaintiff." Bispham, Eq. 376.

Without further pursuing the discussion, I am clearly of the opinion that in no aspect of the case is the complainant entitled to a decree extending the period for 25 years, during which it may, as its own election, cut and remove the timber from defendant's land, with all of the incidental burdens upon it. Counsel say that, if they are mistaken in their interpretation of the contract in that respect, complainant is entitled to a reasonable time, and ask the court to fix such time. It is true that, in several of the cases cited, the court fixed a time within which, after the decision, the grantee was given to cut and remove the timber. In the Camp Case, supra, one year was given. The court, in some instances, remanded the case for the judge to fix a reasonable time. In these cases it was manifest that the grantees intended to cut the timber; there was no speculative element in them. For the reasons stated, and the further reason that complainant has an adequate remedy at law, by an action for damages, for the alleged breach of the contract, and refusal to extend the time, I do not think any further time should be fixed by this court. The measure of damages, if plaintiff can make out its case, in an action at law, is clear. Defendants are the owners of the tract of land of 660 acres, upon which the timber, in 1909, was worth \$4,850; hence, so far as this record shows, a judgment would be enforceable against them. It is shown, without contradiction, that Mrs. Dennis is solvent. I have not deemed it necessary to discuss or decide the controversy in regard to the tender alleged to have been made by the Midland Timber Company. I am of the opinion that, upon the pleadings and evidence, complainant is not entitled to a decree enforcing specific performance. The prayer for a permanent injunction must be denied.

A decree dismissing the bill at complainant's cost may be drawn.

In re DEUTSCHE BROS.

(District Court, S. D. New York. February 5, 1915.)

1. BANKS AND BANKING ~~15~~ — INSOLVENCY — APPLICATION OF ASSETS — "BENEFIT."

Under Laws N. Y. 1910, c. 348, § 25, as amended by Laws 1911, c. 393, requiring parties engaging in the business of receiving deposits or money for transmission to present to the comptroller a surety bond conditioned upon the faithful holding and transmission of all money, and in the event of the insolvency or bankruptcy of the party, upon the payment of the full amount of such bond to the assignee, receiver, or trustee for the benefit of the persons making deposits or delivering money for transmission, where the amount of the bond of bankrupt private bankers had been paid to their trustee in bankruptcy, the trustee could be authorized to use a part of such fund to save valuable equities in real property of the bankrupt, which otherwise might be lost because of the failure to pay interest, the relative rights of the special class of creditors and the general creditors being properly preserved, as the statute makes no provision for the distribution of the fund by the trustee, and the word "benefit," as used in the statute, is of broad meaning and wide signification.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 12-17; Dec. Dig. ~~15~~.]

For other definitions, see Words and Phrases, First and Second Series, Benefit.]

2. BANKRUPTCY ~~138~~ — BANKS — ASSETS — BOND — "TRUSTEE."

Under Laws N. Y. 1910, c. 348, § 25, as amended by Laws 1911, c. 393, requiring a bond from private bankers conditioned for payment in the event of insolvency or bankruptcy to the assignee, receiver, or trustee, in case of bankruptcy the trustee in bankruptcy is the "trustee" intended.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 193-204, 206-209; Dec. Dig. ~~138~~.]

For other definitions, see Words and Phrases, First and Second Series, Trustee.]

3. BANKRUPTCY ~~138~~ — BANKS — ASSETS — BOND — COMPOSITION — FUNDS AVAILABLE.

Under Laws N. Y. 1910, c. 348, § 25, as amended by Laws 1911, c. 393, the amount of the surety bond of bankrupt private bankers, which had been paid to the trustee in bankruptcy, could not be used by the bankrupts in carrying out a plan of composition accepted by a majority of the creditors, under which they were to reopen their business, turning over their net profits to a corporation to be organized under the supervision of the superintendent of banks, and which was to execute notes to the creditors, as the bankrupts never had title to such fund, and the trustee in bankruptcy did not acquire title through them.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 193-204, 206-209; Dec. Dig. ~~138~~.]

In Bankruptcy. In the matter of Deutsche Bros., bankrupts. On certificate of the referee, bringing up the question of his power to grant an application by the trustee. Matter referred back to the referee for a conclusion on the merits.

Samuel Hoffman, of New York City, for creditors.

Samuel Strasbourger, of New York City, for bankrupt.

MAYER, District Judge. The bankrupts were engaged in the borough of Manhattan, city of New York, in the business of private bank-

ing, which was conducted pursuant to a license issued to them by the comptroller of the state of New York under the provisions of article 3a of the General Business Law and acts amendatory thereof and supplemental thereto.

Before the issuance of the license to the bankrupts, they, as principals, and the Aetna Accident & Liability Company, executed and delivered to the comptroller of the state of New York their bond in the sum of \$100,000 in accordance with the provisions of the act referred to, the salient parts of which will be set forth hereinafter. In due course, Mr. Richards, the superintendent of banks of the state of New York, became trustee in bankruptcy, and thereafter the Aetna Company paid to the trustee the penal amount of the bond, to wit, \$100,000.

Heretofore an order was made by the referee requiring the trustee to segregate, and hold in trust for the benefit of persons depositing money with the bankrupts, either for the purpose of transmission to others or for the purpose of safe-keeping, the said \$100,000, and further requiring the distribution of the sum in special dividends to the persons thereto entitled, and this same order likewise provided for such a dividend of 20 per cent. This dividend of 20 per cent. will use up approximately \$60,000, leaving still in the hands of the trustee, out of this \$100,000, approximately the sum of \$40,000. Exclusive of the money realized from the bond, the assets of the estate in cash do not exceed the sum of \$3,000; but there are other assets of the estate, consisting of various parcels of improved real property in the city of New York and within the Southern district. The trustee has had appraisals made, and from these appraisals and his knowledge of the real estate he is convinced that, if the real property can be held for a reasonable time, it, and each parcel thereof, will pay an income, and that such income will be sufficient to pay the fixed charges in the way of interest and taxes. Meanwhile, however, the property is in danger of being lost because of failure of interest, and, in at least one instance, because of an overdue second mortgage, and the consequent result of foreclosure proceedings which are now pending.

The \$3,000 in the hands of the trustee will be wholly insufficient to save the real property. Unfortunately, almost all of the creditors of the bankrupts are persons of humble means, who confided their money to these private bankers, either for transmission or safe-keeping. The outstanding liabilities under this head aggregate in the neighborhood of \$225,000, while the liabilities to creditors other than this class, such as merchandise creditors, aggregate not to exceed \$10,000. The trustee (and he has the co-operation of all concerned) is exceedingly anxious that a plan be worked out whereby, if possible, to save what he believes are valuable equities, to the end that ultimately a much more substantial result will be obtained for the transmission and safe-keeping deposit creditors than if the equities in the real estate should be wiped out and the \$40,000 (approximately) remaining out of the money paid over by the Aetna Company should be distributed as dividends to the persons who may be entitled thereto.

At an adjourned first meeting held on November 27, 1914, the bankrupts presented an offer of composition, and a majority in number and

amount of the claims proved accepted the offer of the bankrupts, and such acceptances are on file with the referee. On December 19, 1914, the bankrupts petitioned the referee for an order directing the trustee to deposit the sum of \$85,000 out of the funds then in his possession, subject to the order of this court, for the purpose of carrying out the composition. The referee ruled that the \$100,000 then in the possession of the trustee, obtained by him from the surety company, could not be used for any purpose other than a direct payment to the persons for whose benefit, under the statute, the money was available.

The plan of composition contemplated the payment of 25 per cent. in cash, and if there were sufficient funds a larger initial payment, in the opinion of the board of directors of a corporation to be formed. The remaining 75 per cent. (or whatever the balance was after making the initial payment) was to be paid in income notes executed by the proposed corporation, which were to be indorsed by the bankrupts, and which were to be payable on or before three years from the date thereof, pro rata, out of the proceeds resulting from the sale of the assets conveyed to the corporation, such pro rata payment to be made semiannually, beginning six months after the date thereof out of such proceeds.

Immediately upon the confirmation of the composition a corporation was to be organized under the Stock Corporation Law of the state of New York, whose affairs were to be managed by a properly selected board of directors. The capital stock was to be transferred to and vested in three trustees, to be appointed by the superintendent of banks, who should hold the same as trustees for the benefit of all creditors, and who should vote the stock for the persons designated as directors of the corporation.

Such steps as were necessary were to be taken to vest in the corporation all the property of the bankrupt estate. The board of directors were to be vested with the full management and charge of the property, and were to liquidate the same as rapidly as possible, paying semiannually to holders of the income notes pro rata such dividend out of the proceeds as they might determine to be advisable. The bankrupts agreed, immediately upon the composition being effected, to reopen the business of selling steamship tickets, money exchange, and money transmission heretofore carried on by them under rules and limitations fixed by the superintendent of banks, and to continue during the term of the adjustment notes to manage and operate the business, and to pay over to the directors of the corporation the net profits of the business, they to receive reasonable compensation for their services, to be fixed by the board of directors. Certain other provisions were incorporated in the offer of composition, which need not now be set forth in detail.

The certificate of the referee brings up the question as to whether there is power to acquiesce in or direct the trustee to use the balance of the \$40,000, or any part thereof, for the purpose of paying taxes, interest installments on mortgages, and the second mortgage to which reference has been made. The attorneys for the bankrupts at the same time bring up the question as to whether the referee should be

directed by the court to order the trustee to deposit part of the \$100,000 subject to the order of the court, for the purpose of carrying out the composition in the event of it being confirmed by the court.

In other words, the situation is this: If, out of the \$100,000 realized from the Aetna Company bond, \$85,000 can be utilized for the purposes of the composition, then the composition, if deemed advisable, can go through. (In order to avoid confusion, it may be stated that the \$85,000 would be made up of the \$60,000 which constituted the 20 per cent. dividend declared for the purpose of relieving the creditors and an additional \$15,000.) As part of that situation, and also as an independent proposition, the question is whether any part of \$100,000 can be used to save the properties which the trustee believes have substantial equities.

The matter should be dealt with promptly, and therefore, while the question of the composition is not before me on any certificate of review, I have concluded, in order to avoid delay, to state my opinion in reference thereto. I will therefore consider (1) the certificate of review before me, and (2) the power, as matter of law, of the court to direct the trustee to turn over a part of the fund of \$100,000 as, in effect, assets which can be considered as part of the offer of composition.

[1] It is provided, among other things, by section 25 of chapter 348 of the Laws of 1910, as amended by chapter 393 of the Laws of 1911, effective June 21, 1911, as follows:

"Except as provided in section 29d, no individual or partnership shall hereafter engage directly or indirectly in the business of receiving deposits of money for safe-keeping or for the purpose of transmission to another or for any other purpose in cities of the first class without having first obtained from the comptroller a license to engage in such business. Before receiving such license the applicant therefor shall file with the comptroller a written statement in the form to be prescribed by the comptroller and verified by the individual or members of the firm making the application, showing the amount of the assets and liabilities of the applicant, designating the place where the applicant proposes to engage in business, that the applicant has been, or if the applicant shall constitute a partnership, that a majority of the members thereof having a controlling interest in the business of such partnership have been continuously for a period of five years immediately preceding the date of such application resident in the United States. Such applicant shall at the same time deposit with the comptroller five thousand dollars if the applicant is engaged only in the business of receiving money for transmission to another and otherwise ten thousand dollars in money or in securities which shall consist of bonds of the United States, of this state or of any municipality thereof, or other bonds approved by the comptroller, and if a deposit of securities shall be so made in lieu of money, the comptroller shall thereafter require the applicant to maintain such deposit at all times at a value which shall equal the sum that the applicant is required by this section to deposit. In addition thereto there shall be presented to the comptroller a bond to the people of the state of New York executed by the applicant and by a surety company approved by the comptroller, conditioned upon the faithful holding of all moneys that may be deposited with the applicant, in accordance with the terms of the deposit and the repayment of such moneys so deposited and upon the faithful transmission of any money which shall be delivered to such applicant for transmission to another, *and in the event of the insolvency or bankruptcy of the applicant, upon the payment of the full amount of such bond to the assignee, receiver or trustee of the applicant, as the case may require, for the benefit of the persons making such deposits and of such persons as shall deliver money to the applicant for transmission to another.*"

In the Matter of Moritz Rosett and Max Rosett, Individually, etc., Bankrupts, Joseph M. Conklin, as Trustee, etc., Petitioner, 204 Fed. 431, 122 C. C. A. 617, the Circuit Court of Appeals for the Second Circuit (April 14, 1913) had this statute under consideration. The question in that case was whether the fund was distributable among all the creditors who did banking business with the bankrupts, or only among such creditors as did banking business with them in the city of New York, and the court held that only those who did banking business with them within the state of New York were entitled to the benefits of the fund. No other case involving the construction of the part of the statute here under consideration has been called to my attention.

The question, therefore, is a new one, and must be resolved in accordance with familiar rules of construction. What the New York Legislature was endeavoring to accomplish was the protection to some extent of the persons making deposits with or delivering money for transmission to these private banks. It undoubtedly realized that the depositors and transmitters are people of small means, and many, and perhaps most, of them of recent foreign origin, who cannot speak English, and who need a great measure of protection. That is precisely the situation in the case at bar, and therefore one of much concern, because of the desire to safeguard the rights of these unfortunate people so far as the law will permit.

[2] In the provision above quoted the Legislature contemplated insolvency or bankruptcy of the banker and used words which were technically correct. Having in mind "the event of the insolvency or bankruptcy" of the banker, it was provided that the payment of the full amount of the bond should be made to the "assignee, receiver or trustee of the applicant, as the case may require." Clearly "trustee" means a trustee in bankruptcy, selected as the statute provides. It will be noted that there is no provision for the distribution of the fund by the trustee. There is nothing in the statute which in so many words commands in kind the distribution of the particular fund, the payment of which by the surety company is required under the bond after insolvency or bankruptcy.

The payment is "for the benefit of the persons" making deposits, and of such persons as shall deliver money to the banker for transmission to another. The word "benefit" is one of broad meaning, and under this statute, in my opinion, of wide signification. The duties of assignees, receivers, and trustees are defined by statute and regulated by rules of court, and these officials are subject to the supervision of the courts, and must account in and to the courts.

In seeking the meaning of a statute, an illustration sometimes is helpful. Let it be supposed that a bankrupt private banker had pledged with some financial institution securities concededly worth \$200,000, that the amount of the loan for which such securities were pledged was \$100,000, and that by the payment of the loan the trustee, for the benefit of the estate, would receive \$200,000 in securities or money, and thereby be able to pay the class to be benefited 100 cents on the

dollar. It is hard to believe that a remedial statute of this character was intended to prevent the appropriate officer in bankruptcy from saving for people needing protection assets which otherwise would be lost.

I think that what is meant by "for the benefit of the persons making deposits and of such persons as shall deliver money to the banker for transmission to another" is benefit of a class of persons, namely, depositors and transmitters, and that this class under the decision in the Rosett Case is confined to those transacting the business in question with the bonded private banker within the state of New York.

I am of the opinion that the Legislature never intended that an assignee, receiver, or trustee should be prevented from using the fund in such manner as would increase the estate, or from applying the fund in such directions as would save assets, where the saving of the assets would be for the benefit of the very class of people for whose protection the statute was enacted. To hold otherwise would be to give the statute a narrow construction, which would impair the useful purpose for which it was designed.

I conclude, therefore, that the referee had power to grant the application of the trustee for leave to apply part of the fund under consideration for the purposes set forth by the trustee in his application. Apparently the referee has considered only the question of law involved, and therefore the matter will be referred back for a conclusion on the merits.

For the guidance of counsel I may say that they should present to the referee a full statement showing the precise condition of each of the properties, which statement should comprehend, among other things, the amount of taxes, interest, income, and cost of maintenance. I may further observe that, if the referee is of opinion that the facts warrant the use of the fund for the purposes desired, there need be no difficulty in preserving the rights of the special class. If this money saves equities in real estate, a lien will be created in favor of the statutory class for whom the trustee will be acting. It will not be troublesome to work out and preserve the relations in this regard between the general creditors and this special class of creditors.

[3] In respect of the proposed composition and the use of part of the \$100,000 fund to that end, it must be remembered that the bankrupts never had title to the fund. By the provisions of the statute, the title to this fund becomes vested in the trustee in bankruptcy, and nowhere are the bankrupts in the chain of title, and in no manner can they be said to be the channel through which the title flows. The fact that the bankrupts deposited certain securities with the surety company in order to obtain the bond does not in any manner change the situation. The obligation of the bond is to pay the trustee for the benefit of a certain class described in the statute, and while in the case at bar a majority of the creditors in number and amount have approved the proposed plan of composition, yet the court cannot create title where there never was any.

The result is that the bankrupts cannot use these funds directly or indirectly as a contribution to the assets which would make up the estate intended to be administered in the carrying out of the plan of com-

position, and the referee was right when he refused to sign the order directing the trustee to deposit part of the fund for the purpose of carrying out the composition.

The application of the trustee is returned to the referee for his report on the merits.

UNITED STATES ex rel. NG HEN et al. v. SISSON, Chinese Inspector.

(District Court, S. D. New York. July 20, 1914.)

1. ALIENS ☞53—DEPORTATION—COUNTRY TO WHICH ALIENS SHOULD BE DEPORTED.

Under Immigration Act Feb. 20, 1907, c. 1134, § 35, 34 Stat. 908 (Comp. St. 1913, § 4284), providing that the deportation of aliens illegally within the United States shall be to the trans-Atlantic and trans-Pacific ports, from which such aliens embarked for the United States, or, if such embarkation was for foreign contiguous territory, to the foreign port at which such aliens embarked for such territory, whether an acquired domicile in Canada or Mexico will prevent deportation of an alien entering the United States therefrom to the European or Asiatic port of original embarkation, nothing short of an actual domicile will do so, and it is for the alien to show such domicile.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. § 112; Dec. Dig. ☞53.]

2. ALIENS ☞32—DEPORTATION—SUFFICIENCY OF EVIDENCE.

In a habeas corpus proceeding by a Chinese person ordered deported, evidence held to justify a finding that such person, who entered the United States from Canada, came originally from China.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. §§ 84, 92-95; Dec. Dig. ☞32.]

3. ALIENS ☞32—DEPORTATION—PORT TO WHICH ALIENS SHOULD BE DEPORTED.

Under Immigration Act, § 35, where there is no evidence of the particular port in China from which a Chinese person embarked for the United States, such person may be deported to the port nearest the place where he was born and has his family.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. §§ 84, 92-95; Dec. Dig. ☞32.]

4. ALIENS ☞54—DEPORTATION—PORT TO WHICH ALIENS SHOULD BE DEPORTED.

The detention of an alien under a warrant of deportation is illegal, unless the warrant provides for deportation to the port required by law.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. § 112; Dec. Dig. ☞54.]

5. ALIENS ☞54—DEPORTATION—HABEAS CORPUS—BAIL.

Where a writ of habeas corpus by an alien ordered deported is sustained, and the prisoner discharged, the court may provide for bail to insure his appearance if the ruling be reversed; but where the writ is dismissed, the prisoner's right to bail depends entirely upon the rules regulating his custody where he already is, as a writ of habeas corpus does not put the relator into the custody of the court, or disturb the custody of the person then detaining the relator, and the court has no power to enlarge the relator while the inquiry proceeds or after the writ has been dismissed.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. § 112; Dec. Dig. ☞54.]

Habeas corpus by the United States, on relation of Ng Hen and others, against Harry R. Sisson, Chinese Inspector in charge for the District of New York and New Jersey. Writ dismissed, and relators remanded.

John N. Boyle, of New York City, for relators.

H. Snowden Marshall, U. S. Atty., and Harold A. Content, Asst. U. S. Atty., both of New York City, for respondent.

LEARNED HAND, District Judge. These cases stand separately, as the record in each is different. The first case in order is Ng Hen, who upon his first hearing was most frank and candid. He was born in China, of a Chinese mother who had never been out of China.

He embarked from Hong Kong with the intention of coming to the United States as soon as possible. There can be no doubt that he is within section 35 and must be deported.

[1] The next case is Ng Yee Chung, who admits that he was born in China and has a family there. The testimony of Ng Hen justifies the conclusion that Ng Yee Chung's statement is false in which he says that he had at no time left the United States after landing in San Francisco five years ago, and further justifies the conclusion that he was one of the three whom Ng Hen and Ng Kai met in the barn in Canada just before crossing the St. Lawrence. There is, however, no evidence to show when he entered Canada, nor from where. He may have embarked for the United States direct, and gone to Canada, and then decided to come back, or he may have embarked from China for Canada, and then come into the United States for the first time. In the first case he is directly within the decision in *Lewis v. Frick*, 233 U. S. 291, 34 Sup. Ct. 488, 58 L. Ed. 967. In the second case the point is raised whether, to bring the case within section 35 it must not appear that when the alien embarked for foreign contiguous territory he expected to enter the United States.

Literally there is no such requirement. The question is whether the words must be so understood by intendment. I do not think it necessary to decide whether an alien, shown to have been actually domiciled in Canada or Mexico, and found illegally in the United States, comes within section 35. Ng Yee Chung, being an alien, his domicile of origin will endure till a new one has been shown to arise. I am willing to go so far in construing section 35 as to hold that at least nothing short of a domicile in Canada or Mexico will prevent deportation to the European or Asiatic port of original embarkation, and that this is for the alien to show. Whether an acquired domicile will change the result is not presented.

Wong Suey's case is like Ng Hen, except that his testimony somewhat conflicts with Ng Hen's. His admission that he meant from the outset to come to the United States brings him unconditionally within section 35.

[2] Ng Kai's case is quite different from the others, and without the use of Ng Hen's testimony presents the same state of facts as was before the Circuit Court of Appeals in *United States ex rel. Moore v.*

Sisson, 206 Fed. 450, 124 C. C. A. 356. The whole of Ng Kai's story was a silly fabrication, to believe which would rightly enough earn its author's contempt. The fact that it is all obviously false does not supply any evidence. All that can be gathered from Ng Kai's story is that he is a Chinaman who is telling a false story about how he came here. While we may make some inferences from his motive, they hardly justify a specific conclusion as to where he was born and where he came from. Ng Hen, however, says that Ng Kai came with him from Regina and entered with him. This justifies the deportation, just as in the case of Ng Yee Chung, but does not determine that China was the country whence he came. But Ng Hen also says that Ng Kai came before he (Ng Hen) came from Hong Kong, and this, in the absence of contradiction and in the light of Ng Kai's own perjury, is enough to justify a finding that he came from China. Hence his case is like Ng Yee Chung.

Hop Yet's case is like Ng Kai's, in that he certainly enough made up a false tale; but in it he admitted that he had been born and married in China. Ng Hen's story justifies the conclusion that he was one of the five who crossed the river, and the rule I have accepted in Ng Yee Chung's case justifies his deportation to China.

[3] Therefore the writ will be dismissed as to all five relators. A question is raised, in that the warrant of deportation mentions no port; the statute requiring that the deportation should be to the port of embarkation. In the case of Ng Hen, Wong Suey, and Ng Kai this port is Hong Kong, and the warrant should so read. In the case of Ng Yee Chung and Hop Yet we have no evidence of the port of embarkation. The problem is a practical one, and had best be solved by deporting them to whatever port is nearest to the place where each was born and has his family. The warrant will therefore be amended to conform to these directions, if the relators so wish it, and, when amended, the writ will be dismissed, and the relators remanded.

[4] It may well be questioned whether this court has the power to change the warrant as I have directed. The point was especially reserved in *Lewis v. Frick*, *supra*, whether habeas corpus searched more than the legality of the relator's detention and included the purposes of the executive officers. If, however, as was decided in *United States ex rel. Moore v. Sisson*, *supra*, the detention is illegal, unless the plan, of which it is a part, will in the end land the relator where the law requires him to go, it is as illegal if it seeks to convey him to Tien Tsin or Shanghai or Port Arthur, if he should go to Hong Kong, as though it sought to send him to any port in China, when he should go to Canada. It therefore appears to me that, under the rule in *United States ex rel. Moore v. Sisson*, *supra*, this court must hold the detention illegal, unless it be upon a warrant in which the terminus ad quem is that required by law.

[5] A question has also been raised of bail pending an appeal. This matter has been the subject of a confusion which it seems to me the subject does not justify. A writ of habeas corpus does not put the relator into the custody of this court. It does not assume to disturb the custody of the person then detaining the relator. It requires his

production and examines the legality of the custody. This court has no proper power to enlarge the relator while the inquiry proceeds, and less power to do so after the writ has been dismissed. If the writ be sustained, and the prisoner discharged, then the court might provide for bail to insure his appearance if the ruling were reversed, but only in that case. Till the writ be sustained, the question of bail depends entirely upon the rules regulating the relator's custody where he already is.

UNITED STATES ex rel. HOM CHUNG et al. v. SISSON, Chinese Inspector.

(District Court, S. D. New York. February 2, 1915.)

1. ALIENS ~~32~~—DEPORTATION—COUNTRY TO WHICH ALIENS SHOULD BE DEPORTED.

Under Immigration Act Feb. 20, 1907, c. 1134, § 35, 34 Stat. 908 (Comp. St. 1913, § 4284), nothing short of a domicile in Canada or Mexico will prevent the deportation of an alien entering the United States therefrom to the European or Asiatic port of original embarkation, and it is for the alien to show such domicile.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. §§ 84, 92-95; Dec. Dig. ~~32~~.]

2. ALIENS ~~32~~—DEPORTATION—COUNTRY TO WHICH ALIENS SHOULD BE DEPORTED.

Chinese persons, ordered deported to China, must show from what country, other than China, they came to the United States, if they wish to be deported to some other country.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. §§ 84, 92-95; Dec. Dig. ~~32~~.]

3. ALIENS ~~32~~—DEPORTATION—PORT TO WHICH ALIENS SHOULD BE DEPORTED.

The port to which a Chinese person should be deported is a practical matter for the immigration authorities to determine, and if the port to which such a person is ordered deported is not the one from which he sailed, he must show what that port was.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. §§ 84, 92-95; Dec. Dig. ~~32~~.]

Habeas corpus to inquire into detention of certain Chinese persons.

Robert M. Moore, of New York City, for relators.

H. Snowden Marshall, U. S. Atty., and Harold A. Content, Asst. U. S. Atty., both of New York City, for respondent.

LACOMBE, Circuit Judge. The evidence indicates that these three, with others, surreptitiously entered the United States from Canada. They were found in Jersey City, locked in a box car of the Erie Railroad. They claimed to have been born in the United States, but failed to prove their averments, and were ordered deported. The only question is whether the government can send them to China, or only to Canada.

~~32~~ For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

[1] I concur with Judge Hand's ruling in the case of Ng Hen, 220 Fed. 538. He says:

"I am willing to go so far in construing section 35 as to hold that at least nothing short of a domicile in Canada or Mexico will prevent deportation to the European or Asiatic port of original embarkation, and that this is for the alien to show. Whether an acquired domicile will change the result is not presented."

[2] It is understood that Canada refuses to receive Chinese persons. A construction of the act which would make it impossible for the United States to send them to China or any other place, unless it could show the particular port from which they sailed, does not commend itself to me. If they wish to be sent to some place other than China, it is for them to show from what country, other than China, they came.

Hom Ech testified that neither his father nor mother ever told him where he was born, and he does not know whether his mother was ever out of China. Hom Chung testified that when he was about 19 years old he was living in a village in China; that he came from China about 2 years ago; that his blood mother was never out of China. Hom Jung testified that he went home to China with his father and mother when he was 2 or 3 years old; that he remained there 16 or 17 years; and that he left China a little over 4 years ago.

[3] As to the question to what port they shall be sent, that is a practical matter for the immigration authorities to determine. If it is contended by any of the relators that the port is not the one from which he sailed, it will be for him to show what that port was. The intent of the statute is too clear to allow it to be defeated by relators leaving uncertain what it is in their power to make certain.

Writs dismissed.

In re MARRINER.

(District Court, D. Maine. February 11, 1915.)

No. 10380.

BANKRUPTCY ~~CO~~184—LIENS—FAILURE TO RECORD.

Under Bankr. Act July 1, 1898, c. 541, § 67a, 30 Stat. 564 (Comp. St. 1913, § 9651), providing that claims, which for want of record or for other reasons would not have been valid liens as against the claims of creditors of the bankrupt, shall not be liens against his estate, and Rev. St. Me. c. 93, § 1, providing that no mortgage of personal property is valid against any other person than the parties thereto, unless possession is delivered to and retained by the mortgagee, or the mortgage is recorded, where, though a mortgage was not recorded for two years, it was not withheld from record for the purpose of giving the mortgagor a fictitious credit, or pursuant to any agreement or collusion between the mortgagor and mortgagee, and was not recorded, after being so withheld, in contemplation of bankruptcy, or with any corrupt purpose, or with knowledge that the mortgagor was in a bankrupt condition, the mortgage was valid as against creditors who extended credit to the mortgagor prior to the recording of the mortgage, as under the Maine statute a mortgage made in good faith is valid against all parties who, previous to the date of its

record, have not acquired a lien by attachment, levy, or some similar proceeding.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 275-277; Dec. Dig. ↗184.]

In Bankruptcy. In the matter of Willis E. Marriner, bankrupt. On petition by Clement F. Robinson, trustee, for review of an order allowing the mortgage claim of Elwin A. Soule. Order affirmed.

Arthur L. Robinson, of Portland, Me., for trustee.

J. Bennett Pike, of Bridgton, Me., and Arthur Chapman, of Portland, Me., for claimant.

HALE, District Judge. The matter now before the court is the petition of the trustee, Clement F. Robinson, for a review of the findings of the referee, allowing the mortgage claim of Elwin A. Soule. The chattel mortgage in question is dated February 21, 1913; it covers the bankrupt stock, and fixtures, tools, and appliances, in petitioner's store at Bridgton. The mortgage was not recorded until February, 1914. The indorsement on the back states that it was received on February 13, 1914, for record in the town clerk's office.

It is contended by the trustee in bankruptcy that the mortgage is invalid on two grounds: First, because it was a preference; second, because it was negligently withheld from record, thereby deceiving other mercantile creditors, who sold goods in the belief that the purchaser's stock was not incumbered by any mortgage to Soule, so that the mortgagee is estopped from claiming any priority over other creditors under it.

In considering the question relating to a preference, the referee has carefully considered the testimony, and has concluded that at the time of recording the mortgage Soule did not have reasonable cause to believe that a preference was being effected thereby. The referee, therefore, decided that no preference had been made. In reviewing his finding upon this point, I am satisfied that he is correct.

The second contention presents a rather unusual question. The trustee insists that the lien of this mortgage should not be allowed, by reason of the provisions of section 67a of the Bankruptcy Act, to wit:

"Claims which for want of record or for other reasons would not have been valid liens as against the claims of the creditors of the bankrupt shall not be liens against his estate."

The Revised Statutes of Maine (chapter 93, § 1) provide:

"No mortgage of personal property is valid against any other person than the parties thereto, unless possession of such property is delivered to, and retained by the mortgagee, or the mortgage is recorded by the clerk of the city, town or plantation organized for any purpose, in which the mortgagor resides, when the mortgage is given."

In this case there is no contention that the mortgage was kept off record for any corrupt or colorable purpose. It is not contended that there was any collusion or agreement between the mortgagor and the mortgagee whereby the mortgage was withheld from record for the

purpose of giving the mortgagor a fictitious credit, as in *Blennerhasset v. Sherman*, 105 U. S. 100, 26 L. Ed. 1080, where the Supreme Court has held such agreement sufficient to render a deed void at common law. The Perkins Case (D. C.) 155 Fed. 237; The Shaw Case (D. C.) 146 Fed. 273; *Butterfield v. Woodman* (D. C.) 216 Fed. 208, 214.

It is not contended in the case at bar that when the mortgage was recorded, such record was made with any knowledge on the part of the mortgagee that the mortgagor was in a bankrupt condition, or that such record was made in contemplation of bankruptcy, or with any corrupt purpose.

The trustee contends that the mortgagee has withheld his mortgage from record for two years, during which time the mortgagor has been obtaining credit from various mercantile houses, who have sold him goods in the belief that the stock in trade was unencumbered by a mortgage; that the mortgagee is now estopped to come in and claim a lien ahead of other mercantile creditors, who have been extending credit in the meantime in ignorance of the mortgage; that, even aside from any question of estoppel, it is contrary to this statute to give any validity to an unrecorded mortgage. The trustee relies upon *Sawyer v. Pennell*, 19 Me. 167; *Sheldon v. Connor*, 48 Me. 584; *Shaw v. Wilshire*, 65 Me. 485; *Garland v. Plummer*, 72 Me. 401.

The trustee also cites cases which have arisen under statutes of other states, somewhat similar to the Maine statute, regarding the recording of chattel mortgages. I have studied with interest the very suggestive argument of the learned counsel for the trustee. I cannot, however, sustain his contention. The referee is correct in finding that there is no case in which our Maine statute has been so construed as to give creditors a right, after a mortgage is recorded, to set it aside as against claims arising while the mortgage was unrecorded. Under the Maine statute a mortgage, made in good faith, is valid against all parties who, previous to the date of its record, have not acquired a lien by attachment, levy, or some such proceeding. The decisions of other states on similar statutes are not altogether decisive of the question. I think it must be held that a mortgage is good only between the parties so long as it is unrecorded; but, when recorded, it takes effect as against third parties. *Sawyer v. Turpin*, 91 U. S. 114, 23 L. Ed. 235; *Humphrey v. Tatman*, 198 U. S. 91, 25 Sup. Ct. 567, 49 L. Ed. 956.

In view of the fact that the petitioner has had the use of the bankruptcy court in protecting and disposing of the mortgaged property, and in view of the fact that a portion of the expense thereof is justly chargeable to the sum found to be due the petitioner by virtue of his mortgage, the referee has ordered that, out of the amount found due the petitioner, the sum of \$75 be deducted as representing that portion of the expense of protecting, preserving, and disposing of the mortgaged property, which would be justly chargeable to the mortgagee. His finding is affirmed, namely, that the sum of \$1,000 and interest thereon since February 21, 1913, less the sum of \$75, be ordered to be paid to Elwin A. Soule, in settlement of his claim by virtue of the mortgage.

A decree may be presented in pursuance of this order.

DIGGS V. UNITED STATES.[†]

CAMINETTI V. SAME.

(Circuit Court of Appeals, Ninth Circuit. March 18, 1915. Concurring Opinion April 8, 1915.)

Nos. 2404, 2405.

1. CRIMINAL LAW ~~721~~, 857—**WITNESSES** ~~305~~—**PRIVILEGE FROM SELF-INCRIMINATION—WAIVER—COMMENTS ON FAILURE TO TESTIFY.**

Under Const. Amend. 5, providing that no person shall be compelled in any criminal case to be a witness against himself, and Act March 16, 1878, c. 37, 20 Stat. 30 (Comp. St. 1913, § 1465), providing that a person charged with an offense shall at his own request, but not otherwise, be a competent witness, and that his failure to make such a request shall not create a presumption against him, where a person charged with crime testifies in his own behalf, the waiver is complete, and he is no longer under the protection of the amendment, and his failure to testify concerning certain matters may properly be commented on and considered by the jury.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1672, 2054, 2055; Dec. Dig. ~~721~~, 857; Witnesses, Cent. Dig. §§ 1053–1057; Dec. Dig. ~~305~~.]

2. CRIMINAL LAW ~~780~~—**INSTRUCTIONS—TESTIMONY OF ACCOMPLICE.**

While it is the better practice for courts to caution juries against too much reliance upon the testimony of accomplices, it is not reversible error to refuse an instruction to this effect.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1859–1863; Dec. Dig. ~~780~~.]

3. CRIMINAL LAW ~~510~~—**TESTIMONY OF ACCOMPLICES—CORROBORATION.**

In the federal courts, corroboration of the testimony of an accomplice is not necessary to support a conviction.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1124–1126; Dec. Dig. ~~510~~.]

4. CRIMINAL LAW ~~507~~—**TESTIMONY OF “ACCOMPlices”—CORROBORATION.**

Women transported from one state to another for an immoral purpose are not “accomplices” to the offense of transporting them and furnishing tickets for their transportation.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1082–1096; Dec. Dig. ~~507~~.]

For other definitions, see Words and Phrases, First and Second Series, Accomplice.]

5. WITNESSES ~~268~~—**CROSS-EXAMINATION OF ACCUSED—SCOPE.**

Where, on a trial for transporting women from one state to another for an immoral purpose, though accused testified to nothing that occurred on the trip to such other state, he repeatedly referred in his testimony as to matters previously occurring to such trip to R., it was not improper to allow him to be asked on cross-examination what he meant by the R. trip, and whether he was accompanied on such trip by the women in question and another man charged with a similar offense.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 931–948, 959; Dec. Dig. ~~268~~.]

6. WITNESSES ~~268~~—**CROSS-EXAMINATION OF ACCUSED—SCOPE.**

Where, on such trial, one of the women on cross-examination testified to intimate relations with accused, a question asked him on cross-examination as to whether he suggested to his counsel the questions asked her, to which he replied that he suggested that to his counsel a long time before he came into the courtroom, and might have made the suggestion during her cross-examination, and the statement of counsel for the gov-

~~For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes
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[†] Rehearing denied May 10, 1915.

ernment that the defense, prompted by the defendant, put such questions, were not improper.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 931-948, 959; Dec. Dig. ☞268.]

7. CRIMINAL LAW ☞723—ARGUMENT OF COUNSEL.

On a trial for transporting women from one state to another for immoral purposes, the prosecuting attorney in his argument stated that the eyes of the people of the United States were on the jury, and that 60,000,000 or 90,000,000 people were awaiting the verdict, respecting which statement the court, when objection was made, stated that this was merely a form of speech and that counsel should confine himself to the evidence. Counsel further remarked that, if there was any man who had sunk to the uttermost depths of depravity, it was the man in form alone who seduced a girl and then exposed her shame to the world, and that if he had one redeeming trait of character, having blasted the life of a virgin, he would go to the penitentiary before going before a jury and admitting that he seduced her, and recounting the times when he had illicit intercourse with her, and that a decent man would die first, to which objection was made on the ground that accused had made no such admissions. Counsel further remarked that the government demanded that the laws enacted for the protection of young and decent women be rigidly enforced, and that an acquittal would be a blot upon the name of the state. The court told the jury to be guided solely by the evidence, and not by the statements or declarations of counsel, and accused requested no further instruction on this point. *Held*, that there was nothing so offensive or inflammatory in the remarks as to require a reversal.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1663, 1674, 1676; Dec. Dig. ☞723.]

8. PROSTITUTION ☞1—TRANSPORTATION OF WOMEN FOR IMMORAL PURPOSES—ELEMENTS OF OFFENSES.

The immorality denounced by the White Slave Traffic Act (Act June 25, 1910, c. 395, 36 Stat. 825 [Comp. St. 1913, § 8813]), prescribing the punishment for knowingly transporting any woman or girl in interstate commerce for the purpose of prostitution or debauchery, or for any other immoral purpose, is not limited to commercialized vice, and the act applies to transportation for the purpose of making the girl the concubine or mistress of the person transporting her.

[Ed. Note.—For other cases, see Prostitution, Cent. Dig. §§ 1, 2; Dec. Dig. ☞1.]

Violations of White Slave Act, see note to *Savage v. United States*, 130 C. C. A. 2.]

9. CRIMINAL LAW ☞814—INSTRUCTIONS—CONFORMITY TO EVIDENCE.

On a trial for transporting a woman from one state to another for an immoral purpose, an instruction that, in considering her testimony and the weight to be given thereto, the jury might consider her motive in testifying, whether she had been or appeared to be acting under the influence of any person, and whether any promise of immunity had been offered to her, and any hope she might have for leniency in any criminal action brought against her, was properly refused, where there was no evidence tending to show any promise of immunity, or that she was acting under the influence of any one.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1821, 1833, 1839, 1860, 1865, 1883, 1890, 1924, 1979-1985, 1987; Dec. Dig. ☞814.]

10. PROSTITUTION ☞4—TRANSPORTATION FOR IMMORAL PURPOSE—SUFFICIENCY OF EVIDENCE.

Evidence held to support a conviction of C. for transporting two women from one state to another for an immoral purpose, though D., charged with a similar offense, purchased the tickets for the transportation.

[Ed. Note.—For other cases, see Prostitution, Cent. Dig. § 4; Dec. Dig. ☞4.]

**11. PROSTITUTION ~~5~~—TRANSPORTATION OF WOMEN FOR IMMORAL PURPOSES
—INSTRUCTIONS.**

Where, on a trial for transporting and procuring tickets for the transportation of women from one state to another for an immoral purpose, to wit, that they should be and become the concubines and mistresses of accused and another person charged with the same offense, the court read the indictment and statute to the jury, explained the meaning of the terms of the statute, defined "concubine," "mistress," and the term "debauchery," as used in the statute, and charged that if the women were taken to another state as testified by them, and while there accused and his companion cohabited with them as the testimony tended to show, the jury might find that they were taken there with the immoral purpose and intent charged, the jury could not have understood, as claimed, that accused and his companion were guilty if they merely seduced the girls.

[Ed. Note.—For other cases, see Prostitution, Cent. Dig. § 5; Dec. Dig. ~~5~~.]

Ross, Circuit Judge, dissenting.

In Error to the District Court of the United States for the First Division of the Northern District of California; Wm. C. Van Fleet, Judge.

Maury I. Diggs and F. Drew Caminetti were separately convicted of offenses, and they bring error. Affirmed.

Robert T. Devlin and Marshall B. Woodworth, both of San Francisco, Cal. (S. Luke Howe, of Sacramento, Cal., and Nathan C. Coghlan, of San Francisco, Cal., of counsel), for plaintiffs in error.

J. A. Cooper, of San Francisco, Cal. (Anthony Caminetti, Jr., of San Francisco, Cal., of counsel), for plaintiff in error Caminetti.

Before GILBERT and ROSS, Circuit Judges, and WOLVERTON District Judge.

GILBERT, Circuit Judge. The two cases named above, although separately tried, arose out of a single transaction, in which each of the plaintiffs in error was involved. For the reason that the points presented to this court are similar in the two cases, they will be disposed of in a single opinion of this court.

The indictment against Diggs contained six counts. He was convicted on the first four counts, and there was no verdict on the last two. The first count charged him with transporting Marsha Warrington from Sacramento, Cal., to Reno, Nev., for the purpose of debauchery, and for an immoral purpose, to wit, that the aforesaid Marsha Warrington should be and become his concubine and mistress. The second count charged him with transporting Lola Norris from Sacramento to Reno, that she might become the mistress and concubine of Caminetti. The third count charged him with procuring a ticket for Marsha Warrington from Sacramento to Reno, with the intent that she should become his concubine and mistress. The fourth count charged him with buying a ticket for Lola Norris, with the intent that she should give herself up to debauchery, and for an immoral purpose, to wit, that she could be and become the concubine and mistress of Caminetti. The fifth and sixth counts charged him with persuading,

~~5~~ For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

inducing, and enticing Marsha Warrington and Lola Norris to go to Reno for the immoral purposes set forth in the other counts.

The indictment against Caminetti contained four counts. The indictment was similar to that against Diggs, excepting the two counts relating to the purchase of tickets were omitted from Caminetti's indictment. He was convicted on the first two counts and acquitted on the last two.

[1] Error is assigned to the following instruction to the jury:

"After testifying to the relations between himself and Caminetti and these girls down to the Sunday night on which the evidence of the government tends to show the trip to Reno was taken, he stops short and has given none of the details or incidents of that trip, nor any direct statement of the intent or purpose with which that trip was taken, contenting himself by merely referring to it as having been taken, and by testifying to his state of mind for some days previous to the taking of that trip. Now this was the defendant's privilege, and, being a defendant, he could not be required to say more if he did not desire to do so; nor could he be cross-examined as to matters not covered by his direct testimony. But in passing upon the evidence in the case for the purpose of finding the facts you have a right to take this omission of the defendant into consideration. A defendant is not required under the law to take the witness stand. He cannot be compelled to testify at all, and if he fails to do so no inference unfavorable to him may be drawn from that fact, nor is the prosecution permitted in that case to comment unfavorably upon the defendant's silence; but where a defendant elects to go upon the witness stand and testify, he then subjects himself to the same rule as that applying to any other witness, and if he has failed to deny or explain acts of an incriminating nature that the evidence of the prosecution tends to establish against him, such failure may not only be commented upon, but may be considered by the jury with all the other circumstances in reaching their conclusion as to his guilt or innocence, since it is a legitimate inference that, could he have truthfully denied or explained the incriminating evidence against him, he would have done so."

This assignment presents the question whether the waiver of the privilege of silence by a defendant in a criminal case in becoming a witness in his own behalf is a complete waiver, so as to place him in the position of any other witness in the case, or is only a partial waiver; that is to say, a waiver so far as the defendant sees fit to testify, leaving him, as to other matters, still under the protection of the fifth amendment. The statute of March 16, 1878 (U. S. Comp. Stats. of 1913, § 1465), provides that a person charged with an offense "shall at his own request but not otherwise be a competent witness. And his failure to make such a request shall not create any presumption against him." Upon a careful and cautious consideration of the question we reach the conclusion that the statute should be held to mean that the waiver is complete, and that when it has been made the defendant is no longer under the protection of the amendment.

The only cause we have found for hesitation in reaching that conclusion is the fact that the Circuit Court of Appeals for the Eighth Circuit, a court for which we entertain the highest respect, in a similar case (*Balliet v. United States*, 129 Fed. 689, 64 C. C. A. 201), held such an instruction reversible error. It is to be said, however, that while the opinion in that case contains no discussion of or reference to any adjudicated case of the state courts we think it is not improbable

that the conclusion reached was influenced by the then settled rule of the Supreme Court of the state of Missouri. But in 1913 the Supreme Court of Missouri in State v. Larkin, 250 Mo. 218, 157 S. W. 600, 46 L. R. A. (N. S.) 13, overruled its prior decisions. In that case the court said:

"We have carefully examined the statutes and holdings upon this question of more than 30 states, and we find that it has been held universally that, if the defendant is not sworn as a witness in his own behalf, any comment by the prosecuting attorney on his failure so to testify constitutes reversible error, in the absence of a peremptory and proper rebuke by the trial court. But, on the other hand, except in our own state and in California, where the question has been sometimes doubted, the right of the prosecuting attorney to comment upon the failure of the defendant, when he takes the stand as a witness in his own behalf, to deny or explain incriminating facts and statements, has been uniformly held allowable."

After citing numerous cases the court proceeded:

"The rule that no reference shall be made to the neglect, failure, or even refusal of a defendant to avail himself of his right to testify shall not be commented on, in the event he does not become a witness in his own behalf, is therefore, we find, universal; but, on the contrary, the rule that if he does go upon the witness stand he then stands in the precise attitude of of any other witness is, except in this state, and, as stated, in California, where the rule is subject to some doubt, also universal. Mr. Wharton, in his learned and able work on Criminal Evidence, lays down in the tenth edition thereof the rule that such comment is allowable."

And the court referred to the earlier rule in Missouri as expressed in State v. Musick, 101 Mo. 271, 14 S. W. 214, in which it was said:

"These statements made by the state's witnesses were not denied by defendant, and therefore stand admitted, as much so as if the defendant had admitted them in terms."

We think that the opinion in Reagan v. United States, 157 U. S. 301, 15 Sup. Ct. 610, 39 L. Ed. 709, should be taken as affirming, in substance, what was said of the rule so expressed in State v. Larkin. In that case Mr. Justice Brewer, for the court, referring to the act of March 16, 1878, said:

"On the other hand, if he avail himself of this privilege, his credibility may be impeached, his testimony may be assailed, and is to be weighed as that of any other witness. Assuming the position of a witness, he is entitled to all its rights and protections, and is subject to all its criticisms and burdens. It is unnecessary to consider whether, when offering himself as a witness as to one matter, he may either, at the will of the government or under the discretion of the court, be called upon to testify as to other matters. That question is not involved in this case, and we notice it simply to exclude it from the scope of our observation. The privileges and limitations to which we refer are those which inhere in the witness as a witness, and which affect the testimony voluntarily given. As to that, he may be fully cross-examined. It may be assailed by contradictory testimony. His credibility may be impeached, and by the same methods as are pursued in the case of any other witness. The jury properly consider his manner of testifying, the inherent probabilities of his story, the amount and character of the contradictory testimony, the nature and extent of his interest in the result of the trial, and the impeaching evidence in determining how much of credence he is entitled to."

In Brown v. Walker, 161 U. S. 591, 597, 16 Sup. Ct. 644, 647 (40 L. Ed. 819) the court said:

"Thus, if the witness himself elects to waive his privilege, as he may doubtless do, since the privilege is for his protection and not for that of other parties, and discloses his criminal connections, he is not permitted to stop, but must go on and make a full disclosure."

In *Fitzpatrick v. United States*, 178 U. S. 304, 316, 20 Sup. Ct. 944, 949 (44 L. Ed. 1078) the court said:

"While the court would probably have no power of compelling an answer to any question, a refusal to answer a proper question put upon cross-examination has been held to be a proper subject of comment to the jury"—citing *State v. Ober*, 52 N. H. 459, 13 Am. Rep. 88.

In *State v. Ober*, so cited, the court said:

"Upon the whole, we are unable to reach any other conclusion than that the respondent's testimony, so far as it went (and not less the fact that it went no further), his refusal to submit to a full cross-examination, within proper limits, after waiving his constitutional privilege, and all his conduct and demeanor, were proper matters for comment by counsel and court, as well as for the consideration of the jury."

How the Circuit Court of Appeals for the First Circuit understood the decision in the *Fitzpatrick* Case is shown in *Jacobs v. United States*, 161 Fed. 694, 699, 88 C. C. A. 554, 559, where Judge Putnam said:

"He offers himself as a witness, and therefore puts himself in the position of any other witness, so far that he may be examined with reference to anything pertinent to the case and admissible in evidence therein."

Very numerous decisions of the state courts may be cited which support the ruling of the court below in giving the instruction which is assigned as error. Thus, in *State v. Tatman*, 59 Iowa, 471, 13 N. W. 632, the court said:

"The attention of the jury may properly be called to the fact that the defendant has not testified as to a certain part of the case."

In *Comstock v. State*, 14 Neb. 205, 15 N. W. 355, it was held that a failure of the defendant to contradict a fact within his personal knowledge is in the nature of an admission of such fact. In *Heldt v. State*, 20 Neb. 492, 30 N. W. 626, 57 Am. Rep. 835, the court held that the district attorney may comment on such omission. In *State v. Ulsemmer*, 24 Wash. 657, 64 Pac. 800, it was held that comment might be made upon the defendant's failure to deny incriminating facts in the evidence. The court said:

"He assumes the character of a witness * * * the same as any other witness."

The same rule has been applied in Kansas (*State v. Glave*, 51 Kan. 330, 33 Pac. 8), and in Alabama (*Cotton v. State*, 87 Ala. 103, 6 South. 372). In *Clarke v. State*, 87 Ala. 71, 6 South. 368, the court said:

"Like any other witness he must submit to cross-examination, and his failure to explain any fact or circumstances in his knowledge tending to exculpate him, is a proper subject of comment by the prosecution."

In *Lee v. State*, 56 Ark. 4, 19 S. W. 16, it was held that the failure of one charged with crime to testify in his own behalf shall not create a presumption against him, and does not prevent the prosecuting attorney commenting on defendant's failure to deny certain testimony in

relation to facts of which he must have had knowledge. In Brashears v. State, 58 Md. 568, the court in a similar case said:

"His conduct on the witness stand, and his silence, when testifying, as to matters within his knowledge, were circumstances which the jury had a right to consider in deciding upon the credit due to the witness, in connection with the other facts proved in the case, and they were, therefore, necessarily circumstances upon which the state's attorney had a right to comment in addressing the jury."

In State of Nevada v. Harrington, 12 Nev. 125, 130, the court said:

"Our conclusions are that, if the defendant in a criminal action voluntarily testifies for himself, the same rights exist in favor of the state's attorney to comment upon his testimony, or his refusal to answer any proper question, or to draw all proper inferences from his failure to testify upon any material matter within his knowledge, as with other witnesses."

Many other cases may be cited to the same effect, and the text-books adopt the rule thus expressed as established by a uniform line of decisions. In Wharton's Criminal Evidence, § 681, it is said:

"But if the defendant, having full opportunity to do so, failed on the stand to controvert that which was testified against him, this may be regarded, when the matter is one within his personal knowledge, as an admission of the truth of such testimony."

And such, we think, is the meaning of the decisions of the Supreme Court of the United States, cited above, and epitomized in Sawyer v. United States, 202 U. S. 150, 165, 26 Sup. Ct. 575, 579 (50 L. Ed. 972, 6 Ann. Cas. 269), where it is said:

"It has been held in this court that a prisoner who takes the stand in his own behalf waives his constitutional privilege of silence, and that the prosecution has the right to cross-examine him upon his evidence in chief with the same latitude as would be exercised in the case of an ordinary witness, as to the circumstances connecting him with the crime."

We take this to mean that the waiver of the constitutional privilege of a defendant in a criminal case is a complete waiver, and places the defendant in the same attitude as that of a defendant in a civil action who testifies in his own behalf.

The plaintiff in error waived his privilege of silence when he took the witness stand and testified as to the subject-matter of the offense with which he was charged. He testified at length and in detail as to his relations with the two girls and his codefendant covering a considerable period of time, and ending abruptly at the railroad station at a late hour of the night on which the party took the train for Reno. There he stopped. He made no denial of the testimony that he purchased the train tickets and procured the drawing room on the Pullman car, or that the drawing room was actually occupied by the members of the party in the manner in which the girls testified that it was. Nor did he deny his participation in the discussion of the plan of securing a cottage or bungalow at Reno in which the party were to live during their stay at Reno. The jury, even in the absence of instruction from the court, would inevitably have taken his omission to testify as to those incidents to be an admission of the facts testified to by the two girls.

[2-4] Error is assigned to the denial of defendant's request for an instruction that the jury should determine from the evidence and circumstances whether Marsha Warrington and Lola Norris, or either of them, were accomplices of the defendants, and that, if it was found that they were, the testimony of an accomplice should be received with caution and weighed and scrutinized with great care by the jury, and that the jury should not regard the testimony of an accomplice, unless she is confirmed and corroborated in some material parts of her evidence. To this it is to be said:

First. A refusal to instruct as to the value of the testimony of an accomplice is not error for which a judgment should be reversed. In Holmgren v. United States, 217 U. S. 509, 523, 30 Sup. Ct. 588, 592 (54 L. Ed. 861, 19 Ann. Cas. 778), the court said:

"It is undoubtedly the better practice for courts to caution juries against too much reliance upon the testimony of accomplices, and to require corroborating testimony before giving credence to them."

Other courts also have said that such was the better practice, but, as the rule is stated in 2 Bishop, New Crim. Procedure, 1169, "they are not as of law required to give this advice."

Notwithstanding the views expressed by the Supreme Court in the Holmgren Case as to the better practice, that court and the federal courts generally have held that corroborating testimony is not necessary to support a conviction. This court so held in Lung v. United States, 218 Fed. 817, 134 C. C. A. 505. And it is believed that no court, state or federal, has held that it is reversible error to refuse to caution the jury to scrutinize with care the testimony of an accomplice. In Cheatham v. State, 67 Miss. 335, 7 South. 204, 19 Am. St. Rep. 310, the court said:

"The suspicion with which the testimony of accomplices is received by the courts, and their unwillingness to sustain convictions resting wholly upon the uncorroborated evidence of such persons, has led to the very general practice of advising juries to act with great prudence and suspicion upon such evidence, and to acquit unless there is corroboration in material particulars. But our researches have failed to discover a case in which a conviction has been set aside by reason of the court refusing so to instruct or advise."

The court, in that case, cited State v. Haney, 19 N. C. 390, in which, it was said, the Supreme Court of North Carolina had declared the true rule upon the subject, which was that:

"The practice of giving such instructions or advice to the jury rests in the discretion of the presiding judge, and his refusal so to do is not assignable as error." "No one," said the court, "can require of the judge to give an instruction to the jury, except on the law of the case. The judge may caution them against reposing hasty confidence in the testimony of an accomplice. It is usual, justifiable, and, we add, it is proper, to do so, where he has cause to apprehend that the jury may feel themselves bound to find a verdict conforming to the positive testimony of the witness, without weighing the circumstances of suspicion and distrust under which his testimony is rendered."

See note to Commonwealth v. Price, 71 Am. Dec. 678, in which a large number of cases are cited to the same effect.

In the present case the court instructed the jury that the evidence must be such as to satisfy their minds beyond a reasonable doubt and

to a moral certainty, and said that they should take into consideration the character and conduct of each witness, his relation to the controversy and to the parties, his expressed or apparent bias or partiality, the reasonableness or unreasonableness of the statements he makes, and all other elements which tend to throw light upon his credibility.

Second. We are of the opinion that as to the counts of the indictments on which the defendants were found guilty neither Marsha Warrington nor Lola Norris was an accomplice, for, while there was testimony on which, if credited, Marsha Warrington might have been deemed an accomplice of the defendants in persuading, inducing, and enticing Lola Norris to go to Reno, under the last two counts of the indictments that question is eliminated from the case by the verdict of the jury in acquitting each of the defendants on those counts.

"The test by which to determine whether one is an accomplice is to ascertain whether he could be indicted for the offense of which the accused is being tried." 12 Cyc. 445.

"Where a penal statute is intended for the protection of a particular class of persons, one of that class does not become an accomplice by submitting to the injury." 1 McClain, Criminal Law, § 199.

Thus it is universally held that a woman on whom an abortion is committed is not an accomplice, although she assents to the act. But one may sustain such relation to an offense that, while not an accomplice in the commission of that offense, he may be indicted for a conspiracy to commit the offense. This was what was decided in United States v. Holte, 236 U. S. 140, 35 Sup. Ct. 271, 59 L. Ed. —. There it was held that it was not impossible for a woman transported in violation of the act of June 25, 1910, to be guilty of crime in conspiring for the commission of that offense. The court said:

"A conspiracy to accomplish what an individual is free to do may be a crime."

And the ruling of the court was illustrated by a reference to the crime of abortion, as to which, said the court:

"A woman may conspire to procure an abortion upon herself when under the law she could not commit the substantive crime, and therefore it has been held she cannot be an accomplice."

The court recognized the parity between the offense committed in transporting, or causing to be transported, a woman under the act of June 25, 1910, and the crime of abortion, and the rule that, while the person as to whom either offense is committed cannot be an accomplice, she may be prosecuted as a co-conspirator to procure the commission of the offense.

[5] It is said that the trial court erred in compelling the defendant Diggs to testify to certain matters which were not the proper subject of cross-examination. In his direct testimony he had referred to conversations between the parties which took place just prior to the Reno trip, and in his direct examination he had said:

"I got the full information of all the trains and also the cost of transportation between different places from Sacramento to various positions. The next train leaving town was 10:45, the eastward train, and we all agreed to catch that train."

On his cross-examination, without objection, he had testified:
"I met Miss Warrington and Miss Norris frequently the first week preceding our trip to Reno."

And again he had said, also without objection:

"We left for Reno two weeks after meeting her on the levee."

Again he had said:

"I believe that was one week before we left for Reno on a Sunday night."

And again:

"That night we went to Reno."

After this testimony had been given, counsel for the government propounded this question:

"Q. In your testimony you have referred repeatedly to conversations and conferences that took place before the Reno trip. Now, what did you understand or mean by the Reno trip?"

The question was objected to as not cross-examination. The court overruled the objection and remarked:

"He is not asking him what occurred on that trip. He is simply identifying the trip."

The witness answered:

"It is perfectly evident what trip it was."

And in answer to the question:

"On that trip were you accompanied by Mr. Caminetti, Miss Norris, and Miss Warrington?"

—the question was objected to as not cross-examination, and the witness answered:

"They were along; yes."

We are unable to see upon what ground it can be held that the testimony so admitted constituted error for which the judgment should be reversed. After the witness had referred frequently to the "Reno trip," it was not improper to ask him to identify the trip, and that was all that was done.

[6] It is contended that there was misconduct of counsel for the prosecution, permitted and condoned by the trial judge, prejudicial to the defendant Diggs, in that counsel for the government was permitted to ask of the said defendant on his cross-examination whether, during the course of the trial, and during the cross-examination of Marsha Warrington, he had not repeatedly suggested to his counsel questions to be propounded to her. Marsha Warrington on her cross-examination had testified as to her intimate relations with Diggs, in answer to questions propounded by the latter's counsel. Following this, and while Diggs was on cross-examination, he was asked:

"Didn't you suggest that question to your counsel? A. Well, I suggested that to my counsel a long time before I came into the courtroom; * * * that suggestion may have been made by me during the cross-examination of Miss Warrington. I won't say that I did not make the suggestion."

In view of that testimony, there was clearly no error in the ruling of the court upon the question which is presented in the assignment of error. It follows that it is not ground for reversing the judgment in the Diggs case that counsel for the government remarked:

"Counsel for the defense, prompted by the defendant, put these questions to Marsha Warrington."

[7] Error is assigned to certain statements and animadversions made by the government counsel as to the facts before the jury, the guilt of the defendants, the sanctity of the home, and the importance of the cases under consideration. The remarks of counsel principally complained of in both cases are the following:

"The eyes of not only the people of the state of California are upon you, gentlemen of the jury, awaiting your verdict in this case, but the people of all these United States; 60,000,000 or 90,000,000 people are awaiting your verdict in this case."

Upon objection of counsel for the defendants, the court observed:

"That is merely a form of speech"

—and directed counsel to confine himself to the evidence.

Again counsel for the government, in addressing the jury, said:

"Gentlemen, if there is any depraved man in the world, if there is any man who has sunk to the uttermost depths of depravity, it is that man in form, because he is a man in form alone, who seduces an innocent girl and then exposes her shame to the world. If he had one redeeming trait of character in his composition, having blasted the life of that virgin, he ought to be willing to take 50 years in the penitentiary before he would come before a jury of his fellow citizens, and before the world, and say, Yes, I seduced that girl; before he would come before a jury of his fellow citizens and recount time after time when he had illicit intercourse with this girl. A decent man would die first."

In the Diggs case objection was made by his counsel, Mr. Devlin, as follows:

"If your honor please, I except to that, because no such language came from the defendant; it all came from Marsha Warrington."

"Mr. Roche: It came from Marsha Warrington upon your cross-examination for the first time.

"Mr. Devlin: We had a right to cross-examine her.

"The Court: Mr. Sullivan, confine yourself to the evidence; don't transgress it."

In the Caminetti case counsel for the government said:

"The government of these United States, gentlemen of the jury, whom we have the honor to represent here, your government, as well as my government, the government of all of us, demands that the laws enacted for the protection and preservation of its young and decent women be adequately and rigidly enforced. An acquittal in this case would be a miscarriage of justice, and it would be a blot upon the fair name and escutcheon of California."

In this connection it is to be observed that in charging the jury the court said:

"I should suggest to you, gentlemen, that the statements or declarations of counsel made at the bar are in no sense evidence for your consideration. You are to confine your consideration alone to the evidence that has been admitted before you from the witness stand or in the way of exhibits or other physical objects which may have been laid before you."

And the court admonished the jury that they must not permit themselves to be influenced in their verdict by the fact that the case had attracted so much attention and given rise to so much controversy in the public press, in the halls of Congress, and among the people. The court said:

"Those facts are wholly extraneous to your inquiry or to mine, and we have nothing whatsoever to do with them. They in no way affect the merits of the case, and you should be careful to avoid permitting any feeling of bias or prejudice flowing therefrom to find reflection in your verdict."

Counsel for the defendants were apparently satisfied with these instructions, and they made no request in either case that the jury be instructed to disregard the remarks of counsel. It is the general rule that improper remarks in argument by the prosecuting attorney, although prejudicial, do not justify reversal, unless the court has been requested to instruct the jury to disregard them, and has refused to do so. 12 Cyc. 585. In *People v. Shears*, 133 Cal. 154, 65 Pac. 295, it was held that, where the defendant did not invoke the action of the court to instruct the jury that it was improper, and to disregard it, but merely excepted to the remarks of the district attorney, the impropriety is not ground for reversal of the judgment, upon conviction of manslaughter. A similar ruling was made in *People v. Babcock*, 160 Cal. 537, 117 Pac. 549.

In *Dunlop v. United States*, 165 U. S. 486, 498, 17 Sup. Ct. 375, 379 (41 L. Ed. 799) the court said:

"There is no doubt that, in the heat of argument, counsel do occasionally make remarks that are not justified by the testimony, and which are, or may be, prejudicial to the accused. In such cases, however, if the court interfere, and counsel promptly withdraw the remark, the error will generally be deemed to be cured. If every remark made by counsel outside of the testimony were ground for a reversal, comparatively few verdicts would stand, since in the ardor of advocacy, and in the excitement of trial, even the most experienced counsel are occasionally carried away by this temptation."

In *Chadwick v. United States*, 141 Fed. 225, 245, 72 C. C. A. 343, 363, language was employed by the district attorney more inflammatory and more subject to objection, we think, than the language used by the counsel for the government in the case at bar. In that case the defendant objected and excepted, and no ruling was made by the court. Judge Lurton, for the Circuit Court of Appeals, in reviewing the exception, held that there was no reversible error, and said:

"There is a degree of liberty allowable to counsel, whether for the government or the accused, in respect to the line of argument they shall pursue and the inferences to be drawn from the evidence, which a trial judge should respect until the facts of the case are overstepped or arguments used which plainly abuse the privilege. * * * But to entitle the accused to a reversal, when objection is made and the language not withdrawn, it must appear that the matter objected to was plainly unwarranted and so improper as to be clearly injurious to the accused."

In *Johnston v. United States*, 154 Fed. 445, 83 C. C. A. 299, this court in a similar case said:

"The use of language by counsel, calculated to prejudice a defendant and not justified by the evidence, is improper and censurable, and should be discountenanced by the court. In such a case, it is the duty of the trial court

to set aside the verdict, unless satisfied that the improper language was not instrumental in securing it. But invective based on the evidence and inferences legitimately to be derived therefrom are not inhibited, and it is usually within the discretion of the trial court to determine whether or not the limits of professional propriety have been exceeded. Ordinarily the exercise of that discretion will not be reviewed in an appellate court, unless the invective is so palpably improper that it may be seen to have been clearly injurious."

We discover nothing so offensive or inflammatory in the remarks of counsel for the government as to require us on that ground to reverse the judgments. The trial judge, in the exercise of the discretion vested in him, did not regard the language of counsel as of sufficient importance to call for further interference or action on his part than as indicated in the above excerpts from the record, and therein, we think, there was no abuse of discretion.

[8] It is contended that the court in its instructions gave to the words "concubine" and "mistress" too wide and inclusive a meaning, and it is argued that the defendants, by transporting the women for the purpose of making them their concubines and mistresses, were not guilty of the offense defined in the act, and that the words "prostitution or debauchery, or any other immoral practice," do not include concubinage, and that the immorality denounced by the White Slave Traffic Act is only commercialized vice. The federal decisions are against these contentions. Hoke v. United States, 227 U. S. 308, 33 Sup. Ct. 281, 43 L. R. A. (N. S.) 906, 57 L. Ed. 523, Ann. Cas. 1913E, 905; Athanasaw v. United States, 227 U. S. 326, 33 Sup. Ct. 285, 57 L. Ed. 528, Ann. Cas. 1913E, 911; United States v. Bitty, 208 U. S. 393, 28 Sup. Ct. 396, 52 L. Ed. 543; United States v. Flaspoller (D. C.) 205 Fed. 1006; Johnson v. United States, 215 Fed. 679, 131 C. C. A. 613.

[9] It is assigned as error that the court refused to instruct, as requested by the defendants, that in considering the testimony of Marsha Warrington, and the weight to be given thereto, they might consider her motive in testifying, "whether or not she has been or appears to be, acting under the influence of any person or persons, whether or not any promise of immunity has been offered to her, and any hope she may have for leniency in any criminal action brought against herself." It is sufficient in answer to this assignment to point to the fact that there is in the record no evidence tending in any way to show that there had been a promise of immunity to Marsha Warrington, or that she was acting under the influence of any person or persons.

[10] It is urged that there was no evidence on which to find that Caminetti took any part in transporting the girls from Sacramento to Reno, but that, on the other hand, the evidence was that the tickets were purchased by Diggs alone. The record does not sustain this contention. There are many items of the testimony which show that the journey to Reno was the result of the preconcerted action of both Diggs and Caminetti, and with a view to achieve a common purpose, which was, in fact, accomplished. Thus Lola Norris testified that, on the afternoon of the day on which they started for Reno, the four were together in a box at a restaurant, and that:

"When we agreed on Reno, just before Mr. Caminetti left, he gave me \$20. I don't know whether he wanted me to buy my own, or buy my own and Miss Warrington's together."

Again she testified that on the same occasion Diggs said:

"Some one would have to manage the party, and the others would have to abide by his decisions. And so Mr. Caminetti said, 'I will make you the boss,' and so Mr. Diggs took charge of the party. Mr. Caminetti and Mr. Diggs were to share the expenses."

She testified that thereafter Caminetti left in search for money with which to pay for the trip, and that on his return—

"he said he had been having quite a time trying to locate the party who was to give him the money, but he finally succeeded in finding him, and he secured the money, and we all went down to the depot again. We reached the depot about 15 minutes before the train left, I think. Mr. Diggs went to the ticket office and bought the tickets."

She testified, also, that while Diggs was buying the tickets Caminetti—

"just stood there with us. * * * I heard no objection made by Caminetti to the suggestion of Mr. Diggs that he purchase the tickets."

There was testimony that Caminetti and Diggs together rented the bungalow in Reno which was occupied by the party, and that while there he ordered and paid for groceries to be sent to the bungalow. In view of these features of the evidence, and others not necessary to recount, the court below properly instructed the jury as follows:

"As to the question which has been argued by counsel whether the evidence is sufficient to show that the defendant transported, or aided or assisted in transporting, these girls to Reno, you will understand that it is not necessary, to sustain this charge, that the defendant be shown to have himself paid for the tickets or other expenses of that trip. If he contributed to the means of paying such expenses, or if it was understood between himself and Diggs that he was thereafter to contribute thereto by reimbursing Diggs, this would be sufficient on which to sustain the charge that the defendant aided and assisted in such transportation."

[11] It is contended that the instructions to the jury were erroneous, in that thereby the jury were led to believe that the defendants were merely charged with seducing the women named in the indictment, and that, if the jury so found, they might find the defendants guilty. This contention is not sustained by the record. It appears therefrom that the court read to the jury the indictment, in which it was charged that each defendant transported and caused to be transported the two girls named "for an immoral purpose, to wit, that the aforesaid Marsha Warrington should be and become the concubine and the mistress of the said defendant," and in which the same allegation was made as to Lola Norris. The court also read the statute and explained the meaning of its terms, and, among other things, charged the jury that if they found that these girls were taken to Reno on the occasion in question, as testified to by them, and that while there the defendant Diggs and his companion, Caminetti, cohabited with them as the testimony tends to show, "then you may find that they were taken there with the immoral purpose and intent

charged." In the instructions the court defined the terms "concubine" and "mistress" and the term "debauchery" as used in the statute; and it is clear from the whole of the instructions that the jury must have fully understood the nature of the charges against each defendant.

Since writing the above our attention has been directed to the recent decision of the Circuit Court of Appeals for the First Circuit, in Myrick v. United States, 219 Fed. 1, in which the majority of that court, Judge Putnam dissenting, reversed the judgment of the District Court and followed the rule announced in Balliet v. United States, 129 Fed. 689, 64 C. C. A. 201, above cited. In the majority opinion in that case reference is made to the fact "that the question has not been definitely decided by the Supreme Court." We still entertain the opinion, however, that the language of the statute and the utterances of the Supreme Court which we have cited are sufficiently broad and inclusive to justify the view which we have taken of the effect of the act of March 16, 1878. In this day of enlightened jurisprudence it is believed that the protection against self-incrimination conserved by the fifth amendment is to be classed with other bars which the rules of the common law placed against the admission of evidence of the truth, as to which, said Judge Dillon in State v. Gigher, 23 Iowa, 318, "the tendency of modern legislation and modern decision is to remove these bars and to let in the light." But protection against self-incrimination is still afforded in the provision that the defendant may or may not testify for himself as he may elect. We think that when he elects to become a witness he waives his constitutional privilege against self-incrimination, and that the true rule is stated in Wigmore on Evidence, § 2276 (2):

"The case of an accused in a criminal trial, who voluntarily takes the stand, is different. Here his privilege has protected him from being asked even a single question, for the reason that no relevant fact that could be inquired about would not tend to incriminate him. On this very hypothesis, then, his voluntary offer of testimony upon any fact is a waiver as to all other relevant facts because of the necessary connection between all."

And (2) (d):

"The subject of the direct examination, properly construed, is the whole fact of guilt or innocence, and hence the topic of cross-examination might always range over any relevant facts, except those merely affecting credibility."

There are numerous other assignments of error, which we have carefully considered, but in none of them do we find ground for reversing either of the judgments.

Finding no error, the judgments are affirmed.

WOLVERTON, District Judge (concurring). I am constrained, by reason of the importance of the cases under consideration, to set forth my views particularly touching the instructions of the trial court relative to the failure of the defendants, if such were the case, to deny or explain acts of an incriminating nature that the evidence of the pros-

ecution established against them, they having taken the witness stand in their own behalf. In order to a clear understanding of the view I entertain, it is essential that we get a comprehensive view of the situation.

First, as to the Diggs case. Diggs was indicted by six counts. By the first, he is charged with transporting Marsha Warrington from Sacramento, in California, to Reno, in Nevada, for the purpose of debauchery, and for an immoral purpose, namely, that she should become his concubine and mistress; by the second, that he transported Lola Norris from and between the same points, that she might become the mistress and concubine of F. Drew Caminetti; by the third, that he (Diggs) procured a ticket for Marsha Warrington from Sacramento to Reno, with the intent and purpose that she should become his concubine and mistress; by the fourth, that he procured a ticket for Lola Norris, with the intent and purpose that she should give herself up to debauchery, and for an immoral purpose, to wit, that she should become the concubine and mistress of one F. Drew Caminetti; by the fifth, that he (Diggs) persuaded, induced and enticed Marsha Warrington to go from Sacramento to Reno for the purpose of debauchery, and for an immoral purpose, to wit, that she should become his concubine and mistress; and by the sixth, that Diggs persuaded and enticed Lola Norris to go from Sacramento to Reno for the purpose of becoming the concubine and mistress of F. Drew Caminetti. Diggs was convicted on the first four counts, and acquitted on the last two. The elements of the offenses charged are few and simple, and comprise the transportation, the buying of the tickets, the persuasion and inducement, and the purpose with which these things were done. All were the subject of inquiry at the trial.

The story of Marsha Warrington as a witness runs from her first meeting with Diggs in September, 1912, to the time that the four were apprehended and placed under arrest in Reno, Nev. She tells of her acts and demeanor with relation to Diggs, and of his acts and demeanor toward her, of improper relations with him from time to time, of a trip to San Francisco with Diggs, Caminetti, and Miss Norris during the month of February, 1913, of Diggs' registering under a fictitious name with her as man and wife, of occupying the same room with him at the hotel during the night, of their going on to San Jose, where they were again registered as man and wife, and occupied the same room in the hotel for another night, of the party of the four who met at the house of Diggs in the absence of his wife in January before the Reno trip, and then in much detail the discussions between herself and Diggs, and the four of them, and what they did leading up to the final determination to go to Reno; also of what was done in procuring transportation, what was done on the way, and what was done in Reno. It was a connected story from the beginning to the end. In all material particulars she was corroborated by Lola Norris.

Maury I. Diggs, after the government had rested, took the stand as a witness in his own behalf. He narrated in great detail the history of his relations with Marsha Warrington, and the many troubles that came to him from their acts and conduct prior to the Reno trip, and also of the relationship existing between Caminetti and Lola Norris,

and of the relationship of the four, charging Marsha Warrington with having had improper relations with him at the time the four were met at Diggs' house in the absence of his wife, a thing that Marsha Warrington denied. Continuing, Diggs dwelt at length upon the discussions had, and what happened between him and Marsha Warrington, and among the four of them, relative to his and Caminetti's leaving Sacramento for a while, owing to the reports of scandal that had arisen and the trouble in which they were involved. He relates that the first conversation he had with Marsha Warrington with respect to his leaving the city was on the Southern Pacific levee. This was two weeks and one day before March 9th, the Reno trip having been entered upon on the 10th. Then he tells of other conversations had with her, and with Caminetti and Lola Norris, relative to his and Caminetti's leaving the city for a while to escape the odium that was threatening if they remained. One conversation he specifies as having taken place while they were on an automobile ride, when he suspected they were being followed; another during the last week, ending March 9th, at the Columbia Hotel, in Sacramento, where Diggs was in hiding, he having called Marsha Warrington up and advised her of his whereabouts; another he names as having taken place at the Peerless Restaurant. This was on Saturday. He says:

"Then there was another conversation Sunday afternoon. That was out at Twenty-Eighth and J street. I believe I had called Miss Warrington up and made an appointment to meet her out there at the Park. That was relative to my going away. I still maintained that I was going South to get away from all this trouble. Miss Warrington said, 'Well, I have thoroughly made up my mind I am going, too. I am going with you.' * * * The proposition was thoroughly settled right there, that we were going to get out of town. We had not talked at that time of exactly where we would go, or anything of the kind; but I was very much of the opinion that I wanted to go to Los Angeles, owing to the fact that I had a lot of friends there that had lived there, and thought for a week or so I could have a good time down there, and come back home, and everything would be all right. I did not intend to take the girls. I did not care whether they went with me or went alone. In fact, I wanted Miss Warrington to stay. * * * After leaving Miss Warrington and Miss Norris in the Park, Miss Warrington had prevailed upon Miss Norris that she should go with her, and the girls said that we would meet at the Saddle Rock Restaurant at 8 o'clock. So I early made up my mind that I was going to leave town, and I agreed to meet them there."

From there he went home to his wife. He continues with his story:

"After I got in my house I thoroughly made up my mind to go and see my father and ditch the appointment with the girls, and not see them any more, and take a chance on the whole business. I told my wife good-by. * * * Mr. Hamilton rode as far as Eighth and J, and got off the car, and I went to the depot with the full intention of going on that train and coming to Berkeley and seeing my father. I missed the train by 5 minutes, owing to the fact that I had stopped at the office to get the suit. The car did not get me there in time. I turned around and came back and went to the restaurant. The girls were not there. I went to the cigar store next door and shook dice for cigars, the 'twenty-six' game. In a few minutes, a little after 8 o'clock, I believe, the girls showed up. * * * In the meantime Mr. Caminetti showed up on the scene. He was pretty much under the influence of liquor. He says, 'Well, what is doing?' I said, 'Well, I am going, and the girls say they are going, too.' He said, 'Where are you going?' I said, 'I don't know; anything to get out of town for a while.' He said, 'Well, I haven't got any money; I will go down town and get some,' which he did."

Here Diggs relates that he went out and made inquiry as to the time of departure of all trains leaving Sacramento that night. Then he continues:

"So the thing came up; the next train leaving town was 10:45, the east-bound train, and we all agreed to catch that train. I called Mr. Caminetti up on the telephone again. * * * He did not show up for that train. Miss Warrington and Miss Norris and I went over to the depot. When the train got ready to go, I thoroughly made up my mind between the restaurant and the depot that I did not care who went, or who was ready to go, or anything else; if the crowd was not ready to go, I was going alone; I was going to get out of town. Mr. Caminetti did not appear. Miss Norris, I believe, stayed in the little car house, the street car station at the end of the line, at the depot. Miss Warrington walked over to the Southern Pacific Station with me, and the train stopped. We were contemplating about taking it. Marsha said to me, 'Now,' she said, 'You go on and take the train; if your wife is wise to me, I am scared to death; I am afraid she will cause you harm or trouble, or have you arrested, and you better get out of here.' I was contemplating in my own mind whether to take the train or not. Then I believe I said to Marsha, 'No, I will not take that train.' I said, 'If there is going to be any staying here, I am no piker, and I will stay here and face this whole thing with the rest of you; I am not going to go away and leave you here.' Then we went back to the restaurant. Mr. Caminetti did not appear, so we went back to the restaurant. * * * We all talked over again the serious condition that we were in and where we would go. There was no specific place mentioned at the time during the conversation as to where we would go; no terminal point at all. We merely talked over different routes and different lines and different times of arrivals of different trains going out of Sacramento to the different places. There was no positive terminal settled upon at all. That is about all that occurred there. At this time Caminetti had not got back yet. In nearly every conversation we had, when we spoke of our conditions and the probable arrest of us—us boys, I mean—Marsha or Lola, either one, invariably would ask, 'What will they do to us? What will happen to us if these things come out?' From our meager knowledge of the law, we explained to them as near as we could what would happen if anybody chose to press them, and they thereupon would ask, 'Who will press us?' I cannot remember all the questions they asked, but Miss Warrington asked me what my wife could do to her if she knew she was keeping company with me; and I told her that, owing to the fact that she was not 21, I thought—I said I was not straight on the Juvenile Law, but I believed she could institute proceedings against her through the Juvenile Court if she wanted to. I also told her that if she had any money my wife could sue her for alienation of her husband's affections. That was told her upon her request as to what would happen to her."

Thus ended the examination in chief of Diggs, testifying in his own behalf.

The testimony of the government shows, and it is not disputed, that the four took the train later on the same night for Reno. On cross-examination Diggs says: "We left for Reno two weeks after meeting her on the levee." And again he says, referring to a ride about town: "That was one week before we left for Reno." Further on he was asked: "In your testimony you have referred repeatedly to conversations and events that took place before the Reno trip. Now, what did you understand to mean by the Reno trip?" To which he answered, over objections: "It is perfectly evident what trip it was." And so it was, without question.

Now, the purpose of the defense in offering the testimony of Diggs to the point where he terminated it was threefold: First, to show that there was no persuasion or inducement on his part, causing the girls to

go on the trip; second, to discredit the girls; and, third, to shade the purpose for which the girls were taken or went upon the trip. This comprehends practically the whole case, except the fact of the purchase of the tickets and the transportation from Sacramento to Reno. And yet these latter are so conjoined in time and circumstance with the former that there is no discernible line of cleavage whereby the testimony touching the one set of facts may be cut off from its relation to the other.

I am firmly persuaded that the defendant, having taken the stand and offered his testimony upon the merits of his case, and having entered into it in part, rendered himself amenable to cross-examination as to the whole, and, further, when he sought to show that the girls went upon the journey of their own free will and accord, without persuasion and inducement upon his part, then that his acts and demeanor at the time of leaving, including the purchase of tickets, and while upon the trip and at Reno, became subjects of perfectly legitimate inquiry to test the accuracy of his own rendition of how they all came to go upon the same journey. A defendant cannot tell a half story touching his defense, which is a half story from his standpoint of the merits of the case, then abruptly stop in his course and decline to answer further, and expect to reap the benefit for himself to be derived therefrom, without incurring the discredit that is, by the rules of evidence and legal inference, visited upon the ordinary witness pursuing a like course. Mr. Wigmore, in his work on Evidence (volume 4, § 2276, subd. 2), states the rule very succinctly which I think is applicable in the present case. After having discussed the rule applicable in the case of an ordinary witness, he says:

"The case of an accused in a criminal trial, who voluntarily takes the stand, is different. Here his privilege has protected him from being asked even a single question, for the reason that no relevant fact that could be inquired about would not tend to criminate him. On this very hypothesis, then, his voluntary offer of testimony upon any fact is a waiver as to all other relevant facts, because of the necessary connection between all. His situation is distinct from that of the ordinary witness, with reference to the point of time when a waiver can be predicated, because the ordinary witness is compelled to take the stand in the first instance, and his opportunity for choice does not come till later, when some part of the criminating fact is asked for, while the accused has the choice at the outset. From the point of view of the actual prescience of witness and accused, the result is the same. Each knows well enough that the inquiries will be upon topics relevant to the charge in issue; but that is immaterial. The question is: What does he know as to the connection between the first question and a possible subsequent incriminating question? Now, the accused knows that there must always be such a connection, and, if there is not, then his answer cannot be a waiver. The result is, then, that the accused, as to all facts whatever (except those which merely impeach his credit, and therefore are not related to the charge in issue), has signified his waiver by the initial act of taking the stand."

Further on he says (subdivision "d"):

"The subject of the direct examination, properly construed, is the whole fact of guilt or innocence, and hence the topic of cross-examination might always range over any relevant facts except those merely affecting credibility."

So it is said, in *State v. Wentworth*, 65 Me. 234, 243 (20 Am. Rep. 688):

"If he [defendant] discloses part, he must disclose the whole in relation to the subject-matter about which he has answered in part. * * * Answering truly in part with answers exonerative, he cannot stop midway, but must proceed, though his further answers may be self-incriminative. Answering falsely as to the subject-matter, he is not to be exempt from cross-examination because his answers to such cross-examination would tend to show the falsity of those given on direct examination. If it were so, a preference would be accorded to falsehood rather than to truth."

And again it is said, in *State v. Ober*, 52 N. H. 459, 13 Am. Rep. 88:

"Having testified concerning a part of the transaction, in which it was alleged that he was criminally concerned, without claiming his constitutional privilege, it was too late for him to halt at that point which suited his own convenience."

See, also, *Connors v. People*, 50 N. Y. 240; *Stover v. People*, 56 N. Y. 315; *Heldt v. State*, 20 Neb. 492, 30 N. W. 626, 57 Am. Rep. 835; *Lee v. State*, 56 Ark. 4, 19 S. W. 16; *Clarke v. State*, 78 Ala. 474, 56 Am. Rep. 45; *State v. Tatman*, 59 Iowa, 471, 13 N. W. 632; *State v. Larkin*, 250 Mo. 218, 157 S. W. 600, 46 L. R. A. (N. S.) 13; *State v. Raftery*, 252 Mo. 72, 158 S. W. 585.

The Supreme Court has enunciated the same principle, while perhaps not deciding the exact question here involved. In *Fitzpatrick v. United States*, 178 U. S. 304, 315, 20 Sup. Ct. 944, 948 (44 L. Ed. 1078), the court says:

"Where an accused party waives his constitutional privilege of silence, takes the stand in his own behalf, and makes his own statement, it is clear that the prosecution has a right to cross-examine him upon such statement with the same latitude as would be exercised in the case of an ordinary witness, as to the circumstances connecting him with the alleged crime. While no inference of guilt can be drawn from his refusal to avail himself of the privilege of testifying, he has no right to set forth to the jury all the facts which tend in his favor, without laying himself open to a cross-examination upon those facts. The witness having sworn to an alibi, it was perfectly competent for the government to cross-examine him as to every fact which had a bearing upon his whereabouts upon the night of the murder, and as to what he did and the persons with whom he associated that night. Indeed, we know of no reason why an accused person, who takes the stand as a witness, should not be subject to cross-examination as other witnesses are."

In this case reference is made to *State v. Lurch*, 12 Or. 99, 6 Pac. 408, and *State v. Saunders*, 14 Or. 300, 12 Pac. 441. But these cases fall clearly within the exception noted by Mr. Wigmore. The Oregon statute seems to limit the right of cross-examination to "all facts to which he [defendant] has testified." Sess. Laws 1880, p. 28.

In *Sawyer v. United States*, 202 U. S. 150, 165, 26 Sup. Ct. 575, 579 (50 L. Ed. 972, 6 Ann. Cas. 269), the court seems to have interpreted the rule slightly more broadly than was announced in the *Fitzpatrick* Case. It says:

"It has been held in this court that a prisoner who takes the stand in his own behalf waives his constitutional privilege of silence, and that the prosecution has the right to cross-examine him upon his evidence in chief, with the same latitude as would be exercised in the case of an ordinary witness, as to the circumstances connecting him with the crime."

And again, in *Powers v. United States*, 223 U. S. 303, 315, 32 Sup. Ct. 281, 284 (56 L. Ed. 448), the court says:

"Having taken the stand in his own behalf, and given the testimony above recited, tending to show that he was not guilty of the offense charged, he was required to submit to cross-examination, as any other witness in the case would be, concerning matter pertinent to the examination in chief."

These cases, it would seem, in principle, decide practically the very point in issue here. When it is once ascertained that the inquiry touching what was done at the depot on the night and at the time the four left for Reno, and what took place on the journey, and what happened at Reno, was proper and legitimate subject-matter for the cross-examination of Diggs, it follows with absolute persuasion that the court's instruction complained of was not error for which a reversal should be had.

The case of Balliet v. United States, 129 Fed. 689, 64 C. C. A. 201, would seem to be opposed to this view, but we are not advised respecting the testimony offered in chief, and are without light as to the precise relation which the inferences sought to be drawn bear to the matter testified to. Sanborn, Circuit Judge, in his concurring opinion, has this to say on the subject:

"But in the federal courts the line of demarcation which limits a rightful cross-examination is clear and well-defined. It is the line between subjects relative to which the witness was examined upon the direct examination and those concerning which he was not required to testify."

It may be that the defendant might be called to testify to some collateral fact—that is, as to some matter distinct from the real merits of the case and yet having some pertinent bearing—and not be subject to cross-examination as to the merits; as, for instance, if a defendant in a murder case were called to testify merely whether or not he was related to the deceased. In such a case it would be a strange stretch of the rule to hold that he could be cross-examined as to whether he committed the murder. But where a defendant has taken the stand, and has once entered upon a disclosure or a recital of part of the details relating to the offense charged, the offense charged becomes the subject-matter of the inquiry in chief, and the defendant subjects himself to cross-examination touching the entire subject-matter. And this is my position in the present case. With all due respect for the court deciding the Balliet Case, I am unable to adopt its conclusion.

In the very recent case of Myrick v. United States, 219 Fed. 1, the court was of the opinion:

"That the defendant Cunningham, by taking the stand and testifying as to the commissions paid to agents, did not waive his constitutional right to be free from unfavorable comment on matters to which his testimony did not relate, and as to which he said nothing."

This case I do not regard as opposed to the view here entertained.

I have discussed in particular the Diggs case. But the facts of the Caminetti case, although Caminetti did not go so minutely into the previous relationship existing between him and Diggs with Lola Norris and Marsha Warrington, bring it within the same principle, and the same conclusion would follow. Caminetti's especial purpose in testifying was to show the particular motive which induced him to embark upon the expedition.

Upon all other questions in the case, I concur with the views expressed by Judge GILBERT in the prevailing opinion.

ROSS, Circuit Judge (dissenting). These are companion cases, the respective plaintiffs in error being companions in the transactions out of which the cases arose. The record and arguments in each case are much alike, and therefore the cases may be properly and conveniently disposed of together.

The party defendant in the first case tried in the court below—Diggs—was at the times in question about 26 years old, residing with his wife and one child in the city of Sacramento, where, according to the evidence he was somewhat prominent as an architect and otherwise.

The defendant in the other case—Caminetti—was about two years younger, and had a wife and two children with whom he resided in the same city, and where he occupied an official position of some consequence, and was also a man of some prominence. The two were close friends. Two girls, named respectively Marsha Warrington and Lola Norris, were at the same time living in the same city—the first mentioned with her father and stepmother, and the second with her parents, all of whom were respectable people.

In both cases there was testimony given tending to show that several weeks before the commission of the acts which constitute the basis of the indictments a saloon keeper named Austin, who was an intimate friend of Diggs, and also a friend of Miss Warrington, introduced the two on a street in Sacramento. Miss Warrington was then about 20 years old and a stenographer; Lola Norris, about a year younger, was her intimate friend. The result was that these four persons almost immediately commenced going about together frequently, often to disreputable places, at different times Diggs taking the four in his machine on trips about the city and to outside places, where they sometimes spent the night; he registering under an assumed name with Marsha Warrington as his wife, and Caminetti under an assumed name with Lola Norris as his wife, in each instance where the night was spent away from home the girls deceiving their respective parents by false representations as to where they were going.

The two girls were the chief witnesses against the defendants on their trials. Marsha Warrington herself testified to her seduction by Diggs and that she had become pregnant by him prior to the trip to Reno, Nev., upon which trip the indictments are founded. Lola Norris testified that Caminetti had not accomplished his diabolical purpose prior to their arrival in Reno, although she admitted that she had spent the night with him on at least one of the trips out of Sacramento to near-by places, and had occupied the same bed with him in the drawing room of a Pullman car on the trip to Reno; Diggs and Miss Warrington occupying the other bed in the same drawing room.

There was evidence tending to show that prior to the Reno trip the conduct of these four persons had become more or less known in Sacramento and a subject of comment there, and that publicity as well as court proceedings became imminent before the four departed from Sacramento for Reno, Nev., from which latter place they were brought

back by officers of the law after having spent several days and nights in Reno in a cottage which the men had rented under assumed names, and where Diggs lived with Miss Warrington as husband and wife, and where Caminetti maintained the same pretended relationship with Miss Norris.

Subsequently the indictments in the present cases were presented and filed—that against Diggs containing six counts, and the one against Caminetti four counts.

In the Diggs case the first count is, in substance, that on the 15th day of January, 1913, at Sacramento, the defendant did willfully, knowingly, feloniously, and unlawfully transport and cause to be transported, and aid and assist in obtaining transportation for, Marsha Warrington from Sacramento, Cal., to Reno, Nev., over the line of the Southern Pacific Company, a railroad corporation engaged in carrying passengers from one state to the other, "for the purpose of debauchery and for an immoral purpose, to wit, that the aforesaid Marsha Warrington should be and become the concubine and the mistress of the said defendant."

The second count contains like averments in respect to Lola Norris "for the purpose of debauchery and for an immoral purpose, to wit, that the aforesaid Lola Norris should be and become the concubine and the mistress of one F. Drew Caminetti."

The third count charges that the defendant on the 15th day of January, 1913, at Sacramento, did willfully, unlawfully, and feloniously, knowingly procure and obtain, and cause to be procured and obtained, and aid and assist in procuring and obtaining, a ticket issued by the Southern Pacific Company at its office in the city of Sacramento for passage between that city and Reno, in the state of Nevada, to be used by Marsha Warrington, in interstate commerce, in traveling from Sacramento to Reno over the line of the Southern Pacific Company, a common carrier engaged in the business of carrying passengers between the points named, whereby the said girl was then and there so transported, "with the intent and purpose on the part of the said defendant that said girl, Marsha Warrington, should give herself up to debauchery and for an immoral purpose, to wit, that the aforesaid Marsha Warrington should be and become the concubine and the mistress of the said defendant."

The fourth count contains substantially the same averments as the third, except as to the name of the girl; Lola Norris being therein named, instead of Marsha Warrington, and excepting the intent with which such transportation of Lola Norris is alleged to have been made, the same being, as alleged in the second count, "with the intent and purpose on the part of the said defendant that said girl, Lola Norris, should give herself up to debauchery and for an immoral purpose, to wit, that the aforesaid Lola Norris should be and become the concubine and the mistress of one F. Drew Caminetti."

The fifth count alleges that on the same day and year, at Sacramento, the defendant did willfully, unlawfully, and feloniously, knowingly persuade, induce, and entice, and cause to be persuaded, induced, and enticed, and aid and assist in persuading, inducing, and enticing, Marsha

Warrington to go from Sacramento, Cal., to Reno, Nev., in interstate commerce over the line of railroad of the Southern Pacific Company, "for the purpose of debauchery and for an immoral purpose, to wit, that she, the said Marsha Warrington, should be and become the concubine and the mistress of the said defendant."

The sixth count makes substantially the same allegations as the fifth, except in respect to the girl named; Lola Norris being therein named, instead of Marsha Warrington, and except in respect to the intent, which is therein charged to be "for the purpose of debauchery and for an immoral purpose, to wit, that she, the said Lola Norris, should be and become the concubine and the mistress of one F. Drew Caminetti."

Under that indictment Diggs was found guilty as charged in the first four counts, upon which conviction the judgment against him is based; the jury returning no verdict in respect to the last two counts of the indictment, and no further action by the court in respect thereto appearing to have been taken.

In the Caminetti case the first count charges, in substance, that on the 15th day of January, 1913, at Sacramento, Cal., the defendant did willfully, knowingly, and feloniously, unlawfully transport and cause to be transported, and aid and assist in obtaining transportation for, and in transporting in interstate commerce, from Sacramento to Reno, Nev., over the line of railroad of the Southern Pacific Company, a common carrier engaged in carrying passengers between the two cities named, a certain girl, to wit, one Lola Norris, "for the purpose of debauchery and for an immoral purpose, to wit, that the aforesaid Lola Norris should be and become the concubine and the mistress of the said defendant."

The second count contains substantially the same averments as the first, except that Marsha Warrington is therein named, instead of Lola Norris, and except as to the intent, which is therein charged to be "for the purpose of debauchery and for an immoral purpose, to wit, that the aforesaid Marsha Warrington should be and become the concubine and the mistress of one Maury I. Diggs."

The third count charges, in substance, that the defendant on the day and year already mentioned, at Sacramento, did willfully, unlawfully, and feloniously, knowingly, persuade, induce, and entice, and cause to be persuaded, induced, and enticed, and aid and assist in persuading, inducing, and enticing, Lola Norris to go from the city of Sacramento, Cal., to Reno, Nev., in interstate commerce over the line of railroad of the Southern Pacific Company, a common carrier of passengers between the points named, "for the purpose of debauchery and for an immoral purpose, to wit, that she, the said Lola Norris, should be and become the concubine and the mistress of the said defendant."

The fourth count makes substantially the same charges as the third count, except as to the girl, who is therein alleged to be Marsha Warrington, and in respect to the intent, which is therein alleged to be "for the purpose of debauchery and for an immoral purpose, to wit, that she, the said Marsha Warrington, should be and become the concubine and the mistress of one Maury I. Diggs."

Under that indictment Caminetti was found by the jury guilty as

charged in the first count, and not guilty upon each of the other counts, upon which verdict the judgment against him is based.

In each case the distinct and specific purpose alleged in the indictment in the alleged acts of the defendant, as respects Marsha Warrington, was that she "should be and become the concubine and the mistress of" Diggs, and, as respects Lola Norris, that she "should be and become the concubine and the mistress of" Caminetti.

However depraved and heinous the conduct of the two men was, yet, when brought before the court upon indictment, the same legal presumption of innocence of the offenses charged attended them that accompanies every other person legally charged with crime, and the same obligation rested upon the prosecution to establish their guilt by legal proof beyond a reasonable doubt that arises in the case of every other person legally accused of crime—the ultimate determination of the facts resting, as in every criminal case, with the jury, rightly instructed by the court as to the law governing the case.

In each of the present cases a large amount of evidence was introduced and many incriminating facts and circumstances testified to. Witnesses were sworn and testified on both sides. In the Diggs case that defendant was sworn on his own behalf and testified at length concerning his relations with Miss Warrington, and concerning the actions and relations of all four of the persons here under consideration, prior to their departure from Sacramento on the Reno trip; but in respect to their actions and relations on that trip, and while remaining in Reno, he neither testified nor was questioned, either on direct or cross-examination. In respect to all of those matters he chose to remain silent; and one of the principal questions in the Diggs case relates to the instruction given by the trial court to the jury respecting his silence in that regard.

On the part of the prosecution the actions and relations of the parties on the Reno trip and during the time they remained in that city was fully gone into, and much evidence was also given by the government tending to show that the two girls were persuaded and induced by the two men to go with them on that trip, although the testimony given by Diggs in his own behalf, if believed by the jury to be true, directly tended to show that there was no inducement or persuasion on the part of the men, but, on the contrary, that the girls went with them willingly, and, as to Miss Warrington, insistently.

Among the details of the trip and the stay of the four in Reno was the following testimony of the two young women introduced on behalf of the prosecution: That they left Sacramento for Reno the night of March 9, 1913, is undisputed. Among other things, Miss Warrington testified:

"After Mr. Diggs, Miss Norris, and myself reached the depot, the train came in, and I told Mr. Diggs to go on and take the train, and that I was perfectly willing to stay in Sacramento and would not go with him. He said, 'No,' that he wanted me to go."

Caminetti not having been in time for that train, Diggs reached him by telephone and arranged a further meeting of the party with Cami-

netti at the Saddle Rock restaurant, concerning which meeting Miss Warrington further testified:

"When Mr. Caminetti reached there, he said he had some money and that he would go on the next train. We then left the Saddle Rock and went to the depot, reaching it about 12 o'clock. Mr. Diggs said for us to wait and he would get the tickets; we waited, and he got the tickets at the ticket office in the depot. I waited with Mr. Caminetti and Miss Norris; then the train came and we got on. It was an ordinary Pullman car, and Mr. Diggs got a drawing room from the Pullman conductor and he paid for it. We waited until it was made up, then the four of us entered. Mr. Diggs, I think, ordered the porter to make up the drawing room. There were three beds—the upper and lower berths and a little side bed. We all went to bed right after we entered the room. Miss Norris and Mr. Caminetti had the upper berth, and Mr. Diggs and I had the lower berth. Miss Norris got in the upper berth two or three minutes after we entered the room. I think she got her clothes off up there, her shoes, her skirt, and her waist and her hat. Mr. Caminetti got in the berth the same time she did. I think he took his clothing off up there. I got in the lower berth first. Before getting into it I took off my skirt and waist and pumps. Mr. Diggs took off his shoes and coat, and I think he took off his trousers and his outer shirt. * * * I saw Mr. Diggs give the tickets to the conductor."

Miss Norris, also sworn on behalf of the prosecution, gave similar testimony to that of Miss Warrington just quoted, and in the course of her testimony said, among other things:

"We reached Reno about 8 or 9 o'clock next morning."

And again:

"I recall when the train reached Truckee. We arose about an hour and a half before the train reached Reno. Upon our arising in the morning, Mr. Diggs said that they would get a cottage when we got into Reno. All four of us were to live in the cottage."

Referring to the time of reaching Reno, Miss Warrington also testified:

"I remained in the berth with the defendant Diggs until about 8 o'clock the next morning, I think. Mr. Diggs got out first. Mr. Caminetti, I think, got out of the upper berth first. I recall reaching Reno that morning. It was before noon, I think; the first place we went was to a café to have our lunch. * * * Then Mr. Diggs and Mr. Caminetti went to the real estate firm, I think."

In respect to the meeting at the Saddle Rock restaurant Miss Norris also testified:

"At the Saddle Rock restaurant, just before leaving, Mr. Caminetti gave me some money and told me to buy my own ticket to Reno. Mr. Diggs saw him give it to me, and he said that he would buy all the tickets; that it would never do for us to separate, and for Miss Warrington and I to go together, and they go together, away from us. And he said— We had been talking about places to go, and they had suggested several places, and Mr. Diggs said it would not do for every one to have suggestions; that each one, of course, thought his was the best, and that some one would have to manage the affair; somebody would have to be the boss; 'Now who will it be;' and Mr. Caminetti said, 'Well, I name you to be the person to manage the trip;' and so he considered himself the boss."

The party left Sacramento shortly after midnight of March 9, 1913, by the Southern Pacific Railroad. On their arrival in Reno the next

morning they at first went to the Riverside Hotel, concerning which Miss Warrington testified:

"They said we should go to the hotel and wait for them, and they would try and rent a house for one month at least. I think they said they were going to stay in Nevada about six months. * * * They told us that when we reached the Riverside Hotel we should wait there until they returned. They returned about 5 o'clock. Then they registered, after which we went upstairs to the suite of three rooms, two bedrooms, with a sitting room between. We occupied these rooms just one night, and left about 9:30, I think, next morning. Mr. Caminetti and Miss Norris had one, and Mr. Diggs and I had the other room. We retired about 10:00 o'clock. We all discarded our wearing apparel. Mr. Diggs occupied the bed with me, and Miss Norris occupied the other bed with Mr. Caminetti."

And concerning which Miss Norris testified:

"Mr. Diggs and Mr. Caminetti went over to the clerk's desk in the office of the hotel and reserved three rooms, a suite of rooms. Mr. Diggs told us that he registered as Mr. Enright and wife, and Mr. Caminetti registered as Mr. Ross. * * * There were three rooms, two bedrooms and a sitting room. Mr. Caminetti and I occupied one, and Mr. Diggs and Miss Warrington the other. I discarded most of my wearing apparel that night."

On the day of the arrival of the party in Reno the men rented from a man named Mergen, acting for a firm of real estate agents there, a cottage, concerning which transaction Mergen testified on behalf of the prosecution:

"I recall negotiating with Mr. Enright on the 10th of March, 1913, for the renting of that cottage. * * * The name Enright was given me by himself. I would recognize the man again if I saw him in this courtroom. Q. Will you kindly look around and see if he is here? A. He is right there, with his hand up to his face.

"Mr. Roche: You will concede, gentlemen, that that is the defendant.
"Mr. Devlin. Yes."

And in respect to the stay and actions of the parties in question while in Reno Miss Norris further testified:

"I knew that Mr. Caminetti went by the name of Ross at Reno, and that I was going by the name of Mrs. Ross, and that Mr. Diggs and Miss Warrington were going by the name of Enright and wife. * * * Mr. Diggs and Miss Warrington occupied the front bedroom, and Mr. Caminetti and I the back bedroom. Mr. Caminetti and I had sexual intercourse in that bungalow. He said he would marry me, and I believed him."

And Miss Warrington also testified:

"While at Reno I had sexual relations with Mr. Diggs."

Upon the conclusion of all of the evidence in the Diggs case, the court, after argument by the attorneys of the respective parties, instructed the jury, giving, among other instructions, this in respect to the defendant:

"The defendant has taken the stand in his own behalf, and, so far as his testimony tends to cover the transaction involved in the charges against him, it is somewhat at variance with that of the two girls, Miss Warrington and Miss Norris; that is, according to his story of their intimacy, he makes it appear that Miss Warrington was apparently pursuing him as much as he was pursuing her, if not more, and he claims that when he suggested the idea of leaving Sacramento alone she protested that she should not be left behind, but should go with him, and that it was she, and not the defendant,

who insisted that Miss Norris should accompany them. Now this conflict, so far as it exists, is for you to determine; that is, you will say whether the statements of these girls are true, or that of the defendant, to the extent that you find it material to determine in order to reach your verdict. The testimony of the defendant, however, does not cover the entire transaction as testified to by the two girls and the other witnesses for the prosecution. After testifying to the relations between himself and Caminetti and these girls down to the Sunday night on which the evidence of the government tends to show the trip to Reno was taken, he stops short and has given none of the details or incidents of that trip, nor any direct statement of the intent or purpose with which that trip was taken, contenting himself by merely referring to it as having been taken, and by testifying to his state of mind for some days previous to the taking of that trip. Now this was the defendant's privilege, and, being a defendant, he could not be required to say more if he did not desire to do so; nor could he be cross-examined as to matters not covered by his direct testimony. But in passing upon the evidence in the case for the purpose of finding the facts you have a right to take this omission of the defendant into consideration. A defendant is not required under the law to take the witness stand. He cannot be compelled to testify at all, and if he fails to do so no inference unfavorable to him may be drawn from that fact, nor is the prosecution permitted in that case to comment unfavorably upon the defendant's silence; but where a defendant elects to go upon the witness stand and testify, he then subjects himself to the same rule as that applying to any other witness, and if he has failed to deny or explain acts of an incriminating nature that the evidence of the prosecution tends to establish against him, such failure may not only be commented upon, but may be considered by the jury with all the other circumstances in reaching their conclusion as to his guilt or innocence, since it is a legitimate inference that, could he have truthfully denied or explained the incriminating evidence against him, he would have done so."

It must be remembered that neither of the defendants to these cases was on trial for fornication or adultery. While both of those acts are made a crime and punishable as such by the laws of the state of California, neither is made a crime by any law of the United States. The statute of the United States upon which the present prosecutions are based is the act of June 25, 1910 (36 Stat. 825, c. 395), which the act itself expressly declares "shall be known and referred to as the 'White Slave Traffic Act,'" the second, third, and fourth sections of which are as follows:

"Sec. 2. That any person who shall knowingly transport or cause to be transported, or aid or assist in obtaining transportation for, or in transporting, in interstate or foreign commerce, or in any territory or in the District of Columbia, any woman or girl for the purpose of prostitution or debauchery, or for any other immoral purpose, or with the intent and purpose to induce, entice, or compel such woman or girl to become a prostitute or to give herself up to debauchery, or to engage in any other immoral practice; or who shall knowingly procure or obtain, or cause to be procured or obtained, or aid or assist in procuring or obtaining, any ticket or tickets, or any form of transportation or evidence of the right thereto, to be used by any woman or girl in interstate or foreign commerce, or in any territory or the District of Columbia, in going to any place for the purpose of prostitution or debauchery, or for any other immoral purpose, or with the intent or purpose on the part of such person to induce, entice, or compel her to give herself up to the practice of prostitution, or to give herself up to debauchery, or any other immoral practice, whereby any such woman or girl shall be transported in interstate or foreign commerce, or in any territory or the District of Columbia, shall be deemed guilty of a felony, and upon conviction thereof shall be punished by a fine not exceeding five thousand dollars, or by imprisonment of not more than five years, or by both such fine and imprisonment, in the discretion of the court.

"Sec. 3. That any person who shall knowingly persuade, induce, entice, or coerce, or cause to be persuaded, induced, enticed, or coerced, or aid or assist in persuading, inducing, enticing, or coercing any woman or girl to go from one place to another in interstate or foreign commerce, or in any territory or the District of Columbia, for the purpose of prostitution or debauchery, or for any other immoral purpose, or with the intent and purpose on the part of such person that such woman or girl shall engage in the practice of prostitution or debauchery, or any other immoral practice, whether with or without her consent, and who shall thereby knowingly cause or aid or assist in causing such woman or girl to go and to be carried or transported as a passenger upon the line or route of any common carrier or carriers in interstate or foreign commerce, or any territory or the District of Columbia, shall be deemed guilty of a felony and on conviction thereof shall be punished by a fine of not more than five thousand dollars, or by imprisonment for a term not exceeding five years, or by both such fine and imprisonment, in the discretion of the court.

"Sec. 4. That any person who shall knowingly persuade, induce, entice, or coerce any woman or girl under the age of eighteen years from any state or territory or the District of Columbia to any other state or territory or the District of Columbia, with the purpose and intent to induce or coerce her, or that she shall be induced or coerced to engage in prostitution or debauchery, or any other immoral practice, and shall in furtherance of such purpose knowingly induce or cause her to go and to be carried or transported as a passenger in interstate commerce upon the line or route of any common carrier or carriers, shall be deemed guilty of a felony, and on conviction thereof shall be punished by a fine of not more than ten thousand dollars, or by imprisonment for a term not exceeding ten years, or by both such fine and imprisonment, in the discretion of the court."

In each indictment the charges related only to the trip of the parties in question from Sacramento, Cal., to Reno, Nev., and to the acts and circumstances connected with and growing out of that trip. Those acts and circumstances are in part detailed by the testimony of the witnesses Marsha Warrington and Lola Norris above quoted, in respect to which the defendant neither testified nor was questioned on either his direct or cross-examination. In respect to those matters he chose to avail himself of the privilege conferred upon him by article 5 of the amendments to the Constitution of the United States, which reads:

"No person * * * shall be compelled in any criminal case to be a witness against himself"

—and of the act of Congress of March 16, 1878 (20 Stat. 30, c. 37), which is as follows:

"That in the trial of all indictments, informations, complaints, and other proceedings against persons charged with the commission of crimes, offenses, and misdemeanors, in the United States court, territorial courts, and court-martial, and courts of inquiry, in any state or territory, including the District of Columbia, the person so charged shall, at his own request but not otherwise, be a competent witness. And his failure to make such request shall not create any presumption against him."

To the extent that the defendant waived the immunity extended to him by the provisions of the Constitution and statute of the United States above quoted, he placed himself, as the court below properly told the jury, in the position of any other witness, and subjected his testimony to comment, by both counsel and court, to the same extent as may be properly and legally made by either respecting the testimony of any other witness. Authorities to that effect are very numerous, and

many of them are referred to by the respective counsel in the present cases. But such waiver does not, in my opinion, extend beyond the testimony given by the defendant, and the inferences and conclusions to be drawn therefrom, where he does not refuse to answer any proper question.

The counsel for the government have cited many authorities as to the proper limits to the cross-examination of a defendant in a criminal case who voluntarily goes on the stand as a witness, and as to the inferences to be drawn from his refusal to answer proper questions on cross-examination. But all such authorities are wholly inapplicable to the present cases for the reason that the direct examination of both defendants here was confined to matters occurring before the commencement of the Reno trip, and the only defendant who was cross-examined at all—Diggs—does not appear to have refused to answer any proper question. To hold that any inference or conclusion can be properly drawn from a failure of the defendant to explain or deny matters or circumstances concerning which he did not testify and concerning which he was not questioned, either on direct or cross-examination, would, in my opinion, manifestly be to make his silence in respect to such matters and circumstances evidence against him, contrary to the provisions of the Constitution and statute above quoted. And so the Circuit Court of Appeals for the Eighth Circuit in effect held in *Balliet v. United States*, 129 Fed. 689, 695, 64 C. C. A. 201, 207, where the court said:

"We have next to consider whether the jury were misdirected, and only one alleged error of this sort is called to our attention. At the conclusion of a somewhat lengthy charge, the trial judge made this statement, to which an exception was duly taken: 'It has been suggested that I have overlooked one thing. I may say you may consider, in determining the question, the fact that the defendant having gone upon the witness stand, if he has not fully explained, or has not explained matters which are material to the issues in this case, and which are naturally within his knowledge, you may consider that as a circumstance tending to show that the facts, if explained, etc., would bear out the contention of the government, and his failure to explain them or give a truthful explanation is against him.'

"We have not been able to conclude that this instruction states a correct rule of law, or that the giving of it was not a material error. As we interpret this instruction, it means that, inasmuch as the defendant had elected to testify in his own favor, if while on the stand he had not fully explained all matters and things material to the issues in the case which the jury might think were naturally within his knowledge, then the jury might conclude that the facts, etc., if he had indulged in an explanation concerning them, would have borne out the contention of the government (that is, shown that he was guilty), and that his failure to explain was against him (that is, would justify a conclusion of guilt). This rule of law would put the defendant in a criminal case in a peculiar attitude, for if he takes the stand as a witness he must performe explain every fact and circumstance which has been put in evidence against him, as tending to establish guilt, which a jury may deem material, and such as he could explain, at the risk of having them conclude, because of his silence as respects such facts and circumstances, that they are true and that he is guilty. If a defendant in a criminal case desires to take the stand and contradict some particular fact or circumstance that has been testified to, he cannot safely do so for fear of raising a presumption of guilt by his failure to explain other facts and circumstances in evidence which the jury may happen to regard as material and may think the accused could explain. The federal statute (Act March 16, 1878, c. 37, 20 Stat. 30 [U. S. Comp. St. 1901, p. 660]) provides, in substance, that a person charged with an offense

'shall at his own request, but not otherwise, be a competent witness. And his failure to make such request shall not create any presumption against him.' When the defendant in a criminal case, in compliance with this statute, waives his constitutional privilege by taking the witness stand, he occupies the attitude of any other witness, and may be cross-examined like an ordinary witness, and to the same extent. *Fitzpatrick v. United States*, 178 U. S. 304, 315, 20 Sup. Ct. 944, 44 L. Ed. 1078. The federal statute does not, like the statutes of some states (*vide Rev. St. Mo. 1899, § 2637*), expressly provide that the examination of the accused shall be limited to the matters testified to on his direct examination, but we apprehend that it should be so limited, because that is the general rule which obtains in the federal courts relative to the cross-examination of all witnesses except, when the rule is relaxed, as it sometimes is, on grounds of convenience or necessity. *Houghton v. Jones*, 1 Wall. 702, 706, 17 L. Ed. 503; *Wills v. Russell*, 100 U. S. 625, 25 L. Ed. 607; *Montgomery v. Aetna Life Ins. Co.*, 38 C. C. A. 553, 97 Fed. 913; *Goddard v. Creffield Mills*, 21 C. C. A. 530, 75 Fed. 818; *Safter v. United States*, 31 C. C. A. 1, 87 Fed. 329. It is also doubtless true that, when a defendant in a criminal case takes advantage of the statute and testifies in his own favor, the government may comment on his testimony and draw inferences therefrom as freely as if he were an ordinary witness and not the accused. It is only where the accused fails to testify that the statute prohibits unfavorable comment and attempts to create a presumption against him because he has not done so. Conceding this much, we are nevertheless of opinion that the instruction in question went too far, in that it required the accused to explain every fact and circumstance which had been introduced against him, and gave to them additional probative force because he had not done so or attempted to do so. Furthermore, it left the jury at full liberty to determine what matters which had been given in evidence were 'material to the issues in the case,' without directions on that point, and equal liberty to determine what matters were 'naturally within his knowledge' and susceptible of explanation. The testimony in the case had taken a very wide range and covered a considerable period of time. While on the stand some facts and circumstances that had been introduced in evidence may have been overlooked by the accused or by his counsel, and he may not have been interrogated with respect thereto for that reason, or they may have been regarded as of no importance, or the circumstances may have been of a character which admitted of no further explanation, being in themselves such circumstances as the jury could ignore or draw such inferences therefrom as they thought proper. And yet the instruction was of a nature which permitted the jury to draw unfavorable inferences against the accused, because in the course of his examination he had not alluded to every fact and circumstance already in evidence, and given an explanation thereof consistent with his innocence. We are satisfied that the instruction cast an undue burden on the defendant, and that it was also misleading. Moreover, we are not able to say with certainty, as we must to uphold the verdict, that the defendant was not prejudiced by the instruction."

The instruction held erroneous in the case just cited, and the giving of which entitled the defendant to a new trial, was by no means so strong against the defendant there as is that against the defendant Diggs in which the jury was told:

"It is a legitimate inference that, could he have truthfully denied or explained the incriminating evidence against him, he would have done so"

—in other words, that the law drew such an inference in respect to material testimony against him where he remained silent in regard to it. I think it clear that that instruction was erroneous and threw an illegal burden upon the defendant; it was omitted from the instructions given in the case of *Caminetti*, subsequently tried.

In the prevailing opinion in the present cases the court cites, as sustaining its holding that the trial judge was right in instructing the

jury in the Diggs case that it was "a legitimate inference that, could he have truthfully denied or explained the incriminating evidence against him, he would have done so," the decisions of the Supreme Court in the cases of *Reagan v. United States*, 157 U. S. 301, 15 Sup. Ct. 610, 39 L. Ed. 709, *Brown v. Walker*, 161 U. S. 591, 16 Sup. Ct. 644, 40 L. Ed. 819, *Fitzpatrick v. United States*, 178 U. S. 304, 20 Sup. Ct. 944, 44 L. Ed. 1078, and *Sawyer v. United States*, 202 U. S. 150, 26 Sup. Ct. 575, 50 L. Ed. 972, 6 Ann. Cas. 269. How very far those cases are from holding anything of the sort may be very clearly shown by making a brief reference to each of them. Thus:

The defendant in the case of *Reagan v. United States*, 157 U. S. 301, 15 Sup. Ct. 610, 39 L. Ed. 709, was charged with the crime of smuggling, and took the stand as a witness in his own behalf. The Supreme Court, in considering the instruction of the trial court in respect to that matter, said:

"By the Act of March 16, 1878, c. 37, 20 Stat. 30, a defendant in a criminal case may, 'at his own request, but not otherwise, be a competent witness.' Under that statute it is a matter of choice whether he become a witness or not, and his failure to accept the privilege 'shall not create any presumption against him.' This forbids all comment in the presence of the jury upon his omission to testify. *Wilson v. United States*, 149 U. S. 60, 13 Sup. Ct. 765, 37 L. Ed. 650. On the other hand, if he avail himself of this privilege, his credibility may be impeached, his testimony may be assailed, and is to be weighed as that of any other witness. Assuming the position of a witness, he is entitled to all its rights and protections, and is subject to all its criticisms and burdens. It is unnecessary to consider whether, when offering himself as a witness as to one matter, he may, either at the will of the government or under the discretion of the court, be called upon to testify as to other matters. That question is not involved in this case, and we notice it simply to exclude it from the scope of our observations. The privileges and limitations to which we refer are those which inhere in the witness as a witness, and which affect the testimony voluntarily given. As to that he may be fully cross-examined."

It is thus seen that the Supreme Court there expressly declared that the question here involved was not involved in that case, and that it was mentioned only for the very purpose of excluding it from the scope of its observations in that case.

The case of *Brown v. Walker*, 161 U. S. 591, 16 Sup. Ct. 644, 40 L. Ed. 819, came before the court on an appeal from an order of the Circuit Court made upon a return of a writ of habeas corpus remanding the petitioner to the custody of the marshal, he having refused to answer a certain question as a witness before the grand jury in relation to a charge then under investigation by that body against certain officers and agents of a certain railway company for an alleged violation of the Interstate Commerce Act; and the question before the Supreme Court was whether the Act of Congress of February 11, 1893, c. 83, 27 Stat. 443 (Comp. St. 1913, § 8577), which enacts that "no person shall be excused from attending and testifying or from producing books, papers, tariffs, contracts, agreements and documents before the Interstate Commerce Commission, or in obedience to the subpoena of the Commission, * * * on the ground or for the reason that the testimony or evidence, documentary or otherwise,

required of him, may tend to incriminate him or subject him to a penalty or forfeiture," sufficiently satisfies the constitutional provision declaring that no person shall be compelled in any criminal case to be a witness against himself. The few lines quoted from the opinion in that case by the court in the present cases give, in my opinion, a very inadequate idea of what the Supreme Court held in *Brown v. Walker*, and in no respect sustain, as I view it, the ruling of the court below upon the question under consideration in the present cases.

So in the case of *Fitzpatrick v. United States*, 178 U. S. 304, 315, 20 Sup. Ct. 944, 44 L. Ed. 1078, the question here involved did not arise; the question there being one as to the extent to which cross-examination was proper where the defendant takes the stand in his own behalf—the court saying at page 315 of 178 U. S., at page 948 of 20 Sup. Ct. (44 L. Ed. 1078):

"Where an accused party waives his constitutional privilege of silence, takes the stand in his own behalf, and makes his own statement, it is clear that the prosecution has a right to cross-examine him upon such statement with the same latitude as would be exercised in the case of an ordinary witness, as to the circumstances connecting him with the alleged crime. While no inference of guilt can be drawn from his refusal to avail himself of the privilege of testifying, he has no right to set forth to the jury all the facts which tend in his favor without laying himself open to a cross-examination upon those facts. The witness having sworn to an alibi, it was perfectly competent for the government to cross-examine him as to every fact which had a bearing upon his whereabouts, upon the night of the murder, and as to what he did and the persons with whom he associated that night. Indeed, we know of no reason why an accused person, who takes the stand as a witness, should not be subject to cross-examination as other witnesses are. Had another witness been placed upon the stand by the defense, and sworn that he was with the prisoner at Clancy's and Kennedy's that night, it would clearly have been competent to ask what the prisoner wore, and whether the witness saw Corbett the same night or the night before, and whether they were fellow occupants of the same room. While the court would probably have no power of compelling an answer to any question, a refusal to answer a proper question put upon cross-examination has been held to be a proper subject of comment to the jury. *State v. Ober*, 52 N. H. 459 [13 Am. Rep. 88]. And it is also held in a large number of cases that, when an accused person takes the stand in his own behalf, he is subject to impeachment like other witnesses. If the prosecution should go farther and compel the defendant, on cross-examination, to write his own name or that of another person, when he had not testified in reference thereto in his direct examination, the case of *State v. Lurch*, 12 Or. 99 [6 Pac. 408], is authority for saying that this would be error. It would be a clear case of the defendant being compelled to furnish original evidence against himself. *State v. Saunders*, 14 Or. 300 [12 Pac. 441], is also authority for the proposition that he cannot be compelled to answer as to any facts not relevant to his direct examination."

There is here cited by the Supreme Court, with its apparent approval, a decision of the Supreme Court of Oregon to the effect that a defendant to a criminal case *cannot be compelled to answer as to any facts not relevant to his direct examination*. And, in the case of *Sawyer v. United States*, 202 U. S. 150, 26 Sup. Ct. 575, 50 L. Ed. 972, 6 Ann. Cas. 269, what the Supreme Court held was that where a defendant takes the stand in his own behalf he waives his constitutional privilege of silence and the prosecution has the right to cross-examine him *upon his evidence in chief* with the same latitude

as though he were an ordinary witness as to circumstances connecting him with the crime; the court, at page 165 of 202 U. S., at page 579 of 26 Sup. Ct. (50 L. Ed. 972, 6 Ann. Cas. 269), saying:

"It has been held in this court that a prisoner who takes the stand in his own behalf waives his constitutional privilege of silence, and that the prosecution has the right to cross-examine him upon his evidence in chief with the same latitude as would be exercised in the case of an ordinary witness, as to the circumstances connecting him with the crime. *Fitzpatrick v. United States*, 178 U. S. 304 [20 Sup. Ct. 944, 44 L. Ed. 1078]."

In each of the present cases there was a sharp conflict, as will be seen from the quotations already made, between the testimony of the two women and that of Diggs upon the question as to whether the women were persuaded, induced, or coerced into taking the Reno trip. That conflict is further shown by additional testimony of Diggs, and by the testimony of Caminetti. The latter was not cross-examined at all, and his direct testimony was short and confined to matters also antedating the trip to Reno, and mainly to reported threats of publicity of the relations existing between Diggs, himself, and the women, and threats of arrest and personal violence, and concluded with these statements:

"I remember having been at the Peerless restaurant on Saturday afternoon, March 8, 1913. I saw Maury I. Diggs there at that time. There were different people there at different times. Miss Norris and Miss Warrington were not there all the time. They were there during part of the time. I had a conversation with Maury I. Diggs in the Peerless restaurant with reference to something his father had said to him while in San Francisco. The Peerless restaurant is in the city of Sacramento on Ninth street between K and L. Miss Warrington was there when I got there, and later on, just after I got there, Miss Norris came in. Mr. Diggs said: 'I have just come up from San Francisco, and my father is coming up Monday to have you and Lola and Marsha arrested. He claims that you and Lola and Marsha are as much responsible for the position in which I am in as I am, and that he is going to put you three through everything I have gone through.' He said: 'I tried to keep him from coming up, but I could not, and he will be up here to-morrow morning.' That is about the substance of what he said. He went over it and enlarged upon it. I replied: 'Then I am gone.' I meant that when Mr. Diggs got there to have me arrested that I would not be there, that I was going to get out of town. First Mr. Diggs said that if I went it would be necessary for him to go, and when he said that Miss Warrington said: 'I am going, too; I can't stay here if you leave.' And Lola—Miss Norris—said that she could not go, although she hated to stay in Sacramento and face things she thought or knew were going to happen, but she could not leave. Thereupon Miss Warrington turned around and said: 'Lola, I am going, and you have got to go, too.' I believed the statements made by Mr. Diggs to me as having come from his father were true. I had already had a talk with him over the phone in which he said the same things, and by the tone of his voice I knew that he was extremely angry with me at that time, and from what Mr. Diggs said I gathered that his anger had grown. I told Miss Norris and Miss Warrington and Maury I. Diggs of the conversation I had had with Mr. Lesley, to which I have testified. Prior to the conversation at the Peerless restaurant I told them about what Mr. Lesley had said."

Additional testimony of Diggs is as follows:

"I said to Marsha: 'That is enough; the juvenile officers are after us; my father is here to carry out his intentions, and I am going to go. I am going to get out of this town for awhile. I am going to go away from here;

this is too hot for me.' Then Marsha said: 'Well, old boy, believe me, you're not going away and leave me here.' I said: 'Miss Warrington, you can do just as you please; but I am going to go away from here for awhile. I have too much to lose, and I have too good a family to bring trouble down on them, and I am going to go away.' She said: 'I am going too; you are not going away and leave me.' Thereupon Mr. Caminetti spoke up something about Miss Norris. Then she said: 'If Miss Norris doesn't want to go, I'll make her go; she has got to go away with me.' Miss Warrington said that about Miss Norris. * * * During the last week ending March 9th Miss Warrington and Miss Norris met me at the Columbia Hotel. They came up and seen me about 4 o'clock in the afternoon. I think that either Mr. Caminetti told them, or I told them, that I was there. I believe that I called Miss Warrington up. Miss Warrington came up there. It was in regard to our conditions. The specific arrangement was for all to come up there, whether it was on my suggestion or Mr. Caminetti's; I have forgotten which. I told her that I thoroughly and positively made up my mind to leave town. I said: 'I am going to Los Angeles for a week or two, and I have just got to go; that is all there is to it.' I was very much worried; in fact, I was scared to stick my nose out of that room. On that occasion I told her all about my business, all about my relations, and I told her that this thing was getting too much for me; that I had too much to lose, and had a good home, and a good wife, and too nice a child to take any chances. I said: 'Miss Warrington, we have to quit our going together; we have to cut it out; everybody is getting onto us.' She broke in and said: 'Yes, you bet your life they're getting onto us; a friend of mine, who is a newspaper reporter, told me we were going to be written up in the Sacramento Bee.' I said: 'Who was it?' She said: 'Alfred Putnam.' I said: 'What did he say to you?' She said that he said that one of the editors had got wise to our actions and had an article all written up, and that he was going to run it, and was going to publish it immediately, but through his influence, and through his respect for my father, owing to the fact that they were both Masons, had got the article squelched, and got it stopped. I said: 'Are you sure they had an article?' She said: 'Why, positively, he told me it was all written up and he saw it.' I said: 'Don't you think that is a little grand stand play on Putnam's part?' and she said: 'No, sir; that is the truth.' I said: 'By jinks; that is getting pretty serious.' She said: 'Yes, I guess you have had about all you want of the Sacramento Bee, haven't you?' And I said: 'Yes, I had; that I didn't want to get into any tangle with them; that I didn't want them to ever write me up.' Then the conversation drifted on back into the fear that was overtaking the whole crowd. I thoroughly declared myself that I was going. Marsha said: 'Well, if you're going, I am going, too; you're not going to leave me here with the bag to hold and face all this trouble.' I said: 'Miss Warrington, you can do just exactly as you please about it; I don't intend to ask you to go, or ask you to stay home; it is your business, and you can do as you please.' She said: 'Well, I am going.' Lola Norris said: 'I can't go. I am not going; my father is not feeling well, and it would break my mother's heart for me to go.' And Marsha said: 'Yes; and it will break my father's heart, too.' Somebody said something about her mother. She said: 'Well, I don't care about my mother; my mother and I don't get along anyhow.' Miss Warrington said she would like to go to spite her mother, her stepmother. Her aunt is her stepmother. She said her father had always been very good to her, and she liked her father, and didn't want to leave him. I said: 'That is up to you; you people can do as you please, but I am going to get out of here. That is final and positive. I am going. I don't care what the rest of you do—Mr. Caminetti, or any of you. I have too much to lose.' When Lola said it would break her mother's heart to go, Marsha said: 'Well, I can't help that; you've got to go with me; you've got to go along with me.' Lola, to my knowledge, did not say whether she was going or not. Then Mr. Caminetti spoke up, and he says these words very distinctly— He was sitting on the other side of the table. He says, 'Now, girls, I want to make myself understood right here;' he says, 'If Diggs is going, I am going;' and he says, 'If you people go with us, that is your business;' he says, 'Now, I don't want you girls to leave with

the idea that you're going to get any great or glorious or glittering future; I want to go on record right here as saying that I don't want you to go; I would rather have you stay home here; I don't want to be bothered with women in this business, if Diggs and I are going to get arrested, and are trying to get away from arrest, we don't want to be hampered with women. I want to go on record right now as not persuading you girls to go, or asking you to go; on the other hand, if you are going to go, we would rather have you go in some other direction.' Marsha sat up and said: 'We are not going to go in any other direction; if you and Diggs are going, we will go with you; you can't leave us; if you leave us here, and leave us to go in another direction, we will never see you again; that will be the end of you; we will never see you again.'

While there was testimony on the part of the government tending to show that both Diggs and Caminetti persuaded and induced the girls to go with them from Sacramento to Reno, there was on the part of both defendants testimony tending to show that neither of them did so, but, on the contrary, that their going was voluntary. If voluntary, the girls were necessarily accomplices with the men in the alleged violation of the act of Congress upon which the indictments are based, and could, as was expressly held by the Supreme Court February 1, 1915, in the case of *United States v. Clara Holte*, 236 U. S. 140, 35 Sup. Ct. 271, 59 L. Ed. —, have been indicted and prosecuted for having conspired with the men for a violation of the "White Slave Traffic Act."

Whether or not the testimony tending to show that the women were accomplices was true was, as a matter of course, like all other questions of fact, one for the exclusive determination of the jury under appropriate instructions. Based upon the view, however, that the women were not accomplices of the men, the court below refused to give any of the instructions requested by the defendants upon the subject of accomplices, some of which correctly defined what constitutes an accomplice, and the proper caution and care with which the testimony of accomplices should be weighed and scrutinized by the jury, to which action of the court exceptions were duly taken by the defendants. In holding, as I do, that they should have been given, it is but fair to the learned judge of the court below to say that at the time the present cases were tried the decision of the Supreme Court in the case of *United States v. Clara Holte*, supra, had not been rendered.

While many of the states have statutes expressly providing that no one can be convicted of a crime upon the testimony of an accomplice without some corroboration of his testimony, there is no such statute of the United States, and while, therefore, it is not essential in the federal courts, as it is in the courts of such states, to a conviction upon the testimony of an accomplice that such testimony be corroborated, it is proper and generally recognized as the duty of the courts in all such cases to explain to the jury the nature of such testimony, and to caution them to scrutinize and weigh it with great care. Such general rule is thus stated in Greenleaf on Evidence (16th Ed.) §§ 380 and 381:

"§ 380. The degree of credit which ought to be given to the testimony of an accomplice is a matter exclusively within the province of the jury. It

has sometimes been said that they ought not to believe him, unless his testimony is corroborated by other evidence; and, without doubt, great caution in weighing such testimony is dictated by prudence and good reason. But there is no such rule of law; it being expressly conceded that the jury may, if they please, act upon the evidence of the accomplice, without any confirmation of his statement. But, on the other hand, judges, in their discretion, will advise a jury not to convict of felony upon the testimony of an accomplice alone and without corroboration; and it is now so generally the practice to give them such advice that its omission would be regarded as an omission of duty on the part of the judge. And considering the respect always paid by the jury to this advice from the bench, it may be regarded as the settled course of practice, not to convict a prisoner in any case of felony upon the sole and uncorroborated testimony of an accomplice. The judges do not, in such cases, withdraw the cause from the jury by positive direction to acquit, but only advise them not to give credit to the testimony.

"§ 381. But though it is thus the settled practice, in cases of felony, to require other evidence in corroboration of that of an accomplice, yet, in regard to the manner and extent of the corroboration to be required, learned judges are not perfectly agreed. Some have deemed it sufficient, if the witness is confirmed in any material part of the case; others have required confirmatory evidence as to the *corpus delicti* only; and others have thought it essential that there should be corroborating proof that the prisoner actually participated in the offense, and that, when several prisoners are to be tried, confirmation is to be required as to all of them before all can be safely convicted—the confirmation of the witness, as to the commission of the crime, being regarded as no confirmation at all, as it respects the prisoner; for, in describing the circumstances of the offense, he may have no inducement to speak falsely, but may have every motive to declare the truth, if he intends to be believed, when he afterwards fixes the crime upon the prisoner. If two or more accomplices are produced as witnesses, they are not deemed to corroborate each other; but the same rule is applied, and the same confirmation is required, as if there was but one."

The case of Bennett v. United States, 227 U. S. 333, 33 Sup. Ct. 333, 57 L. Ed. 531, was based upon the same act of Congress as the present cases, the White Slave Traffic Act of June 25, 1910; and it seems from the opinion of the court that, like the cases here, two women were involved in that alleged unlawful transaction, one Opal Clarke, and the other Ella Parks. The defendant there was indicted for having caused the illegal transportation of Opal Clarke, and in considering the objection to one of the instructions upon the question of corroborating the testimony of one of the women the Supreme Court said:

"The basis of this contention is that Opal Clarke was the accomplice of defendant as to Ella Parks, and that hence the court erred in its instructions to the jury in regard to the extent of the corroboration Opal Clarke's testimony had received. The instruction complained of submitted to the jury the fact, and warned against a conviction upon the uncorroborated testimony of an accomplice, and said: 'Necessarily, if you find that she was an accomplice with respect to these charges, or any of them, you will then necessarily have to inquire into the facts as to whether or not there is corroborating testimony. There is evidence tending to corroborate her testimony, and it is for you to consider its force and value and the weight to give to it.' The contention is that this was error, 'as the court instructed the jury that there was corroborating evidence, when the court should have charged the jury that it was for them to ascertain from the testimony whether or not there was corroborating testimony.' The objection is hypercritical. The court did not instruct the jury that there was corroborating testimony, but testimony of that tendency, and added that the force and weight of its corroborating power was for the jury to determine."

In Blashfield on Instructions to Juries, pp. 484, 485, it is said:

"Except in one state, it seems to be the well-settled and almost universal practice for the court to instruct that the testimony of accomplices should be viewed by the jury with great care and caution. It has been held, however, that, in the absence of a request, failure to give such instruction cannot be assigned as error. There is some diversity of opinion as to whether a refusal to give an instruction of this nature, when requested, will be ground for reversal. There are rulings both ways on this point"—citing a large number of cases.

In the case of United States v. Ybanez (C. C.) 53 Fed. 536, 540, the court, in speaking of the defendants there said:

"Some of them are, by their own statements, clearly accomplices, while at least two others claim that they were captured by Garza's men, and were compelled to join the expedition under the pressure of force and threats of violence. If any of the witnesses testifying in the case were constrained or compelled to go with, and remain in, the expedition, because of violence, or threats of violence, offered to them by men engaged in the enterprise; that is, if they did not join and remain with the expedition voluntarily, but were compelled to do so by men engaged therein, then they would not be regarded, in law, as accomplices, for an accomplice is a voluntary assistant in a crime. 'He is a person who knowingly and voluntarily, and with common intent with the principal offender, unites in the commission of an offense.' Bearing in mind this distinction between a person who is an accomplice and one who is not, you are further instructed that whether the testimony of an accomplice be true or false is a question which, like all controverted questions of fact, is submitted solely to you to determine for yourselves. It is not within the province of the court to pass upon controverted questions of fact, or upon questions affecting the credibility of witnesses. But it is the duty of the court to call your attention to certain rules which obtain in courts of justice in reference to these persons known in law as 'accomplices.' On this point you are instructed 'that a particeps criminis—that is, an accomplice—notwithstanding the turpitude of his conduct, is not on that account an incompetent witness.' It is the settled rule in this country that an accomplice in the commission of a crime is a competent witness, and the government has the right to use him as a witness. It is the duty of the court to admit his testimony, and that of the jury to consider it. The testimony of an accomplice is, however, always to be received with caution, and weighed and scrutinized with great care by the jury; and it is usual for courts to instruct juries—and you are so instructed in this case—not to regard the evidence of an accomplice unless he is confirmed and corroborated in some material parts of his evidence connecting the defendant with the crime, by unimpeachable testimony. But you are not to understand by this that he is to be believed only in such parts as are thus confirmed, which would be virtually to exclude him, inasmuch as the confirmatory evidence proves, of itself, those parts it applies to. If he is confirmed in material parts connecting the defendant on trial with the offenses charged in the indictment, he may be credited in others; and the jury will decide how far they will believe a witness, from the confirmation he receives by other evidence, from the nature, probability, and consistency of his story, from his manner of delivering it, and the ordinary circumstances which impress the mind with its truth. U. S. v. Kessler, Baldw. 22 [Fed. Cas. No. 15,528]; U. S. v. Reeves [C. C.] 38 Fed. 409, 410. With the rules above announced for your guidance, you will give to the testimony of such witnesses as have been shown to be accomplices such weight as you consider it entitled to receive."

In the case of United States v. Van Leuven (D. C.) 65 Fed. 78, 81, Shiras, District Judge, said:

"At the common law, as the same existed in England, in the progress and development of that law the conclusion was reached by the judges charged with the duty of presiding over trials of criminal cases that it was unwise

for a jury to convict a person upon the uncorroborated testimony of an accomplice, and therefore judges cautioned the juries in this particular, and charged them that it was unwise for the jury to convict upon the uncorroborated testimony of an accomplice. In the state of Iowa it has been enacted as a provision of statutory law that no person shall be convicted of a crime upon the uncorroborated testimony of an accomplice, but there must be corroborative testimony tending to connect the defendant with the commission of the offense. I have always deemed it my duty as a judge of a court of the United States, and trying cases arising in the state of Iowa, and where the defendant is a citizen of this state, to say to the jury that they cannot convict upon the uncorroborated testimony of an accomplice; and when a case stands before a jury on that kind of evidence alone I assume the duty of charging them to return a verdict of not guilty, but, if the testimony of an accomplice is accompanied by evidence tending to corroborate the same in its material statements, then it is the duty of the court to submit the whole to the jury, and it is for the jury to determine whether the corroborating evidence is of such a character and weight as justifies the jury in giving weight to the testimony of the accomplice."

The state of California has a statute similar to the statute of Iowa referred to in the last-cited case. But here we are not called upon to consider whether the federal courts in California should go to the extent indicated in the opinion in that case. I am, however, clearly of the opinion that the testimony in the present cases was such as to entitle the defendants to an instruction explaining to the jury what constituted an accomplice, and the care and caution with which the testimony of accomplices should be weighed and scrutinized, especially in view of the circumstances under which these trials took place, and of at least one circumstance occurring during the trial, which, however, need not be specifically referred to, since there is to be no other trial; for if it be true, as some of the testimony undoubtedly tends to show, that the women went voluntarily with the men in interstate commerce for the purposes stated in the indictments, they were manifestly accomplices with them in the violation of the White Slave Traffic Act, and might have been indicted, prosecuted, and punished as conspirators under the provisions of the United States Penal Code of March 4, 1909, c. 350, § 37, as was expressly decided by the Supreme Court in the very late case of *United States v. Clara Holte*, already cited.

In the case of *Crawford v. United States*, 212 U. S. 183, 204, 29 Sup. Ct. 260, 268 (53 L. Ed. 465, 15 Ann. Cas. 392) the Supreme Court, in speaking of the testimony of an accomplice—one Lorenz—said:

"But the evidence of a witness, situated as was Lorenz, is not to be taken as that of an ordinary witness, of good character, in a case whose testimony is generally and *prima facie* supposed to be correct. On the contrary, the evidence of such a witness ought to be received with suspicion, and with the very greatest care and caution, and ought not to be passed upon by the jury under the same rules governing other and apparently credible witnesses. In many jurisdictions such a man is an incompetent witness unless he has been pardoned. The facts surrounding this case make it particularly important that the rule in regard to material errors should be most rigidly adhered to. If it be not clear that no harm could have resulted from the commission of this material error, the judgment should be reversed."

And in the very recent case of *Lung v. United States*, decided by this court January 4, 1915, 218 Fed. 817, 134 C. C. A. 505, we pointed out, as has been above shown, that while in the federal courts the tes-

timony of a confessed accomplice need not be corroborated to support a conviction, such testimony should be received with suspicion and with the greatest care and caution, and not taken as that of an ordinary witness of good character, generally and *prima facie* supposed to be true, and that, in the case then under consideration, the instructions of the trial court not being contained in the record, and there being no complaint in respect to them, the presumption was that the jury was so instructed.

For the reasons stated, I think that in each case the judgment should be reversed, and the case remanded for a new trial.

BALAKLALA CONSOL. COPPER CO. v. REARDON.

(Circuit Court of Appeals, Ninth Circuit. February 15, 1915.)

No. 2420.

1. TRIAL ~~133~~—ERROR—CURE BY INSTRUCTIONS TO DISREGARD.

In an action for personal injuries, the admission of a question asked a juror on his voir dire as to whether he had any connection with an indemnity company or organization for the purpose of insuring against personal injuries, and the statement of counsel, in response to the court's inquiry as to the purpose of such examination, that there was indemnity insurance against that kind of an accident, and that the insurance company was defending through its own counsel, was cured by the court's remark that he would instruct the jury to pay no attention to the remark of counsel, unless it should appear that it was a pertinent fact, where no evidence was adduced to show that the juror was interested in any such company, and it therefore did not appear that it was a pertinent fact, as the court's remark was tantamount to a distinct instruction to pay no attention to the counsel's remark, unless it should appear to be pertinent, and, if defendant's counsel desired a further instruction at the close of the trial, it was his duty to request it.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 316; Dec. Dig. ~~133~~.]

2. DEATH ~~72~~—ACTIONS FOR CAUSING—EVIDENCE—LOSS OR INJURY RESULTING FROM DEATH.

Under Civ. Code Cal. § 1970, providing that, when death results from injury to an employé, his personal representative shall have a right of action against the employer for the benefit of the widow, children, dependent parents, etc., in an action for the benefit of the parents, evidence that the parents were very poor, and that deceased had contributed to their support since he was big enough to work, was properly admitted; the pleadings having made an issue as to the parents' dependency.

[Ed. Note.—For other cases, see Death, Cent. Dig. § 91; Dec. Dig. ~~72~~.]

3. DEATH ~~32~~—ACTIONS FOR CAUSING—PERSONS FOR WHOSE BENEFIT SUIT MAY BE BROUGHT.

Under Civ. Code Cal. § 1970, to support an action for the death of an employé for the benefit of his parents, there must be an actual dependency, and not a dependency resting on a presumption on account of relationship.

[Ed. Note.—For other cases, see Death, Cent. Dig. §§ 47, 48; Dec. Dig. ~~32~~.]

4. MASTER AND SERVANT ~~286~~—ACTIONS FOR DEATH—QUESTIONS FOR JURY.

In an action for the death of a miner, killed while drilling holes for blasting by the explosion of a missed shot, evidence *held* to make a question for the jury as to defendant's negligence with respect to the failure of a person employed for that purpose to inspect for the purpose of discovering missed shots.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1001, 1006, 1008, 1010–1015, 1017–1033, 1036–1042, 1044, 1046–1050; Dec. Dig. ~~286~~.]

5. MASTER AND SERVANT ~~107~~—LIABILITY FOR INJURIES—UNSAFE PLACE TO WORK.

The rule that an employer is not bound to furnish a safe place, where the perils to the working place are caused by the progress of the work in which the employé is engaged, had no application to miners engaged in drilling holes preparatory to blasting, and injured by the explosion of a missed shot in a hole partly drilled by the preceding shift; there being no danger in the work if proper inspection was made, and the employer having undertaken to inspect each working place before assigning the men to work there.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 199–202, 212, 254, 255; Dec. Dig. ~~107~~.]

6. MASTER AND SERVANT ~~205~~—LIABILITY FOR INJURIES—CONTRIBUTORY NEGLIGENCE.

Where a mine operator provided an inspector to search for and discover missed holes before each succeeding shift went to work at any place, a miner, engaged in drilling holes preparatory to blasting, and his helper, were entitled to assume that such inspector had done his duty, and to act upon that assumption.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 547–549; Dec. Dig. ~~205~~.]

7. MASTER AND SERVANT ~~289~~—ACTIONS FOR INJURIES—QUESTIONS FOR JURY.

In an action for the death of a miner, engaged in drilling preparatory to blasting, evidence *held* insufficient to make a question for the jury as to whether it was his duty to look for and discover, if possible, missed shots in places where he was at work.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1089, 1090, 1092–1132; Dec. Dig. ~~289~~.]

8. MASTER AND SERVANT ~~291~~—ACTIONS FOR INJURIES—INSTRUCTIONS—CONFORMITY TO EVIDENCE.

Where an action for the death of an employé, alleged to have been due to the negligence of an inspector, and an action for injuries to another employé, were tried together, and in the action for death there was no allegation that the inspector was incompetent, and the court, while covering many points common to both cases in its charge, distinguished the cases in every particular in which they differed, and expressly directed the jury's attention to the fact that in the action for injuries the complaint alleged that the inspector was incompetent, and that his incompetence contributed proximately to the injury, the refusal of an instruction that in the action for death there was no charge in the complaint that the accident was proximately caused by the inspector's incompetence, and that no recovery could be had therefor, was not error, though it might properly have been given.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1133, 1134, 1136–1146; Dec. Dig. ~~291~~.]

In Error to the District Court of the United States for the Second Division of the Northern District of California; William C. Van Fleet, Judge.

Action by J. E. Reardon, administrator of Frank Whitsett, deceased, against the Balaklala Consolidated Copper Company. Judgment for plaintiff, and defendant brings error. Affirmed.

For opinion below on demurrer and motion to strike, see 193 Fed. 189.

Frank Whitsett, the deceased, and his brother, Fred Whitsett, were employed to operate a Burleigh drill in the defendant's mine. The deceased was an experienced miner, and was known as a machine man. His brother was a machine man's helper, or chuck tender. The drill was operated by compressed air, and was used to drill holes in the rock or ore, preparatory to blasting. The brothers exchanged work from time to time, and alternately worked as drill man and chuck tender. At the time of the accident Fred was operating the drill, and the deceased was chuck tender. It was the practice to drill about a dozen holes in the face of the drift, four near the top, four in the middle, and four near the bottom. The bottom four were called "lifters." When the holes were finished, they were filled with dynamite, and there was a cap and fuse for each hole. As the men went off shift, the fuses were lighted, and the rock was blasted out. On the night of the accident, when the Whitsett brothers went to work in one of the drifts, the holes had all been drilled by the preceding shift, except three of the lifters, and one of those had been partly drilled. They began to work on the unfinished hole, and while they were drilling it the drill struck and exploded a missed shot, which killed the deceased and seriously injured his brother. Separate actions were brought by the administrator of Frank Whitsett and by Fred Whitsett. The cases were joined for trial before the same jury. The plaintiff obtained a verdict against the defendant in the sum of \$3,500.

The complaint alleged failure and neglect of the defendant to exercise ordinary care in providing and maintaining a safe, suitable, and proper place for the deceased to perform his labor, and it alleged that the presence of the unexploded blast was unknown to the deceased, but could have been discovered and known by the defendant in the use and exercise of ordinary care and diligence. The answer denied that the defendant could have discovered or known of the missed shot. The main issue before the court below was whether or not the accident was proximately caused by negligence on the part of the defendant. The defendant insisted that there was no duty on its part to furnish the deceased with a safe place in which to work, and that the duty of looking for and detecting a missed shot rested on the deceased, and further contended that the missed shot was so concealed that it was impossible, by ordinary or practicable methods, to discover it.

C. H. Wilson, of San Francisco, Cal., for plaintiff in error.

William M. Cannon, of San Francisco, Cal., and C. S. Jackson, of Roseburg, Or., for defendant in error.

Before GILBERT and ROSS, Circuit Judges, and WOLVERTON, District Judge.

GILBERT, Circuit Judge (after stating the facts as above). [1] Error is assigned to a statement made by counsel for the plaintiff, in the presence of the jury, to the effect that the defendant had indemnity insurance against the accident, and that the insurance company was defending the action through its own counsel. On the examination of one of the talesmen, on his voir dire, by Mr. Cannon, counsel for the plaintiff, the following colloquy was had:

"Mr. Cannon: Q. Have you any connection, either as a stockholder or otherwise, with an indemnity company, or organization for the purpose of insuring people against personal injuries?

"Mr. Wilson: I object to that question as immaterial.

"Mr. Cannon: I do not think that it is immaterial. I would like to state why I asked the question.

"The Court: What is the reason?

"Mr. Cannon: The reason is—

"Mr. Wilson: I object to the reason being stated.

"The Court: I am asking for it.

"Mr. Cannon: In this case there is certain indemnity insurance against this kind of accident, and the insurance company is defending, through its own counsel, this action; therefore I have a right to inquire.

"Mr. Wilson: I object to the statement made by counsel, and assign it as error. It is an improper statement to make in this case. * * * We now move that the jury be discharged, on the ground that improper and foreign matter has come to the knowledge of the jury.

"The Court: The motion will be denied. I will instruct the jury to pay no attention to the remark of counsel, unless it should appear it is a pertinent fact.

"Mr. Cannon: Q. Have you any connection, either as a stockholder or otherwise, with any indemnity company such as I have described?

"Mr. Wilson: We insist upon our objection.

"The Court: I overrule the objection.

"Mr. Wilson: I will take an exception."

Error is assigned, not only to the statement of counsel, but to the ruling of the court in refusing to discharge the jury, and in admitting the testimony.

In Pennsylvania Co. v. Roy, 102 U. S. 451, 459, 26 L. Ed. 141, the court said:

"The charge from the court that the jury should not consider evidence which had been improperly admitted was equivalent to striking it out of the case. The exception to its admission fell when the error was subsequently corrected by instructions too clear and positive to be misunderstood by the jury. The presumption should not be indulged that the jury were too ignorant to comprehend, or were too unmindful of their duty to respect, instructions as to matters peculiarly within the province of the court to determine. It should rather be, so far as this court is concerned, that the jury were influenced in their verdict only by legal evidence. Any other rule would make it necessary in every trial, where an error in the admission of proof is committed, of which error the court becomes aware before the final submission of the case to the jury, to suspend the trial, discharge the jury, and commence anew. A rule of practice leading to such results cannot meet with approval."

In Throckmorton v. Holt, 180 U. S. 552, 567, 21 Sup. Ct. 474, 480 (45 L. Ed. 663), the court said:

"The general rule is that, if evidence which may have been taken in the course of a trial be withdrawn from the consideration of the jury by the direction of the presiding judge, such direction cures any error which may have been committed by its introduction."

In line with these cases is Turner v. American Security & Trust Co., 213 U. S. 257, 267, 29 Sup. Ct. 420, 53 L. Ed. 788.

The only modification of the rule is in cases where the court can see that such a strong impression has been made upon the minds of the jury by illegal and improper testimony that its subsequent withdrawal will not remove the effect caused by its admission. Portland Gold Min. Co. v. Flaherty, 111 Fed. 312, 49 C. C. A. 361, was a case in which, as here, counsel for the plaintiff stated to the jury that the case was being defended by an insurance company; but in view of the fact that the court immediately, upon the first suggestion of counsel, excluded from the jury any consideration of the statement, the Circuit Court of

Appeals held that there was no reversible error. See also, Weeks v. Scharer, 129 Fed. 333, 64 C. C. A. 11, Union Pac. R. Co. v. Thomas, 152 Fed. 365, 371, 81 C. C. A. 491, and Armour & Co. v. Kollmeyer, 161 Fed. 78, 83, 88 C. C. A. 242, 16 L. R. A. (N. S.) 1110.

The defendant contends that the trial court did not unequivocally withdraw from the jury the consideration of the statement so made by counsel, and that the court omitted to charge the jury, on the final submission of the case, to disregard that statement. But we regard the remark of the court as a distinct charge to the jury. It was tantamount to saying:

"I instruct the jury to pay no attention to the remark of counsel, unless it should appear it is a pertinent fact."

It did not thereafter appear that it was a pertinent fact, for no evidence was adduced to show that the juror was interested in any indemnity company. If counsel for the defendant desired further instruction at the conclusion of the trial, it was his duty to bring the matter to the attention of the court at that time, and request such an instruction. We cannot think that the matter so alluded to on the examination of the juror was of a nature so impressive that the jury could not divest their minds of it and render a verdict according to the instructions of the court and the evidence in the case. There is no indication of prejudice in the amount of the verdict which was rendered. It is not improbable that all intelligent jurors of the present day know, as a matter of common knowledge, that in the large majority of damage cases brought against mining and manufacturing corporations the real party in interest as defendant is an indemnity insurance company. There is little, if any, substantial ground for assuming that a juror of the class of men who are usually summoned in a federal court would permit such a fact to influence in any degree his verdict.

[2, 3] It is contended that the court erred in admitting evidence of the financial condition of the parents of the deceased; the evidence being that they were very poor, and that the deceased had contributed to their support since he was big enough to work for wages. Section 1970 of the Civil Code of California contains this provision:

"When death, whether instantaneous or otherwise, results from an injury to an employé received as aforesaid, the personal representative of such employé shall have a right of action therefor against such employer, and may recover damages in respect thereof, for and on behalf, and for the benefit of the widow, children, dependent parents, and dependent brothers and sisters, in order of precedence as herein stated, but no more than one action shall be brought for such recovery."

The complaint had alleged that James Whitsett, the father of the deceased, was wholly dependent upon the said Frank Whitsett for subsistence and support, and by reason of his death was left utterly helpless and destitute. The answer denied this allegation on information and belief. The allegation was made a distinct issue, and we see no reason why the plaintiff should not be allowed to prove it as he did.

The defendant cites Green v. Southern Pacific Co., 122 Cal. 563, 55 Pac. 577, as decisive of the question. In that case it was held that, in an action brought by the widow and children of the deceased to

recover damages as his heirs at law for his death caused by the negligence of the defendant, the evidence of the poverty of one of the plaintiffs, a daughter of the deceased, who was living with him at his death, was not competent, and that its admission was prejudicial error, that it had no pertinent or competent bearing on the extent of the injury suffered by the plaintiffs, and that, whatever the daughter's condition in life, she was entitled under the law, in common with her co-plaintiffs, to maintain the action solely as one of the next of kin and heirs at law of the deceased. In that case the evidence which was objected to had no relation to the issues. In the case at bar, it went to the very right of the plaintiff to recover.

But the defendant contends that the word "dependent," as used in section 1970 above quoted, means only one who is dependent for support and maintenance, that it does not necessarily mean a complete dependence, but may be a partial dependence, and that therefore it was error to permit evidence that the parents were very poor. We think that the word "dependent," as used in the statute, was intended to describe a condition of actual dependency, and not a dependency that rested on a presumption on account of relationship, for it is applied to persons to whom no such presumption obtains. It was therefore necessary for the plaintiff to prove, not a mere relation of dependency, but an actual dependency. *South Side Trust Co. v. Wilmarth*, 199 Fed. 418, 117 C. C. A. 650. We find no decision of any court of California holding that, under the provisions of section 1970 above quoted, evidence such as was admitted by the court below in this case is incompetent. We find no error, therefore, in its admission.

[4, 5] Error is assigned to the denial of the defendant's request for an instructed verdict in its favor. Prior to the argument to the jury, the defendant submitted to the court the following written request:

"You are instructed by the court that on the evidence and under the law you will return a verdict in this case for the defendant."

It does not appear that the request was argued before the court, or that the particular grounds of the motion were at any time specified. It has been held in the Seventh circuit that such a motion is insufficient to raise a question for review in the Circuit Court of Appeals. *Adams v. Shirk*, 104 Fed. 54, 43 C. C. A. 407. We are disposed to assume, however, that the court below passed upon the question which is now presented in this court—that is, whether or not there was sufficient evidence to go to the jury to show the defendant's negligence—and to hold that the motion was sufficient.

It appears from the testimony that the defendant had one employé, Yokum, who was known as a "missed hole" man, whose sole duty it was to examine the faces of the drifts before crews were set to work drilling therein, to discover and shoot missed holes. This man had made a casual inspection of the face of the drift, where the accident occurred; but, as the muck had not then been removed, he could not inspect the lowest row of holes. After the muck was removed, Yokum was present at the drift; but he made no further inspection of it. On that failure of Yokum to inspect the plaintiff bases its charge of negligence. But the defendant urges that there was evidence tending to

show that it was the duty of all employés working in the drifts to look out for missed holes, and that that duty rested upon the plaintiff's intestate, as well as upon Yokum. But there was testimony to the contrary. Several of the employés testified that they were never warned or given instruction by the defendant to look for missed holes.

Again, the defendant contends that it was not required to furnish the men engaged in drilling holes a safe place to work, for the reason that the working place was not of a permanent character, but was constantly shifting or being transformed, as the result of the employé's work, invoking the rule that the employer is not bound to furnish a safe place where the perils to the working place are caused by the progress of the work in which the employés are engaged. That rule has no application to the present case. The work was not work of construction or repair, in which the risks are caused by the progress of the work, and are assumed by the employé. It is a case in which the defendant directed its employés to work in places which had been prepared for their work as each gang was moved about the mine from drift to drift, and the defendant had undertaken to inspect each working place before assigning the men to work there. There was no danger in the work if proper inspection was made.

In *Rocky Mountain Bell Tel. Co. v. Bassett*, 178 Fed. 768, 102 C. C. A. 216, we said:

"The employer's duty was either to make the working place safe, or, if the danger was not obvious, to notify the employé of the hidden, unseen, and unappreciated danger, so that he might adopt means for his own safety."

And again we said:

"But where an employé is called from other work, and is set to work in an excavation, he has the right to assume that the master has investigated the conditions, and that the place is safe unless the danger is plain and obvious."

But it is said that there was no neglect of the master's duty in law in the present case for the reason that at times it was impossible to discover missed holes, and that neither the foreman who set the Whitsett brothers to work, nor the Whitsett brothers themselves, saw any indication of a missed hole at the place where the drill was set. We are not at all impressed with the credibility of the statement that the missed hole was not discoverable. Clearly it could have been found on proper inspection. It was a hole drilled in rock, and of a diameter sufficient to hold sticks of dynamite and a fuse. If Yokum had "barred" down all the loose rock on the face of the drift, as it was his duty to do, according to the testimony, he must necessarily have discovered the missed hole. Upon all the testimony we are convinced that the trial court committed no error in submitting the case to the jury.

The foregoing considerations dispose of the contention that the court erred in refusing to charge the jury, in substance, that no duty rests upon an employer to furnish a safe place to work, if the working place is not permanent, or has not previously been prepared by the master as a place for doing the work.

[6] Nor do we find error in the instruction, which the court gave, to the effect that if the jury found that the defendant provided an inspector called a "missed hole" man, whose duty it was to search for

and discover missed holes before each succeeding shift should go to work at any place, any driller or chuck tender was entitled to assume that such an inspector had done his duty in that regard, and to act upon that assumption.

[7] The defendant assigns error to the refusal of the court to charge that, if they found that it was the duty of Frank Whitsett to look for and discover, if possible, missed shots in places where he was engaged to work, his administrator cannot recover in this action, whether, upon the exercise of ordinary care Frank Whitsett could have found the missed shot, or it was so concealed that he could not, in the use of ordinary care, have found it. It is a sufficient answer to this assignment to point to the fact that there was no proof that it was Frank Whitsett's duty to look for missed shots. It is true that the foreman of the defendant's mine testified that it was the duty of all machine men to look for missed holes, in order to protect themselves. He did not testify, however, that any such rule was ever communicated to the plaintiff's intestate. On the contrary, the defendant's witness Meyers, the shift boss, when asked about the duty of machine men with reference to discovering missed holes said:

"I do not know that you would call it a duty. Of course, we did all we could about missed holes and things like that."

Meyers went on to say that the machine men were naturally on the lookout for missed holes, and some chuck tenders looked for missed holes and some did not.

"That is a thing that is so thoroughly understood among miners that there is no such thing as duty attached to it. Independently of instructions, most all the drill men and chuck tenders look for missed holes."

In the face of such testimony, the jury would not have been justified in finding that it was the duty of Frank Whitsett to look for and discover missed shots.

[8] It is assigned as error that the trial court refused to instruct the jury that, in the action brought by Reardon for the death of Frank Whitsett, "there is no charge in the complaint that the accident was proximately caused by the incompetence of Yokum," and that no recovery could be had in that case, or, if the jury found that the accident was proximately caused by the negligence of Yokum, the verdict must be for the defendant. While the first portion of the requested charge might properly have been given, it was not error to refuse it. It was coupled, however, with matter which clearly did not express the law, and, in any view, an instruction as to the incompetence of Yokum was not appropriate to the present case. Fred Whitsett in his complaint had alleged that Yokum was incompetent, but no such allegation was made in the case at bar. The court, in instructing the jury, covered many points that were common to both cases, but pains were taken to distinguish the two cases in every particular in which they differed. The court expressly directed the attention of the jury to the fact that in the case of Fred Whitsett the complaint alleged that the defendant had employed an incompetent man as a "missed hole" man, and that that fact contributed proximately to Fred Whitsett's injury.

We find no error. The judgment is affirmed.

**UNITED STATES FIDELITY & GUARANTY CO. OF BALTIMORE,
MD., v. UNITED STATES et al.**

(Circuit Court of Appeals, Fourth Circuit. November 28, 1914.)

No. 1308.

1. INTERNAL REVENUE \Leftrightarrow 23—WAREHOUSE BONDS—LIABILITY OF SURETY.

The surety on a warehousing bond, given by the owner of a distillery warehouse, conditioned for the payment of the internal revenue tax imposed on all spirits deposited in such warehouse before their removal therefrom and within eight years from the date of their entry for deposit therein, was liable for the tax on spirits deposited in such warehouse, though the government instituted proceedings whereby the distillery and the spirits therein were forfeited to it, and thereafter, while such spirits were in possession of the government, they were stolen and never recovered, as it was obviously the purpose of the government in requiring such a bond to provide against any contingency that might arise preventing it from collecting the tax, and the remedies of the government were not alternative, but cumulative.

[Ed. Note.—For other cases, see Internal Revenue, Cent. Dig. §§ 62-67; Dec. Dig. \Leftrightarrow 23.]

2. INTERNAL REVENUE \Leftrightarrow 12, 26—TAXES ON SPIRITS—WHEN DUE.

The internal revenue tax on spirits becomes due as soon as the spirits are produced, and the government has a first lien thereon until the tax is paid.

[Ed. Note.—For other cases, see Internal Revenue, Cent. Dig. §§ 30-32, 74; Dec. Dig. \Leftrightarrow 12, 26.]

In Error to the District Court of the United States for the Eastern District of Virginia, at Norfolk; Edmund Waddill, Jr., Judge.

Action by the United States against the United States Fidelity & Guaranty Company of Baltimore, Md., and another. Judgment on a directed verdict for the United States, and the defendant named brings error. Affirmed.

Edward R. Baird, Jr., of Norfolk, Va. (Baird, Swink & Moreland, of Norfolk, Va., on the brief), for plaintiff in error.

Hiram M. Smith, Asst. U. S. Atty., of Richmond, Va. (Richard H. Mann, U. S. Atty., of Petersburg, Va., on the brief).

Before PRITCHARD, KNAPP, and WOODS, Circuit Judges.

PRITCHARD, Circuit Judge. This is an action instituted in the United States District Court for the Eastern District of Virginia, at Norfolk, in February, 1914, against Columbus F. Cheshire and the United States Fidelity & Guaranty Company, upon a warehousing bond in the penalty of \$5,000, in which the former is principal and the latter is surety. The plaintiff in error will be referred to as defendant, and the defendant in error as plaintiff; such being the relative positions the parties occupied in the court below.

This case was heard upon a stipulation as to the facts. The court instructed the jury to return a verdict in favor of the government for \$3,221.79, with interest from the 30th day of May, 1913, at the rate of 6 per cent. per annum until paid; said amount being the full claim

of the government as presented in such action. Judgment was accordingly entered by the court upon this verdict.

[1] The circumstances are as follows:

Columbus F. Cheshire was a distiller, owning distillery warehouse No. 3, near Portsmouth, Va. The warehousing bond given by him, upon which this suit was brought, was conditioned.

"To pay the full amount of tax, at the rate imposed by an act of Congress of August 28, 1894, on all spirits so deposited in said distillery warehouse before removal therefrom and within eight years from the date of entry of such spirits for deposit in said warehouse."

Because of alleged offenses against the government, proceedings were begun by it, before the institution of this suit, against Cheshire, in which was obtained a judgment forfeiting to the government the distillery, the land whereon it was located, and 64 barrels of spirits, upon which taxes amounting to \$3,221.79 were then unpaid. The agreed statement of facts contains the following:

"Fourth. On May 30, 1913, subsequent to the seizure and forfeiture of the distillery in these proceedings described, and while said distillery and whisky was in the possession of the United States government, to be sold by the marshal under the order of this court in said libel proceedings, the whisky in the warehouse was stolen therefrom before said sale, and has never been recovered or sold."

Upon the trial the court refused certain instructions asked for by the defendant, and at the request of the government charged the jury as follows:

"The jury are charged that the United States tax on spirits distilled attaches to the same as soon as it comes into existence, and continues as a first lien thereon until the tax is paid or the whisky is sold by the United States; and defendants are not relieved from the payment of the tax thereon because the same was stolen before the sale thereof, while in the possession of the government, notwithstanding it may have been declared forfeited to the government in the proceedings instituted for such forfeiture.

"The jury are accordingly directed to find a verdict for the government for the sum of \$3,221.79, with interest thereon from the 30th day of May, 1913, at the rate of 6 per cent. per annum until paid."

In accordance with such charge, the jury rendered the following verdict:

"We, the jury, upon issue joined, find for the government for the sum of (\$3,221.79) thirty-two hundred and twenty-one 79/100 dollars, with interest thereon from the 30th day of May, 1913, at the rate of six per centum per annum until paid. John W. Starke, Foreman. June 12th, 1914."

The surety excepted to the ruling of the court below, and the case comes here on writ of error.

The only question involved in this controversy is as to whether the court below erred in holding that under the facts of this case the surety was not relieved of its obligation to pay the taxes on the amount of spirits placed in the warehouse in pursuance of the execution of the bond in question. That portion of the obligation material to the issue is as follows:

"The principal shall * * * well and truly pay or cause to be paid * * * the full amount of tax on all spirits so deposited at said distillery

warehouse before the removal therefrom and within eight years from the date of entry of such spirits for deposit in said warehouse."

It should be borne in mind that in the enforcement of the revenue laws it is the prime object of the government to safeguard its right to collect all the tax on spirits produced. Therefore, when spirits are entered for deposit in a warehouse, the government, in addition to requiring a bond for the payment of the taxes thereon, also retains possession of the warehouse, and the key to the same is kept at all times in the custody of a storekeeper and gauger.

[2] It has been uniformly held that the tax on spirits becomes due as soon as the same is produced, and that the government has a first lien on the same until the tax is paid. *United States v. National Surety Co.*, 122 Fed. 904, 59 C. C. A. 130; *United States v. Ulrici*, 111 U. S. 38, 4 Sup. Ct. 288, 28 L. Ed. 344; *Harkins v. Williard*, 146 Fed. 707, 77 C. C. A. 129. However, it is contended by counsel for defendant that, inasmuch as the spirits in question were stolen after there had been a forfeiture of the same to the government by a decree of the District Court, the defendant, as surety on the warehouse bond, was thereby relieved from liability. When the defendant became surety on the warehouse bond, it entered into a contract with the government to the effect that the full amount of all taxes on spirits deposited at the distillery warehouse should be paid for before removal, and within eight years from the day when such spirits were entered for deposit.

By taking advantage of the statute, the distiller was afforded an opportunity to postpone the payment of tax on spirits produced. In other words, he secured an extension of eight years in which to make such payment. It is but natural that the government, in extending this grace to the distiller, should insist upon a provision in the warehouse bond that would absolutely remove all doubt as to the payment of the tax within the period mentioned. Common observation and experience teach us that during the period mentioned unforeseen contingencies are liable to arise which might render it impossible for the government to realize the tax by the sale of the spirits. Therefore it is obvious that it was the purpose of the government, in requiring the distiller to execute a bond of this character, to provide against any contingency that might arise which would prevent the government from collecting its tax. If this had been a distiller's bond, and the spirits had been stolen before the entry of decree of forfeiture, there would be no controversy here as to the liability of the surety; that question having been definitely settled in the cases of *United States v. Mullins*, 119 Fed. 335, 56 C. C. A. 238, *United States v. Guest*, 143 Fed. 456, 74 C. C. A. 590, and *United States v. Sisk*, 176 Fed. 885, 100 C. C. A. 355.

The case at bar is clearly analogous, and the fact that the spirits in this instance had been forfeited by a decree of the District Court before they were stolen could in no wise affect the status of the obligors; it being clearly provided in the bond in question that the tax on the spirits produced should be paid before the same were removed from the warehouse. This unconditional and continuing obligation was required by the government, in view of the many contingencies

which might arise, wherein it would be impossible for the government to realize the tax due by the sale of the spirits.

There is nothing in the bond to warrant the contention that the remedies of the government are alternative. Such rights are cumulative. Therefore the pursuit by one remedy could in no wise affect the right of the government, as in this instance, to resort to another for the purpose of collecting its tax. In the case of United States v. Witten, 143 U. S. 76, 12 Sup. Ct. 372, 36 L. Ed. 81, distilled spirits were stolen from a warehouse where the internal revenue officer had failed to provide sufficient locks on the doors. The court held that such action on the part of the government official could not be pleaded as a defense to an action to recover on the distiller's bond the taxes due on spirits before their removal from the warehouse. Among other things, the court in that case said:

"The only duty which the revenue officers owed in regard to the security of the warehouse and the safe-keeping of the spirits therein was to the government, and not to the defendants; and any negligence of those officers gave the defendants no rights against the government, and afforded them no excuse for not performing their obligation according to its term. This is too well settled by previous decisions of this court to require more extended discussion. Hart v. United States, 95 U. S. 316 [24 L. Ed. 479], and cases cited; Minturn v. United States, 106 U. S. 437 [1 Sup. Ct. 402, 27 L. Ed. 208]."

In view of what we have said, it follows that the judgment of the lower court should be affirmed.

Affirmed.

OTIS et al. v. PITTSBURGH-WESTMORELAND COAL CO.

(Circuit Court of Appeals, Third Circuit. February 6, 1915. On Petition for Rehearing, March 26, 1915)

No. 1888.

1. TRIAL ~~295~~—INSTRUCTIONS—CONSTRUCTION AS A WHOLE.

In an action for the breach of a contract for the sale of bonds, where the principal issue was whether the plaintiffs accepted their option to purchase, a statement in the charge that it does not appear that there was any written acceptance, and that there was no letter referring to an acceptance in terms, was not erroneous, as requiring the acceptance to be in writing, where the court in connection therewith stated that the method of accepting the option was not specified, and in such a case it might be accepted in any manner by which the minds of the parties might meet, with the understanding that the acceptance had taken place.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 703-717; Dec. Dig. ~~295~~.]

2. APPEAL AND ERROR ~~1064~~—HARMLESS ERROR—INSTRUCTIONS—IMMATERIAL ISSUE.

Where the main issue between the parties was whether or not plaintiffs had taken certain bonds of the defendant under their option contract, and thereby accepted the option, or whether the bonds were purchased under a separate contract, error in an instruction as to whether the bonds were those held by defendant at the time the option contract was made

~~295~~ For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

is harmless, since that would have no effect in determining whether they were delivered under the option or under a separate contract.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4219, 4221-4224; Dec. Dig. ~~242~~1064.]

On Petition for Rehearing.

3. TRIAL ~~242~~—INSTRUCTIONS—ISSUES—INCONSISTENT DEFENSES.

In an action for breach of contract to sell certain bonds to plaintiffs, where plaintiffs claimed that they had exercised their option to purchase the bonds by purchasing a part of them, and the defendants claimed that those bonds were sold under a separate contract and the option was never exercised, but if it was, the contract was terminated by plaintiffs' breach in failing to pay for those bonds according to the terms of the contract, a charge that the main question was whether the option was accepted, and if accepted, whether the failure to pay for the bonds in full was a material violation of its terms, was not objectionable as confusing before the jury two inconsistent grounds of defense.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 569-576; Dec. Dig. ~~242~~.]

In Error to the District Court of the United States for the Western District of Pennsylvania; Charles P. Orr, Judge.

Action by Charles A. Otis and others, partners doing business under the name and style of Otis & Hough, now for use of Otis & Co., against the Pittsburgh-Westmoreland Coal Company. Judgment for the defendant, and plaintiffs bring error. Affirmed, and petition for rehearing dismissed.

See, also, 199 Fed. 86, 117 C. C. A. 598.

Arthur O. Fording, of Pittsburgh, Pa., for plaintiffs in error.

E. E. Robbins, of Greensburg, Pa., for defendant in error.

Before BUFFINGTON, McPHERSON, and WOOLLEY, Circuit Judges.

WOOLLEY, Circuit Judge. The plaintiffs were bond brokers. The defendant was a coal operator. In a contract bearing date July 7, 1908, the defendant, in order to procure money needed in its business, made certain engagements for the sale of its bonds to the plaintiffs, and the plaintiffs undertook to resell and dispose of the same. Parts of the contract, and certain decided questions arising therefrom, that have relation to the matters now in controversy, appear in the opinion of this court reversing the judgment entered at the first trial of this case, and reported in 199 Fed. at page 86, 117 C. C. A. 598.

The contract makes two provisions for the delivery and sale of bonds. The first is an outright sale of \$250,000 of bonds, to be delivered and paid for at the rate of \$25,000 of bonds on the 1st day of each month following the date of the execution of the contract, with a stipulation that the plaintiffs might anticipate monthly deliveries by calling for and taking at one time any part or the whole of the bonds purchased, and thereupon be credited on their undertaking to the extent in which the transaction is anticipated. The second provision contemplates an option for the sale of \$1,250,000 of bonds on commission, and contains similar requirements as to monthly and anticipated deliveries. This provision requires that the option, to be ef-

fective, must be accepted, and, if accepted, the contract completed thereby is terminated by the default of the plaintiffs in taking or paying for bonds in the amounts and at the periods agreed upon.

It is admitted that the parties performed all their undertakings with respect to the bonds purchased outright, but on April 8, 1909, before the tenth and last installment of purchased bonds had been delivered and paid for, the defendant delivered and the plaintiffs accepted for resale to a designated purchaser for a specified purpose, \$100,000 of bonds, pursuant to negotiations theretofore had. These bonds were no part of those which were sold and purchased outright.

At the first trial of this case, the court excluded testimony offered by the plaintiffs to show that, by taking this \$100,000 of bonds before the completion of the outright purchase, they had accepted or exercised the option contained in the contract, and held that the option to take the \$1,250,000 option bonds could not be accepted or exercised until after the completion of the delivery and sale of the \$250,000 purchased bonds. On writ of error, this court declined to give to the contract the restricted construction which its literal terms might warrant, and gave it a construction which the court found the parties themselves by their conduct had given it, and held that the plaintiffs obtained an option, which was established by the contract, that they could accept and exercise it before the termination of the period for the delivery of the bonds purchased outright, that the right to anticipate deliveries attached to the option bonds as well as to the purchased bonds, and that if anticipations were made, whether of one class or of the other, the requirement to take \$25,000 of bonds monthly was suspended until such time as would have elapsed had the bonds been taken in regular monthly installments, instead of being taken in advance thereof.

When this court placed this construction upon the option clause of the contract, the question whether the sale of \$100,000 of bonds of April 8, 1909, was an acceptance or was made in pursuance of an acceptance of the option by the plaintiffs, or was a transaction under another contract, became the central question in the controversy. The plaintiffs introduced testimony which had been excluded at the first trial, tending to prove that by the transaction of April 8th they had accepted the option granted them by the contract; and the defendants, on the other hand, introduced testimony tending to show that the transaction was the result of a separate negotiation, having for its object an altogether different matter from what was contemplated by the contract, that the transaction was entered into and completed under an agreement independent of and unrelated to the contract of July 7, 1908, and that therefore it was not an acceptance of the option.

This question was submitted to the jury, and to the manner of its submission the plaintiffs take exception. We are of opinion that the learned trial judge submitted the case upon a very clear statement of the law, and that while certain expressions in the charge, standing alone, might be open to the comment to which the plaintiffs have subjected them, nevertheless, when read in connection with their context, we find them unexceptionable.

[1] In his instructions upon the law, the learned judge properly stated to the jury that the "main question in the case is whether or not

the option was accepted by the plaintiffs," and in defining the burden which rested upon the plaintiffs to prove acceptance of the option upon which they were suing, he said, among other things, that "it does not appear that there was any written acceptance of the option, * * *" and elsewhere he stated that he did not recollect testimony of "any letter immediately following that transaction, or antedating it, in which reference is made in distinct terms to the fact that that [the \$100,000 bond transaction] was an acceptance of the option." Stress is laid by the plaintiffs in error upon these two expressions, maintaining that in effect the jury was instructed that an acceptance of the option must have been by letter or by writing, and that the jury was thereby misled into the inference that, in the absence of testimony showing acceptance by letter or by other writing, the option was not accepted. As we read the part of the opinion from which the expressions excepted to are taken, it is clear to us that nothing in the statement of the judge would have warranted the jury in thinking that the right of the plaintiffs to recover depended upon evidence of a written acceptance of the option. Though allusion was made to the absence of a written acceptance, the allusion was merely preliminary to the statement made, and in substance repeated, that "the method of accepting the option is not provided for in the agreement." Instead of misleading the jury into a belief that a writing was necessary to an acceptance, the words of the judge in effect cautioned the jury that such was not the case, for in the absence of a method of acceptance provided for by the contract the court distinctly instructed the jury that "an option, where there is no provision as to the manner of its acceptance, may be accepted in any manner by which, or in pursuance of which, or at a time when the minds of both parties have met with the understanding that the acceptance has taken place," continuing with an appropriate instruction respecting the legal inference of an acceptance, deduced from the acts of the parties.

[2] The plaintiffs further urge that the learned trial judge, in charging the jury that the burden of proof was upon them, erroneously required them to show not only that they had taken the \$100,000 of bonds, but also to show affirmatively that the bonds so taken were bonds that the defendant had held when the contract was made in July preceding. The court said:

"Now, while the contract does include all the bonds that the defendant had subject to its disposal at that time, yet there is no evidence in the case that the defendant did not have other bonds on April 8th, which may have been other than some of these option bonds, and it was not necessary that the same bonds of the same number be always preserved intact to meet the requirements, provided that other bonds of like tenor and amount of the same issue were available."

It is not entirely clear just what the learned judge meant by this language. Its importance, however, is wholly lost in the consideration of the main issue, which was, not whether the bonds sold on April 8th were a part of the bonds reserved for delivery under the option, if accepted, but whether the bonds then sold were sold under the option or under an entirely different contract.

Testimony that the bonds sold in the transaction of April 8th were bonds reserved to be delivered under the option, if accepted, or testimony that they were other bonds, or absence of testimony upon the point, has no bearing upon the question whether the bonds were sold under a contract completed by the acceptance of the option, or under another contract, for, had the bonds been in fact a part of the bonds reserved for the option, there is nothing in the contract of July 7, 1908, nor in the relation of the parties, which would have prevented them modifying the old contract or entering into a new one concerning the same bonds. Evidence of the character of the bonds would not have proved the character of the contract under which they were sold. This is made clear by the main question submitted in the charge, upon which the jury must have acted, without being disturbed by the expression of the learned judge excepted to.

Default in paying for bonds terminated the contract. By the transaction of April 8, 1909, the bonds purchased by the plaintiffs were sold by them to a creditor of the defendant, and by the creditor were accepted in substitution of the defendant's obligation of indebtedness. The difference between the amount of the defendant's indebtedness and the purchase price of the bonds was paid by the purchaser to the plaintiffs, and the same remitted by the plaintiffs to the defendant, less the sum of \$500. It was claimed by the plaintiffs that this sum was chargeable to the defendant as its part of the expense in effecting the sale. This was denied by the defendant, and the jury was asked to decide, if they found the option accepted, whether in withholding the payment of this sum the plaintiffs had defaulted in a payment for bonds delivered and purchased, and thereby under its provisions had terminated the contract. On this question there was considerable controversy, which the plaintiffs in error have reviewed before this court, but with which we think we have nothing to do.

After a careful consideration of all matters assigned as error, we are very clearly of the opinion that in the proceedings and judgment below error was not committed.

The judgment below is affirmed.

On Petition for Rehearing.

PER CURIAM. [3] In the petition for a rehearing of this case the plaintiffs in error suggest that the court inadvertently erred in overlooking (and approving) two points made by the defendant which were inconsistent with each other, namely, that the one hundred bonds were not taken under the option because of its nonacceptance, and that in withholding five hundred dollars of the proceeds of the sale of the same bonds the plaintiffs failed to make payment under the terms of the option, thereby indicating that this court affirmed the judgment upon two equally inconsistent grounds: "(1) As to the acceptance, because the bonds were not taken under the written contract; (2) as to termination, because they were." The suggestion of such confusion warrants a brief consideration.

As the issues of this case developed, it was clear that the plaintiffs based their right to recover upon the acceptance of an option, the de-

livery and receipt of one hundred bonds thereunder, and their subsequent performance of its terms. The defense was based upon a contention that the option was not accepted, that the one hundred bonds were delivered and sold pursuant to an altogether different contract, but if accepted the option contract was nevertheless terminated by the plaintiffs' default in making full payment for the bonds delivered and sold. The defendant claimed, and the plaintiffs admitted, that five hundred dollars of the proceeds of the sale of the bonds had not been paid to the defendant. In its charge upon this point the District Court, without the suggestion of confusion, said:

"The main question in the case, gentlemen, is whether or not this option was accepted; then if accepted, whether or not the retention of the \$500 was a material violation of its terms."

In approving the submission, this court said:

"The jury was asked to decide, if they found the option accepted, whether in withholding the payment of this sum (\$500) the plaintiffs had defaulted in payment for bonds delivered and purchased and thereby under its provisions had terminated the contract."

The verdict was entirely consistent with a finding by the jury that the option had been accepted and that the contract had been terminated by the plaintiffs' failure to pay for the bonds delivered thereunder.

The other points presented in the petition for a rehearing fail to impress us that this case was improperly submitted or reviewed. The petition, therefore, is dismissed.

SMITH-BOOTH-USHER CO. v. DETROIT COPPER MINING CO. OF ARIZONA.

(Circuit Court of Appeals, Ninth Circuit. February 1, 1915.)

No. 2472.

TRIAL ~~139~~—DIRECTION OF VERDICT—POWER OF COURT.

On a motion for directed verdict, the court may not weigh the evidence; and if the facts are disputed, or if there is substantial evidence both ways, even if there be a preponderance of evidence one way, it is for the jury to determine what facts are established.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 332, 333, 338-341, 365; Dec. Dig. ~~139~~.]

In Error to the District Court of the United States for the District of Arizona; Wm. H. Sawtelle, Judge.

Action at law by the Smith-Booth-Usher Company against the Detroit Copper Mining Company of Arizona. Judgment for defendant, and plaintiff brings error. Reversed.

On December 5, 1912, the plaintiff, the Smith-Booth-Usher Company, entered into a contract with the defendant, the Detroit Copper Mining Company of Arizona, by the terms of which the plaintiff undertook to furnish to the defendant three 200 H. P. International Amet crude oil gas producers. The machinery was to be "as described in the Manufacturers' Bulletin, or of the latest improved design." It was to be shipped from Los Angeles to Morenci,

Ariz., where the defendant's plant is located. The defendant was to pay the plaintiff \$10,000, with interest at 6 per cent. from the date of erection, upon the completion of the 90 days' trial provided for in the contract, in case the apparatus met the guaranty specified. The machinery was intended to produce gas from crude oil. It consisted of three distinct units, which were to furnish gas into a single main, together with "scrubbers, oil pump, and plans and specifications." In order to complete the gas producing plant, the defendant bound itself to furnish a 15,000 cubic feet gas holder and the necessary auxiliary machinery, including pipes and mains. In the latter part of February, 1913, the apparatus was shipped. At the request of the defendant, the plaintiff's erecting engineer, Vorhees, went to Morenci about March 8th, and superintended the erection of the machinery. It was completed about March 27, 1913. Cox, the plaintiff's sales engineer, went to Morenci April 2, 1913, and began the tests of the machinery in the 90 days' trial provided for in the contract. The tests were continued until May 7, 1913. There is evidence that with the consent of the defendant Cox then left Morenci, pending the decision of the defendant on his suggestion that it install a new gas washer for the machinery, and with the intention of returning and continuing the tests. On May 28th the defendant advised the plaintiff that it would go no further with the tests under the contract. The defendant refused to continue with the contract, and refused to pay for the machinery.

The plaintiff in its complaint alleged its performance of the written contract, and a breach of the same by the defendant in failing to supply the 15,000 cubic feet gas holder, and in refusing to proceed with the test. The defendant answered, denying that it failed or refused to furnish the 15,000 cubic feet gas holder, denying that the machinery met any of the guaranties specified in the agreement, admitting that on or about May 28th it had notified the plaintiff that it would go no further with the contract, but alleging that prior to that notice the plaintiff, after it had become fully apparent that the machinery could not be made to comply with the guaranties and conditions of the agreement, admitted that the same was not in compliance therewith, nor in conformity with the requirements of the agreement, and voluntarily abandoned further attempt to run or operate the same, and asked for a long extension of time in which to substitute other and different machinery, which request the defendant denied, and the defendant alleged that the gas produced by said machinery was so inferior in quality and grade, and so charged with soot and suspended matter, as to be not only entirely useless for the purposes for which it was intended, but so as to be highly injurious to the engines and gas-conducting pipes of the defendant.

Oscar C. Mueller and Alfred Wright, both of Los Angeles, Cal., and William M. Seabury, of Phoenix, Ariz. (John De R. Storey, of New York City, on the brief), for plaintiff in error.

Everett E. Ellinwood and John M. Ross, both of Bisbee, Ariz., for defendant in error.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

GILBERT, Circuit Judge (after stating the facts as above). At the close of the plaintiff's testimony, on the motion of the defendant that the jury be instructed to return a verdict in its favor, the court, in an extended instruction to the jury, reviewed and weighed the plaintiff's evidence, and concluded by saying:

"I have carefully examined the evidence in this case, and I find that it fails to show that the plaintiff has established that said apparatus did meet each and all of the guaranties specified in said agreement, and the defendant's motion to instruct the jury to return a verdict in its favor will be granted."

The circumstances under which a court may withdraw a case from the jury are stated by Mr. Justice Harlan, sitting with Judge Lurton

and Judge Sage in the Circuit Court of Appeals for the Sixth Circuit, in the leading case of *Travelers' Ins. Co. v. Randolph*, 78 Fed. 754, 24 C. C. A. 305, in which he said:

"The rule upon that subject has been defined in recent adjudications. The thought intended to be expressed in them is that the jury should be permitted to return a verdict according to its own view of the facts, unless upon a survey of the whole evidence, and giving effect to every inference to be fairly or reasonably drawn from it, the case is palpably for the party asking a peremptory instruction. A mere scintilla of evidence in favor of one party does not entitle him, of right, to go to the jury. *Improvement Co. v. Munson*, 14 Wall. 442, 448, [20 L. Ed. 867]. On the other hand, a case cannot properly be withdrawn from the consideration of the jury simply because, in the judgment of the court, there is a preponderance of evidence in favor of the party asking a peremptory instruction. If the facts are entirely undisputed or uncontested, or if, upon any issue dependent upon facts, there is no evidence whatever in favor of one party, or, what is the same thing, if the evidence is so slight as to justify the court in regarding the proof as substantially all one way, then the court may direct a verdict according to its view of the law arising upon such a case. If a verdict is rendered contrary to the evidence, the remedy of the losing party is a motion for a new trial. In disposing of that motion, the court, in the exercise of a sound legal discretion, may interpose and prevent the injustice that may be done by such a verdict. While the court may instruct the jury as to the law arising upon a given or hypothetical state of facts, it is for the jury, if the facts are disputed, or if there is substantial evidence both ways, even if there be a preponderance of evidence one way, to say what facts are established. And this is what was meant by the observation in some cases that the court should not withdraw from the jury a case depending upon the effect or weight of testimony, unless the evidence should be of such conclusive character as to compel the court to set aside a verdict returned in opposition to it. *Insurance Co. v. Doster*, 106 U. S. 30, 32, 1 Sup. Ct. 18 [27 L. Ed. 65]. The court may be of opinion that, according to the weight of the testimony, a verdict should be returned for the party asking a peremptory instruction. But it may not, for that reason alone, give such an instruction. It may not take the case from the jury, on issues of fact, unless the evidence is so distinctly all one way that a different view of it would shock the judicial mind."

In *Mt. Adams & E. P. Inclined Ry. Co. v. Lowery*, 74 Fed. 463, 477, 20 C. C. A. 596, 609, Judge Lurton said:

"We do not think, therefore, that it is a proper test of whether the court should direct a verdict that the court, on weighing the evidence, would, upon motion, grant a new trial. A judge might, under some circumstances, grant one new trial and refuse a second, or grant a second and refuse a third. In passing upon such motions, he is necessarily required to weigh the evidence, that he may determine whether the verdict was one which might reasonably have been reached. But, in passing upon a motion to direct a verdict, his functions are altogether different. In the latter case we think he cannot properly undertake to weigh the evidence. His duty is to take that view of the evidence most favorable to the party against whom it is moved to direct a verdict, and from that evidence, and the inferences reasonably and justifiably to be drawn therefrom, determine whether under the law a verdict might be found for the party having the onus."

Again, in *Rochford v. Pennsylvania Co.*, 174 Fed. 81, 98 C. C. A. 105, Judge Lurton said:

"A motion for an instructed verdict, upon an insufficiency in law of the evidence, presupposes that the witnesses testifying to the facts adduced to make a case for the party against whom the motion is made are worthy of credit. It is as if the party making the motion had demurred to the evidence, and is equivalent to saying: 'We concede the truth of the facts which are

relied upon to make a case for the plaintiff, or a defense for the defendant; but they are insufficient in law to support a verdict, which must be founded upon such facts."

The right to a jury trial is guaranteed by the Constitution, and it is not to be denied except in a clear case. The foregoing decisions, and many others that might be cited, have definitely and distinctly established the rule that if there is any substantial evidence bearing upon the issue, to which the jury might properly give credit, the court is not authorized to instruct the jury to find a verdict in opposition thereto. Tested by these rules and on a careful consideration of the evidence in the case at bar, we are of the opinion that the cause should have been submitted to the jury.

One of the important provisions of the contract was that which gave the plaintiff the benefit of a 90 days' test. In the light of the testimony, it is clear that this provision secured to the plaintiff a substantial right, a right which was of the essence of the contract. The time which was devoted to the test was but 35 days. The defendant in its answer alleges a breach by the plaintiff of this provision of the contract. There was testimony, however, to the contrary. Cox, the testing engineer, testified that about May 6th Thompson, the defendant's general manager, stated to him that there was too much suspended matter in the gas, and that the gas must be cleaned better than it was being done at that time; that he answered Thompson by saying that by a system of sprays and sluicing the gas could be run through the pipe lines and through the holder without causing interruption of the service, but that, if he desired the gas cleaned better than it was being cleaned, there was an apparatus that had lately been tried at El Centro, whereby the gas could be cleaned absolutely; and that Thompson agreed to send an engineer to inspect that plant, and to be governed by the engineer's report, and would let the plaintiff know whether he was willing to grant an extension of time necessary to obtain that apparatus, and that it was upon that understanding that Cox left for Los Angeles on the following day, and he testified that he (Cox) held himself in readiness to return to Morenci to continue the test, as soon as he heard from Thompson. There is no evidence that Thompson ever did examine or cause to be examined the device at the El Centro plant, and it was not denied that a week later Thompson stated to Mr. Smith, the president of the plaintiff, at Los Angeles, that the defendant had made other arrangements, and had no longer any use for the plaintiff's apparatus. On May 27th Thompson wired the plaintiff that the defendant did not desire to continue with the contract. On May 28th Thompson wrote the plaintiff a letter, in which he set forth the real reasons why he wished to avoid the contract. He wrote:

"Our reasons for doing so are not so much because we doubt that you could finally make clean gas, but because the apparatus required for this and for handling the soot far exceeds anything we were led to expect when we negotiated for the plant."

The letter further explains that the plant so furnished, together with the washing apparatus, would occupy so much space that it would

be out of the question to install another gas plant, as was contemplated, on the defendant's premises.

The court below found failure of proof of the plaintiff's compliance with its contract principally in the fact that there was present in the gas produced by its machinery lamp black, which the court said clogged the defendant's gas pipes. But the evidence shows that the clogging was not in the gas pipes, but in the washers of the units; that the presence of lamp black was to be expected, and to be dealt with, and that the plaintiff, even if it had not already done so, expected, in the course of its tests so to control the same as to obviate the clogging. The contract stipulated that there should be "no suspended matter contained in the gas which will be injurious to the engines or gas-conducting pipes" of the defendant. This is all that the contract required as to the quality of the gas. It did not require that there should be no lamp black in it. Mr. Cox, who was admitted by the defendant to be a qualified expert, testified that the small amount of suspended matter in the gas would have no injurious effects on the defendant's engines or pipes, and although he admitted that the suspended matter might after a time cause the pipes to become clogged unless they were sluiced or cleaned, he testified that the cleaning could be done without closing down the plant, and it was in this connection that he testified that he proposed to Mr. Thompson to introduce the apparatus which would absolutely clean the gas, if the defendant desired it better cleaned, but at the same time he stated that the gas met the requirements of the contract.

One Ensign, an electrical mechanical engineer, testified that at Yuma the same kind of gas producers as those which the plaintiff had installed, used under similar conditions, produced gas which carried more lamp black, before it reached the holder, but that after four years of continuous use it produced less than three inches of lamp black in the bottom of the holder. In brief, there was evidence that the plaintiff had fully complied with its contract; that the gas producers produced a gas sufficiently free of matter in suspension as not to be injurious to the "engines or gas-conducting pipes" of the defendant; that after a test of 35 days, it was still ready and willing to make further tests and alterations in order to satisfy the defendant, and that the defendant refused to abide by the contract, principally for reasons which had nothing to do with the terms and provisions thereof. The case was clearly one for the jury.

The judgment is reversed, and the cause is remanded for a new trial.

UNITED STATES v. PETERSON et al.

(Circuit Court of Appeals, Ninth Circuit. February 15, 1915.)

No. 2414.

PUBLIC LANDS ☞120 — CANCELLATION OF PATENTS — SUFFICIENCY OF EVIDENCE.

In a suit to cancel a patent to land which the patentee conveyed to defendant, on the ground that the patentee in filing on the land and obtaining a patent was acting for defendant, evidence held sufficient to sustain the burden of proof resting upon the government, and to entitle it to a decree canceling the patent.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 332-335; Dec. Dig. ☞120.]

Cancellation of patent, see note to Hartman v. Warren, 22 C. C. A. 38.]

Appeal from the District Court of the United States for the District of Montana; George M. Bourquin, Judge.

Suit by the United States against Jennie Peterson (formerly Jennie Benedict) and others. From a decree dismissing the bill of complaint, the United States appeals. Reversed and remanded, with instructions.

Burton K. Wheeler, U. S. Atty., and Frank H. Woody, Jr., Asst. U. S. Atty., both of Butte, Mont., for the United States.

Cooper & Stephenson, of Great Falls, Mont., for appellees Albright.

Before GILBERT and ROSS, Circuit Judges, and WOLVERTON, District Judge.

GILBERT, Circuit Judge. The United States appeals from a decree dismissing its bill of complaint in a suit brought against the appellees to set aside and cancel, on the ground of fraud, a patent issued to Jennie Peterson for 160 acres of land in the state of Montana.

The testimony of Jennie Peterson was, in substance, as follows: She had been working in Montana for the defendant William H. Albright before she was of age, and had said that when she got old enough she would like to take up a ranch. Thereafter she returned to reside with her mother in Michigan. While there, in the spring of 1901, Albright wrote to her and said that he understood that she wanted to come West again, that she was old enough, and could file on a homestead, that he had a piece of land in view, and, if she decided to come West again, to let him know and he would send her a ticket. She answered his letter, and he sent her a ticket, which she used. She left Michigan July 5, 1901, and went to Great Falls. She had written to Albright, telling him about the time she would leave Michigan. He met her in Great Falls, and told her that the papers were ready in Prior's office. She thereupon filed on her homestead. She had not been on the land, and did not know where it was located. She did not direct Prior to prepare the papers, and had nothing to do with the preparation of the homestead filing, nor did she pay the filing fees, or know who paid them. She discussed with Albright what she was to receive for the land when she proved up on it. The

understanding was that she was to commute and prove up at the end of 14 months, and was to receive \$640, "or the same as the rest of them would receive for their homestead right." By "the rest of them" she meant Peter Carter, August Enger, Hermann, Oliver, "and a few more." Albright told her that she was to receive the same as the rest of them that took up homesteads. She understood that was for \$640. Albright was to pay the expenses. He built her house for her. After making the entry, a part of the time she worked for Albright, and part of the time she lived on her homestead. In the early spring of 1902 she visited the ranch. She had nothing to do with the building of the cabin. While she lived on the ranch, Albright furnished her provisions, as it was a part of the agreement that he was to pay all expenses. She never paid out anything for expenses in the way of improvements. She could not state who did the labor, but thought Peter Parker and Gustav Hermann put up the cabin. She submitted final proof on August 11, 1905. Albright gave her money to pay the expenses of the witnesses. On making proof she answered the questions just as Albright told her to. He had furnished her with a copy of the questions. She did not pay the filing fees, or the fees on final proof. She commuted, and Albright gave her the money. After she got the filing receipt, she transferred it to Mrs. Albright, under Albright's direction. She received \$650 for the land, \$500 in a note of Albright, and \$150 either in cash or by check. After making the entry on her homestead, she had had her homestead filing changed so to embrace some desert land which had been in the possession of one Lavelle, who relinquished the same at Albright's instance. She further testified that, on making final proof, Albright told her not to say anything about his arrangement with her. At that time she had no property except a horse. Albright told her they might ask her if she had any stock. He told her he would give her a bill of sale for two cows, which he did. After she came out of the land office, she handed the bill of sale back to Albright.

Peter Carter testified that he had been employed by Albright, that he filed on a homestead near Albright's quarry, and that he had an agreement to transfer the property to Albright prior to the time when he filed. He said:

"I was to file on the land, and he would pay the expense. When I acquired title, I was to transfer it to him."

And he testified that after he made his final proof, and received his final certificate, he sold it to Albright for \$640.

Frank C. Whittaker testified that he had worked for Albright, and was working with him "as partner on things" for six or seven years, and was interested with him in some mining claims in 1901; that Albright and Mrs. Albright talked to him about getting Jennie Peterson to take up some land. "We three talked it over, and thought it would be a good thing to get her to come out and take up land for Mrs. Albright. Albright suggested that he would send her a ticket to come, and some money for expenses. Mrs. Albright thought it would be all right to have her come and keep books and take up some land," and he testified that before she came he and Albright staked and meas-

ured out the land for her claim, and put up three or four rock~~s~~ in place, so that they would know where it was, and set some stakes thereon. He testified that there was a difference made in her case from that of some other people who had taken up land and sold to Albright. "Before she got a patent, she was to get the same as the rest, \$640—\$440 clear, and he would furnish the money to commute with; that if she would stay on the land five years, and not commute, he would give her \$750." He testified that Albright built the improvements on her place; that on one occasion Jennie Peterson went up to her homestead to stay several weeks, and Mrs. Albright told her to take provisions out of the kitchen, and that he (Whittaker) was sent up there once so that he could be a witness; that he saw her living on the land, and took her some provisions.

Charles Gustafson testified that he had a conversation with Albright, in which Albright told him that Jennie Peterson was coming "out there to take up land for him"; and he testified that Jennie Peterson told him in the fall of 1901 that she had taken up the land for Albright.

Mrs. Gustafson testified that Albright told her:

"We let that girl take up a homestead for us just to help her out, by working in the office and holding land there, so it gives her a show to make money in two places."

And the witness added:

"It was common talk with every one that the homesteads up there were for Mr. and Mrs. Albright."

Albright denied much of the testimony of the other witnesses. He denied that he sent Jennie Peterson a ticket, or that he met her at Great Falls, or took her to Prior's office. He testified that after she came out from Michigan he went over the land with her, and he described the method in which he arrived at the common corners of sections 35, 36, 25, and 26, "and then stepped back 440 steps, about a quarter of a mile, and made a point there, and we were on every 40. She told me she had to be on every 40." He said:

"I probably went to Great Falls with her when she made her filing. No doubt I did; but I didn't pay the filing fee, or the expense of building her cabin."

On cross-examination, he testified:

"I came to Great Falls with her when she made her homestead entry. I often had some business in Great Falls."

He testified that Hermann built a cabin on the homestead; that Hermann said to him, "I want to build Jennie's house;" and as corroborating his testimony, he pointed to his time book, which showed that Hermann was not working for him at the quarry from December 6 to December 27, 1901. He denied that he paid the expenses of final proof, or of the improvements, or of the cultivation of the land. He testified that he paid Jennie Peterson \$800 for her claim, \$150 in cash, \$150 in check, and \$500 by note. He testified that Jennie Peterson had told him she wanted some fencing done on her

claim, and asked him how much it would be, and when it was figured up it amounted to \$110, so he said to her:

"All right, you pay me, and I will get your fencing and put it up.' I constructed the fence on the Jennie Peterson claim, and she paid me for it."

Mrs. Albright testified:

"I don't think there was any agreement existing between her (Jennie Peterson) and Mr. Albright that she was holding the homestead for him."

The court below, while entertaining the opinion that the testimony served to arouse suspicion, and even preponderated in favor of the complainant, held that it fell short of the "high degree of proof" the government must produce to warrant cancellation of its executed contract, its patent and grant of title, and pointed to the fact that there were no circumstances to corroborate Mrs. Peterson, "that the ticket and letters, etc., rested on her testimony alone," and the court added:

"Albright's books are inconsistent with her testimony that he paid all her expenses on the land."

We find nothing incredible in the testimony of Jennie Peterson. Her testimony was given some 10 years after the date when she filed on her homestead, and it is not a suspicious circumstance that she had failed to preserve the letters which she testified Albright wrote her prior to her entry. As to his sending the ticket on which she came West, it is not pointed out how she possibly could have corroborated her testimony. What motive could she and the other witnesses have had to testify falsely against the Albrights? It does not appear, and Albright does not testify, that there was any misunderstanding or ill feeling between Jennie Peterson and himself until after she had stated the facts in regard to her homestead to one Bennett, shortly before the suit was begun. "There was no hard feelings between Mr. Albright and me until this case came up," said Jennie Peterson. But after the suit was begun, she testified, she had a conversation with Albright in which—

"Mr. Albright said I was in for it, and wanted to know what I was going to do about it. I said I was going to tell the truth; and he told me I might get 20 years in the penitentiary if I said I took it up for his benefit, because I swore I took it up for my own benefit. * * * He told me to do the right thing when I testified. I don't know what he meant by the right thing. He didn't explain. He said he would make me a present. He said I must testify that I didn't take it up for him, and he didn't make any bargain with anybody."

She went on to say that at that time he abused her shamefully, and added:

"The reason he talked that way was because his attorney discovered I put my name on this paper for Mr. Bennett. That was what the trouble started over."

According to Albright's testimony, he had had trouble with all the witnesses who testified against him, and Mrs. Peterson had tried to get blood money out of him, to hold him up for \$1,000. He said:

"Jennie Peterson went around the kitchen, in the back way, and came to the hall, and says, 'Have you got anybody hid here?' I said, 'What do I want

to hide anybody for?" Then she said that, if I didn't give her \$1,000, she, Frank Whittaker, and Charley Gustafson would swear me to the pen by a preponderance of the evidence."

He testified :

That Carter "fired a rock at him," and that Whittaker was "pretty crooked—dog-gone crooked"; that Whittaker drew a gun on him on April 27, 1910. "As I went to the table to get breakfast, he jumped from behind the door, and stuck the gun in my face. He said, 'Throw up your hands.' I flew upstairs. I didn't have a gun."

He furnished no explanation of the motive or provocation of these melodramatic acts of Peterson, Carter, and Whittaker, and the nature of the incidents described, and the manner in which they are narrated, carry the suggestion that their source is fictional.

We are unable to agree with the court below that Albright's books are inconsistent with Jennie Peterson's statement that he paid all her expenses on the land. The only books which Albright produced in evidence was his timebook. The daybook, which would have shown the nature of his transactions with Jennie Peterson, was not produced, nor was its absence accounted for, further than by Albright's statement: "I haven't got the daybook, and I don't know where it is." The timebook contained entries of the time of various employés of Albright, and charges of money entered against such employés from time to time. There is nothing but Albright's own testimony to show what those charges were for, whether for money paid for wages, or for groceries and goods supplied, or for services. One of the charges against Jennie Peterson is \$110. Albright testified that that was for fences which he built on her homestead at her request. But the entry itself does not show that it may not have been for wages which she earned in his employment, as she was admittedly working for him as bookkeeper in his office during a large part of the time while she was residing upon her homestead. Albright pointed to entries of his timebook showing that Hermann was not working for him from December 6 to December 27, 1901, for the purpose of proving that Hermann was not in his employment while he was building the cabin on the Peterson claim. But in his answer to the bill of complaint Albright alleged that Jennie Peterson established her residence upon the lands aforesaid on or about the month of October, 1901, and in the homestead proof, made by Jennie Peterson in 1905, she deposed that the house was built in October, 1901. In short, the timebook adds neither strength nor corroboration to Albright's testimony.

Nor are we able to agree with the court below that the evidence is not of that high character which is required in order to set aside a patent for fraud. The latest expression of the views of the Supreme Court as to the nature of the evidence which is called for in that class of cases is found in Diamond Coal Co. v. United States, 233 U. S. 236, 34 Sup. Ct. 507, 58 L. Ed. 936, in which the court said:

"The respect due to a patent, the presumption that all preceding steps required by law were duly observed, and the obvious necessity for stability in titles resting upon these official instruments, require that in suits to annul them the government shall bear the burden of proof, and shall sustain it by that class of evidence which commands respect and that amount of it which produces conviction."

We think in the case at bar the government has met the burden of proof by a class of evidence which is entitled to respect and is convincing. The evidence wholly fails to establish the defense that Mrs. Albright was an innocent purchaser for value.

The decree is reversed, and the cause is remanded, with instructions to enter a decree for the appellant.

LEITER et al. v. POINDEXTER.

(Circuit Court of Appeals, Ninth Circuit. February 15, 1915. Rehearing Denied March 18, 1915.)

No. 2335.

1. BILLS AND NOTES ~~150~~—NEGOTIABILITY—CHARACTER OF INSTRUMENT.

A contract entitled "Stockholder's Purchasing Contract," whereby the subscribers purchased a horse, following which agreement to purchase was a promise to pay \$2,800 therefor in installments in the form of a promissory note, was upon its face what it purported to be, a purchasing contract, and not a negotiable promissory note.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 55, 374-379, 405, 406; Dec. Dig. ~~150~~.]

2. APPEAL AND ERROR ~~843~~—REVIEW—MATTERS NOT NECESSARY TO DECISION.

In an action by the transferee of a contract to purchase a horse, containing a promise to pay in the form of a promissory note, where the jury found for defendant on his contentions that the instrument did not contain the promise to pay when signed by him, and that the preliminary recitals of the contract, with the surrounding circumstances, put plaintiff on notice that the instrument was not a negotiable promissory note, but a contract of purchase, it was immaterial whether as a matter of law the instrument was a negotiable note or not, as the jury by its verdict found that it was not such an instrument in fact.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3331-3341; Dec. Dig. ~~843~~.]

In Error to the District Court of the United States for the Central Division of the District of Idaho; F. S. Dietrich, Judge.

Action by J. M. Leiter and another against Thomas S. Poindexter, brought by plaintiffs, as assignees of the A. C. Ruby Company, on a certain written instrument alleged to be a promissory note, executed by defendant and one Henry Stroh, in favor of the A. C. Ruby Company. Judgment for defendant, and plaintiffs bring error. Affirmed.

Forney & Moore, of Moscow, Idaho, and Wilson & Neal, of Portland, Or., for plaintiffs in error.

C. J. Orland, of Moscow, Idaho, and J. T. Brown, of Colfax, Wash., for defendant in error.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

MORROW, Circuit Judge. On February 14, 1911, the defendant in error, Thomas S. Poindexter, together with one Henry Stroh, made,

executed, and delivered to Samuel K. Watson, acting as agent for and on behalf of the A. C. Ruby Company, the following written instrument:

"Stockholder's Purchasing Contract.

"Feb. 14, 1911.

"After a good and satisfactory examination of the Percheron stallion named Ithos, No. 53,347, owned by the A. C. Ruby Company of Portland, Or., and recognizing his value as a means of improving our horse stock, we, the undersigned subscribers, hereby purchase said stallion of the A. C. Ruby Company accordingly, and we hereby authorize the delivery of said horse to any one of the subscribers hereto.

"\$2800.00.

Portland, Oregon, Feb. 14, 1911.

"For value received, I promise to pay to the order of the A. C. Ruby Company the sum of twenty-eight hundred dollars, payable at the Merchants' National Bank, Portland, Oregon, in payments as follows:

"One thousand and $\frac{00}{100}$ dollars, Oct. 1, 1911.

"Nine hundred and $\frac{00}{100}$ dollars, Oct. 1, 1912.

"Nine hundred and $\frac{00}{100}$ dollars, Oct. 1, 1913—

with interest from date at the rate of eight per cent., payable semiannually, and if not so paid, the whole sum of both principal and interest become due and collectible at the option of the holder hereof, and in case suit or action is instituted to collect payment I agree to pay reasonable attorney's fees.

"Thos. S. Poindexter.

"Henry Stroh."

The plaintiffs in error were plaintiffs in the court below in an action commenced on December 16, 1911, on the foregoing instrument, alleging it to be a promissory note. It is further alleged that prior to the 14th day of August, 1911, A. C. Ruby Company mentioned in said instrument as payee, for a valuable consideration sold, assigned, and transferred the said note by indorsement to J. M. Leiter and Floyd J. Campbell, the plaintiffs in said action, and that the said plaintiffs were then the legal owners and holders of said note; that said note had not been paid, nor any part thereof, except the sum of \$400 paid by the defendant, to apply one-third on each of the installments of principal provided for in said note. The defendant in his answer set up three defenses to the cause of action stated in the complaint:

[1] 1. A denial that the written instrument in suit was a negotiable promissory note. In this defense the issue was presented as a question of law, and was considered and determined by the court below in the negative. The offer of the plaintiffs to introduce evidence tending to show that they were bona fide holders of the instrument for value, and that they took it before maturity without notice of any defense thereto, was accordingly held by the court to be immaterial, and the evidence was excluded. The court also refused to instruct the jury that the instrument set out in the complaint was in law a negotiable promissory note. The case has been brought here by the plaintiffs upon that question alone. We concur in the ruling of the court below upon this question. We are of opinion that the instrument upon its face is what it purports to be, a "Stockholder's Purchasing Contract." But, as we view the case, the question was primarily one of fact. In the defendant's answer the two remaining defenses were questions of fact, the determination of either of which determined whether the instrument was in fact a negotiable promissory note.

[2] 2. In the second defense the defendant alleged that the instrument set out in the complaint was not signed by him in the form and with the conditions therein specified; that if the instrument set out in the complaint was in accordance with the original of which it was claimed and alleged to be a copy, and the defendant's signature was attached thereto, then the defendant alleged that such instrument had been altered and changed; that he at no time ever made, executed, signed, or delivered any such instrument to A. C. Ruby Company, or to any other person or persons; that he never signed any instrument whereby he agreed to pay A. C. Ruby Company \$2,800; that he signed no instrument wherein he promised to pay said sum in installments of \$1,000, \$900, and \$900, respectively, as mentioned in the complaint; that there was no promise to pay any sum of money at any time or date, and that as to all such matters the instrument had been altered and changed; that the defendant never at any time made, executed, or signed such instrument, and never agreed to make, execute, or sign such instrument, or any instrument for the payment of money in any amount to A. C. Ruby Company.

3. The third defense was the alleged failure of consideration upon the breach of a written warranty upon the part of the plaintiffs' assignor with respect to the character of the horse alleged to have been sold to the defendant. It appears that on February 14, 1911, the date of the instrument in suit, the A. C. Ruby Company executed and delivered to the defendant and another, mentioned as purchasers of the horse, and as part of the same transaction, a written guaranty concerning certain qualities of the horse mentioned in the "Stockholder's Purchasing Contract," and it was provided that in case the horse did not have these guaranteed qualities the A. C. Ruby Company would furnish another horse at the same price with the same guaranteed qualities. The defendant alleged in his answer that the horse did not have the qualities specified in the guaranty, and the horse was returned to A. C. Ruby Company without cost. In other words, the defendant alleged a breach of warranty on the part of A. C. Ruby Company, and a failure of consideration for the purchasing contract. This was no defense to the action upon the instrument as a promissory note in the hands of a purchaser for value, before maturity, without notice; but the plaintiffs raised no objection to the answer on that account, nor did they object to the testimony offered in support of this defense, nor did they object to the instructions of the court submitting this defense to the jury.

The jury returned a general verdict in favor of the defendant, and upon that verdict a judgment was entered in favor of the defendant. It is from that judgment that the present writ of error is prosecuted.

4. With respect to the second defense, the verdict was in effect a determination by the jury upon the question of fact that the plaintiff had no cause of action against the defendant upon the instrument as set out in the complaint. With respect to the third defense, the verdict was in effect a determination by the jury that the plaintiffs had no cause of action against the defendant upon the instrument as a purchasing contract. The evidence as it appears in the record was

sufficient to support a verdict upon either of these questions. In submitting the first question to the jury, the court said:

"It is unimportant to you whether this instrument is to be called a promissory note or simply a contract. In other words, it makes no difference whether in law it is to be deemed a promissory note or a contract. In either case, the defendant is bound if he signed it, and if the consideration therefor has not failed, as I shall explain to you in the course of my instructions. * * * There are in reality two primary questions, and this is the first question: I want to make it clear to you and as simple as possible. The first question is: Was this instrument (called 'Stockholder's Purchasing Contract'), in the form in which it now appears when Mr. Poindexter signed his name to it? He admits here upon the stand that this is his signature. However, his first defense is that when he signed his name there the instrument was practically blank. In other words, there was a printed form, but the written matter was not then entered, and that therefore it must have been filled out later by some other person, probably the holder. I say, this in his defense. The testimony, as you will observe, is conflicting upon that question. One or two of the witnesses say the instrument was a blank, and others say it was filled out in the form in which it now appears. There are some circumstances tending to corroborate the plaintiffs, and some the defendant; and it is for you, gentlemen, as best you may, to carefully canvass all the testimony and try to reach a conclusion upon which side the truth lies. If you find with the defendant, that this instrument was a blank, your verdict should be for the defendant, because he would not be bound by the action of any one in later filling in the amount of the note. If, upon the other hand, you find he did sign this in its present form, then he is, upon the face of the instrument, bound by it, and should be required to pay it, unless you find in his favor upon the other matter, which I am about to call to your attention."

In view of the general verdict upon this instruction, it must be held that the jury found as a fact that the defendant did not sign the instrument with its conditions of a promise to pay. This being so, it is clearly no longer material to determine whether the instrument, with the conditions in it, is or is not a negotiable promissory note.

5. The evidence supporting the third defense was also submitted to the jury with appropriate instructions, to which no objection was taken. It is not necessary to reproduce those instructions here, but they involved questions of fact concerning the guaranty, tending to show that the preliminary recitals in the "Stockholder's Purchasing Contract" in suit were sufficient, with the surrounding circumstances, to place the plaintiffs on notice that it was not a negotiable promissory note, but a contract of purchase; and the verdict of the jury must be held to have established that fact. This being so, we must say with respect to this defense, as we said with respect to the second defense, it is no longer material to determine as a matter of law whether the instrument set out in the complaint is or is not a negotiable promissory note. It has been found by a verdict of the jury that it was not such an instrument in fact.

The judgment of the court below is affirmed.

STOCKGROWERS' STATE BANK OF MOUNTAIN HOME et al. v. CORKER.

(Circuit Court of Appeals, Ninth Circuit. February 8, 1915.)

No. 2368.

1. BANKRUPTCY ~~166~~—PREFERENCES—NOTICE THAT PREFERENCE WILL BE EFFECTED.

Where at the time, within four months before bankruptcy, the F. Bank, to which the bankrupt was indebted, induced the S. Bank to make a loan secured by a chattel mortgage, with the proceeds of which the F. Bank was paid, the bankrupt was insolvent and had other outstanding debts of a large amount, the cashier of the F. Bank had directed the attention of the directors to unpaid drafts against the bankrupt, and he then considered the bankrupt's account unsatisfactory, because accrued interest was not forthcoming as demanded, the F. Bank had reasonable cause to believe that a preference would be effected.

[Ed. Note.—For other cases, see *Bankruptcy*, Cent. Dig. §§ 250–253, 255–258; Dec. Dig. ~~166~~.]

2. BANKRUPTCY ~~161~~—PREFERENCES—CHATTEL MORTGAGE.

A chattel mortgage on a stock of merchandise, given by a bankrupt within four months before bankruptcy, was not valid for the amount of a prior mortgage given more than two years before, where in the meantime the merchandise was being disposed of daily in the ordinary course of business, and replenished by other goods from time to time, without any provision being made for the application of the proceeds of sales to the mortgage indebtedness, and it did not appear that any of the goods originally mortgaged remained in stock at the time of the subsequent mortgage, as it is the rule in Idaho that such a mortgage is void as against creditors and other interested parties, though good as between the mortgagor and mortgagee as to all property not disposed of.

[Ed. Note.—For other cases, see *Bankruptcy*, Cent. Dig. §§ 261–263; Dec. Dig. ~~161~~.]

Appeal from the District Court of the United States for the Southern Division of the District of Idaho; Frank S. Dietrich, Judge.

Action by Charles E. Corker, trustee of Thomas Trathen, bankrupt, against the Stockgrowers' State Bank of Mountain Home and another. Judgment for plaintiff, and defendants appeal. Affirmed.

In the town of Mountain Home, Idaho, there were two furniture stores and two banks. One furniture store was conducted by the Thompson Furniture Company, and the other by one Trathen. Trathen owed the First National Bank on two notes, one for \$1,700, and one for \$500. The Thompson Furniture Company owed the Stockgrowers' State Bank an unsecured note for \$3,400 and interest, together with overdrafts. Chatten, president of the First National Bank, was a director also in the Stockgrowers' Bank; Montgomery, assistant cashier of the First National Bank, was a director in the Stockgrowers' Bank; and Green was the attorney for both. Wolfe, another attorney, held assignments from certain creditors of Trathen, amounting to something over \$800, and he was pressing these claims for collection. Trathen, in order to satisfy these demands, went to the First National Bank and applied for an additional loan. The matter was discussed with the officers and directors of the bank. The cashier of that bank considered the Trathen account unsatisfactory, because Trathen had been slow in paying interest. He investigated Trathen's assets, and advised his board of directors not to make the loan. The directors at first decided to make the loan, but thereafter, after interviewing Trathen, the additional loan was declined. Those members of the board of directors of the First National Bank who were favorable to making the loan to Trathen then went to the Stockgrowers' Bank and induced that

bank to loan Trathen the money he needed to take up his debt to the First National Bank, as well as to pay Wolfe's clients. Trathen was notified that his application to the First National Bank had been denied, but that the Stockgrowers' Bank would furnish him the necessary money. He made no application to the Stockgrowers' Bank for a loan. On July 13, 1911, a note and chattel mortgage on Trathen's stock in the furniture store to the Stockgrowers' Bank were prepared by Green at the instance of that bank, and were executed by Trathen. About the same time the Stockgrowers' Bank called its loan to the Thompson Furniture Company, and that company paid the Stockgrowers' Bank through a loan secured from the First National. The outcome of the transaction was that the Stockgrowers' Bank paid the First National \$2,294.35, and agreed to pay Wolfe \$853.49, and it received from the First National Bank \$3,606.69 on the debt owing from the Thompson Furniture Company. The Stockgrowers' Bank, having ascertained that the property on which it had taken its mortgage was not entirely satisfactory, refused to advance the money to pay Wolfe, and thereafter that bank began foreclosure proceedings, and on October 2, 1911, the sheriff sold to it the mortgaged property on the foreclosure for \$2,465.18. On October 23, 1911, Trathen was adjudged a bankrupt, and thereafter the trustee in bankruptcy demanded of the Stockgrowers' Bank the possession of the goods obtained on the foreclosure. On August 8, 1913, the trustee brought the present suit against the two banks to recover, for the benefit of creditors of the bankrupt estate, the possession of the stock of furniture and notes and accounts of Trathen which had been mortgaged to the Stockgrowers' Bank. Upon the issues and the evidence, the court below held that the chattel mortgage and the foreclosure thereof created a fraudulent preference in favor of the First National Bank, and ordered the defendants to redeliver the property to the trustee within 20 days from the date of the decree, and in default thereof that judgment be entered against the defendants in the sum of \$2,465.18, which was found to be the value of the property.

E. M. Wolfe, of Twin Falls, Idaho, and Wyman & Wyman, of Boise, Idaho, for appellants.

Harry S. Kessler, of Boise, Idaho, and W. C. Howie, of Mountain Home, Idaho, for appellee.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

GILBERT, Circuit Judge (after stating the facts as above). [1] The appellants contend that the court below erred in decreeing that the mortgage to the Stockgrowers' Bank was a fraudulent preference. We find no ground for disturbing the conclusion of the court below that the bankrupt was insolvent at the time when the mortgage was made, that the effect of the mortgage was to enable the First National Bank, a creditor of the bankrupt, to obtain a greater percentage on its debt than any other creditor of the same class, and that at the time of taking the mortgage the defendants had reasonable cause to believe that the enforcement thereof would effect a preference within the meaning of the Bankruptcy Act. The record shows that, in addition to the debt which was at that time owing to the First National Bank and the claims which were represented by Wolfe, Trathen had outstanding debts of a large amount, and that the cashier of the First National Bank had directed the attention of his directors to the fact that there were unpaid drafts against Trathen, and that he testified that he considered the Trathen account unsatisfactory, because he had made demand for accrued interest, and it was not forthcoming. In Loveland on Bankruptcy, § 508, the law is thus stated:

"Constructive notice is sufficient, upon the ground that, when a party is about to perform an act by which he has reason to believe that the rights of a third party may be affected, an inquiry as to the facts is a moral duty and diligence, and an act of justice. Whatever fairly puts a party upon inquiry is sufficient notice where the means of knowledge are at hand, and if the party under such circumstances omits to inquire and proceeds to receive the transfer or conveyance, he does so at his peril, as he is chargeable of knowledge and of all the facts, which by a proper inquiry he might have ascertained."

Austin testified:

"I imagine I had investigated his assets, and knew practically what they consisted of. I presume I advised the board of directors as to what his property consisted of, though I cannot say positively."

[2] The principal contention of the appellants is that, notwithstanding the circumstances under which the mortgage was given to the Stockgrowers' Bank, it was good to the amount of \$1,700; that being the amount for which, on April 12, 1909, Trathen had executed his mortgage on the same property to Evans and Owens to secure them as indorsers on his note for \$1,700 to the bank, and which mortgage was transferred to the First National Bank a month prior to the execution of the mortgage to the Stockgrowers' Bank. But the mortgage to Evans and Owens covered Trathen's stock of merchandise as it was in April, 1909. During the 2 years and 3 months that elapsed between that date and the date of the mortgage to the Stockgrowers' Bank, the stock of merchandise was being disposed of daily, in the ordinary course of business, and was replenished by other goods from time to time. The appellants introduced no evidence whatever to show that any of the goods originally mortgaged to Evans and Owens remained in stock at the time of the execution of the mortgage to the Stockgrowers' Bank.

In *Ryan v. Rogers*, 14 Idaho, 309, 94 Pac. 427, it was held that where the mortgagor of a stock of merchandise, constituting his stock in trade, remains in possession of the chattels mortgaged, and with the knowledge and consent of the mortgagee continues to sell and dispose of the same without applying the proceeds of the sales to the reduction of the mortgage debt, the mortgage is thereby invalidated as against creditors and other interested third parties, although such a mortgage would be good as between the mortgagor and the mortgagee as to all property not so disposed of, and also held that if the mortgagee took possession of the mortgaged property prior to the assertion of right or acquisition of claim against the property by a creditor's attachment or execution, or other lien, the mortgagee will be protected to the extent of his claim. In the case at bar the mortgage made no provision for the application of the proceeds of the sales to the mortgage indebtedness, and possession of that merchandise was never at any time taken by the mortgagees or by the First National Bank. It follows that mortgage did not create a lien superior to the rights of the bankrupt's creditors. The recent decision of the Supreme Court of Idaho in *Cauthorn v. Burley State Bank*, 144 Pac. 1108, is not inconsistent with this construction of the law of the state.

Appellants suggest that, if we take the view that the First National Bank entered into an arrangement with the Stockgrowers' Bank

whereby the latter made the loan, but really for the other bank, the latter would not have changed its position throughout the transaction, since its new mortgage would be but a renewal of the old. But even in that view the last mortgage would still be affected by the infirmity of the first mortgage, since it could cover only the property originally mortgaged, and, as we have pointed out, there is no evidence to show that at the time when the last mortgage was taken any of the stock of merchandise included in the first mortgage remained in the possession of the mortgagor.

The decree is affirmed.

TACOMA RY. & POWER CO. v. REMMEN.

(Circuit Court of Appeals, Ninth Circuit. February 15, 1915.)

No. 2424.

1. STREET RAILROADS **117**—ACTIONS FOR INJURIES—QUESTIONS FOR JURY.

In an action for injuries to a person struck by a street car, the testimony of two passengers and a person on the street that the motorman was looking back into the car as the car approached plaintiff made a question for the jury as to defendant's negligence.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 239-257; Dec. Dig. **117**.]

2. STREET RAILROADS **98**—LIABILITY FOR INJURIES—CONTRIBUTORY NEGLIGENCE.

The law imposes upon one attempting to cross a street car track the duty of vigilance and care.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 204-208; Dec. Dig. **98**.]

3. STREET RAILROADS **117**—ACTIONS FOR INJURIES—QUESTIONS FOR JURY.

In an action for injuries to a person struck by a north-bound car on a single-track street railway, where there was evidence that a car was approaching from the north, that plaintiff had seen a light leading him to believe that the north-bound car had turned onto a switch, and that he heard a whistle which he took to be a signal to it to stay on the switch for the south-bound car to pass, there was such a doubt as to his contributory negligence as justified the court in submitting that question to the jury, though he at no time looked towards the south for an approaching car.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 239-257; Dec. Dig. **117**.]

4. STREET RAILROADS **98**—LIABILITY FOR INJURIES—CONTRIBUTORY NEGLIGENCE.

A person crossing street car tracks had a right to assume that the street car company would exercise ordinary care in managing its road and operating its cars, and his failure to anticipate negligence on its part was not necessarily negligence.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 204-208; Dec. Dig. **98**.]

5. TRIAL **252**—ACTIONS FOR INJURIES—INSTRUCTIONS—CONFORMITY TO EVIDENCE.

In an action for injuries to a person struck by a north-bound car on a single-track street railway, where the evidence tended to show that he took no thought of a car coming from the south, but only of one approaching from the north, and that he assumed that two cars could not

be running at the same time in opposite directions, though he also testified that about the time he was on the track he saw a street car, and thought he could make it, and tried to jump, an instruction that if plaintiff thought he had time to cross the track before the car would reach him, and did not have sufficient time so to do, it was an error in judgment on his part, and he could not recover, was properly refused; there being nothing to indicate that he made any mistake in judgment as to his time to cross ahead of a north-bound car.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 505, 596-612; Dec. Dig. ☞252.]

Ross, Circuit Judge, dissenting.

In Error to the District Court of the United States for the Southern Division of the Western District of Washington; Edward E. Cushman, Judge.

Action by Elling Remmen against the Tacoma Railway & Power Company. Judgment for plaintiff, and defendant brings error. Affirmed.

The Tacoma Railway & Power Company, the defendant in the court below, owned and operated a street railway on Yakima avenue in the city of Tacoma. Between Fifty-Sixth and Sixty-Fifth streets the road was a single track. At the juncture of the avenue with each of those streets there was a switch. The plaintiff was walking south on Yakima avenue, on the west side thereof, on an evening in December when it was quite dark. He testified that when he crossed Sixty-First street he saw a light ahead of him and saw it swing to the left, and that he judged it to be a north-bound car going onto the switch at Sixty-Fifth street; that he went a little farther, and a car came along and passed him, going south; that a little after that he heard a blast of a whistle to the south, and took it to be a signal given by the car which had passed him to the car which stood on the switch at Sixty-Fifth street to direct the latter to remain there, because another car was coming south behind the signaling car; that when he heard the whistle he had gone about 150 feet from Sixty-First street; that he proceeded southward on the sidewalk until he reached a point about 300 feet south of Sixty-First street, where the sidewalk abruptly ended, being obstructed by a fence and an inclosure which extended across the sidewalk and about 12 feet into the street; that within the inclosure there were trees which, together with the fence, obstructed his view of the track south of that point; that he started to walk across the street to the east side, then thought he heard a car coming from the north, and that he kept on walking and looking north to see if he could see the headlight of a car, and that he thought he saw one, and other lights, but that he did not see anything so close to him as to involve danger, and to use his own words: "So I straightened up again, and about that time I was on the street car track, and as I glanced ahead I saw a very short distance from me a street car, and I thought I could make it, and I tried to jump at the same time she struck me." The car which struck the plaintiff was coming from the south, and he testified that at no time from the time he went out into the street did he look to see whether a car was coming from that direction.

John A. Shackleford and F. D. Oaklay, both of Tacoma, Wash., for plaintiff in error.

J. F. Fitch, B. F. Jacobs, and J. M. Arntson, all of Tacoma, Wash., for defendant in error.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

GILBERT, Circuit Judge (after stating the facts as above). [1] Error is assigned to the denial of the motion of the defendant for a directed verdict in its favor, which motion was based upon the grounds,

first, that there was no proof of the defendant's negligence; and, second, that the plaintiff was guilty of contributory negligence. So far as the first ground of the motion is concerned, we find in the record ample evidence to go to the jury tending to show that the defendant was negligent. There was the testimony of two passengers upon the car which struck the plaintiff that at the time when the car was approaching the point where the plaintiff attempted to cross the track, a point well lighted up by an electric light near by, the motorman of the car which struck him was not looking ahead, but had turned and was looking into the car; and that he had continued so to look back into the car all the way from Sixty-Fourth street to the place of the accident, a distance of 650 feet. Similar evidence was given by a witness who stood on the street opposite the point where the accident occurred.

[2, 3] A more serious question is whether or not the plaintiff was in law guilty of contributory negligence. The law imposes upon one who attempts to cross a street car track the duty of vigilance and care; and in this case the plaintiff, upon his own admission, crossed the track at a point which was not a usual crossing place and looked only in one direction for an approaching car. His action in so doing, his omission to look at any time to the south, would doubtless constitute contributory negligence in law, were it not for the fact that the defendant, by its management of its cars, gave him reason to believe that a car could not be approaching from the south. His own testimony, and the testimony of one of his witnesses, indicates that at the time when he crossed the track a car going south had left the switch at Fifty-Sixth street and was coming south toward the point where the plaintiff was. We think there is ground for saying that he had the right to assume that the defendant would not be running another car north on the same single track toward a head-on collision with the car which he saw. That circumstance was sufficient, we think, to create a doubt upon the question of the plaintiff's contributory negligence, and to justify the court in submitting it to the jury. That there was a car coming south from Fifty-Sixth street is not contradicted by the defendant, nor does the defendant show that the plaintiff incorrectly interpreted the blast of the whistle which he heard.

[4] The plaintiff had the right to assume that the defendant would exercise ordinary care in managing its road and operating its cars. Kerr v. Boston Elevated Railway, 188 Mass. 434, 74 N. E. 669; Deitring v. St. Louis Transit Co., 109 Mo. App. 524, 85 S. W. 140; Frank J. Lennon Co. v. New York Ry. Co., 108 N. Y. Supp. 995. And his failure to anticipate negligence on the part of the defendant was not necessarily negligence on his part. New York Lubricating Oil Co. v. Pusey, 211 Fed. 622, 627, 129 C. C. A. 88; Strauchon v. Met. St. Ry. Co., 232 Mo. 587, 135 S. W. 14. And so, if the defendant threw the plaintiff off his guard or placed him in peril, the latter's conduct is not necessarily contributory negligence. In re Estate of Kern, 141 Iowa, 620, 118 N. W. 451; Tacoma Ry. & Power Co. v. Hays, 110 Fed. 496, 49 C. C. A. 115; Seattle Electric Co. v. Hovden, 190 Fed. 7, 111 C. C. A. 191.

[5] In view of the foregoing consideration, it was not error to deny the instruction, requested by the defendant, that if the plaintiff failed to look and listen, or take any reasonable precaution to ascertain whether a car was coming from the south, his failure to do so would be negligence, or the further requested instruction that, if the plaintiff thought he had time to cross the track before the car would reach him, and did not have sufficient time so to do, then it was an error in judgment on his part, and he could not recover. There was, as we have seen, no evidence to indicate that the plaintiff made a mistake in judgment as to his time to cross ahead of a car approaching from the south, or that he exercised any judgment as to danger from that direction. The evidence is that he took no thought of a car coming from the south, but only of the car which was approaching in the opposite direction, and that he assumed that the defendant could not be running two cars at the same time on a single track in opposite directions. Under all the circumstances, we think the court properly submitted to the jury the question of the plaintiff's contributory negligence.

We find no error. The judgment is affirmed.

ROSS, Circuit Judge (dissenting). I am unable to agree to the judgment in this case. In my opinion the plaintiff's own testimony shows such contributory negligence on his part as to preclude a recovery by him. I do not think it can be properly said (as is done in the opinion) that the defendant company by its management of its cars gave the plaintiff to believe that a car could not be approaching from the direction the car that inflicted the injury actually did come (the south), nor that the plaintiff had any right to assume that no car would be coming from that direction. Omitting immaterial matter, his testimony is as follows:

"On the 7th day of December, 1912, I left my home at about half past 1 o'clock and went downtown. I had 65 cents in money and paid 5 cents for car fare; bought a glass of beer, and then I bought 50 cents' worth of alcohol, and then another glass of beer, at about 5 o'clock p. m., with my last nickel. I then started to walk home, and was run down by a street car. * * * About the time I crossed Sixty-First street I seen a light that seemed like it was swinging on to the left—striking to the left. I judged it to be on the Alki switch. They call it Sixty-Fifth street switch on Yakima avenue. I thought the light was a car coming downtown, going onto the switch. I was very close to the crossing, or on it, when I saw the light. I got a little further, and a car came along at a good speed and passed me going from town, the same direction I was going. I might have been almost in the center of that block. Not any more. Just a little after she passed me I was about in the center of the block. I heard a blast of the whistle, because I took notice of it. I thought that was a car that was coming behind, a tripper, as I knew by the time of the night it was, and thought it was a signal to the car that swung in first onto the switch for her to stop and wait until that tripper came up. When I heard the whistle I was halfway between the fence and Sixty-First street. * * * I started to walk across the street to the left, as I could not go further on the sidewalk, and there was an orchard and the fence in front of me. As I started to cross the street I thought I heard something. I was satisfied that I heard a car coming from the direction of town, going south. At that time I was off the end of the sidewalk, out in the street. I kept on walking, and looked around to see if I could see the head light of the car. I thought I seen the headlight, and also other lights; but I tried to get my eyes trained on it, fastened upon the headlight of the street car, and I did not see anything so close to me that I thought there was any

danger, and so I straightened up again and about that time I was on the street car track, and as I glanced ahead I saw a very short distance from me a street car, and I thought I could make it, and I tried to jump like this, and at the same time she struck me, and she rolled me over, and I landed on my arms underneath. I looked southward all the time I was walking on the sidewalk, and saw no street car up to the time I started to turn out across the street. There was a street light at the place I turned to go across, and a path at that point. * * * When I looked towards the north, thinking I heard a street car, I was between the sidewalk and the end of the fence; started off the sidewalk. I was walking across over to * * * aiming to get to that sidewalk over there on the other side. I do not remember anything further until two policemen picked me up in the car at the Interurban Depot. * * * It must be $4\frac{1}{2}$ miles from where I left Fifteenth street to the place where I was injured. It is a block from Sixty-First street to the fence. As I got to Sixty-First street I thought I saw a swinging light on the switch. I did not see any car, but the light must have been from the car. I did not see a car at any time coming from the south, until she was as close as you are to me. My view was obstructed by the orchard and the fence. Q. Did you, at any time from the time you went out back of that fence out into the street, look to see whether a car was coming from that direction, or not? A. No, sir; I looked the other way, as I thought that I heard a car coming up the other way. Q. Where were you when you looked for the car coming the other way? A. I was leaving the sidewalk to go out into the street. Q. You were leaving this cement sidewalk? A. The end of the cement sidewalk; yes, sir. Then I looked down towards Tacoma and thought I saw a headlight. I tried to be sure of it, and kept on walking, and then turned around up the other way, as I thought that car was not close enough to hurt me anyhow, and then I got my eye on this other car. Q. When did you hear the blast of the whistle? A. Probably one-half way between Sixty-First street and the fence. Q. Where did that come from? A. It sounded from the south, Alki switch. Q. You heard the blast of a whistle halfway between Sixty-First street and the fence? A. Just about. Q. Then you knew the car was coming? A. I thought the car was going to stay there on account of another car coming up. Q. You knew what the blast of the whistle of a street car means? A. I thought it meant to stop. Q. Did you ever hear a street car give a whistle when it was going to stop? A. For another car behind it. Q. Why did you look towards the city when you heard the whistle at Alki switch? A. I thought there was a tripper behind the one coming on south. I thought the car was coming and was going to stay there on account of another car coming up. I thought the whistle meant to stop. I looked towards the city when I heard the whistle at Alki switch, because I thought there was a tripper behind the one coming on south. Q. You did not pay any attention at all to the whistle? A. I did, sir. Q. What did you do? A. I looked for the car coming. Q. Did you look in the opposite direction? A. I did, sir, because I thought this meant for the car coming from the opposite direction. Q. What kind of a whistle? A. Just one short blast. I think the edge of the fence is 12 feet from the street car track. Q. Where were you when you were hit by the street car? A. I must have been between the two tracks, and when the— I seen the car, and made a jump, and got just about to the east track there. When I first saw the street car that struck me, it was 10 feet away, and I was about the middle of the car track. I was struck right opposite this fence. The right side of my body was struck by the car. I could not say it was the side, or end, or what part of the car struck me. I did not know anything about the fender of the car. I did not see any headlight on the car. After I left Thirty-Eighth street it was raining a little drizzle."

When the witness spoke of "the two tracks," he probably meant the two *rails*, for it would seem from the record that there was but a single track at the place he crossed. But it distinctly appears from his testimony, as I understand it, that from the time he left the sidewalk and entered the street to cross the track he did not look south until

the car coming from that direction was almost upon him, when he took the chances of crossing ahead of it—the witness saying:

"I did not see anything so close to me that I thought there was any danger, and so I straightened up again, and about that time I was on the street car track, and as I glanced ahead I saw a very short distance from me a street car, and I thought I could make it, and I tried to jump like this, and at the same time she struck me, and she rolled me over, and I landed on my arms underneath."

RAILWAY MAIL ASS'N v. HARRINGTON.

(Circuit Court of Appeals, Second Circuit. January 12, 1915.)

No. 121.

1. INSURANCE ☞668—ACTION ON ACCIDENT POLICY—QUESTIONS FOR JURY.

Conflicting evidence considered, in an action on an accident policy to recover for the death of the insured, and *held* to justify the submission of the case to the jury.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1556, 1732-1770; Dec. Dig. ☞668.]

2. INSURANCE ☞659—ACTION ON ACCIDENT POLICY—EVIDENCE OF CAUSE OF DEATH.

A railway mail clerk, on leaving his car at the end of a run, gave indications of a severe pain in the abdomen. A few days later he became incapacitated, was taken to a hospital, and operated upon, but died from peritonitis. There was a yellow spot of some size of recent origin on the skin over the appendix, and the autopsy developed that there were adhesions beneath such spot. In an action on an accident policy to recover for his death, it was shown that he was a young man and had previously been in good health. There was medical testimony that the appendix was split, and not perforated, which indicated that the injury was caused by violent external means, causing appendicitis, naturally followed by the peritonitis. Deceased was alone in his car during the run. *Held* that, in the absence of admissible direct evidence, it was competent for plaintiff to show, as justifying an inference as to the manner of injury, that there was an iron rack in the car, the corner of which was at about the same height above the floor as the discolored spot would be when deceased was standing at the rack, and that the road over which his route ran was very rough.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1691-1693; Dec. Dig. ☞659.]

3. INSURANCE ☞659—ACTION ON ACCIDENT POLICY—EVIDENCE.

In an action on an accident policy to recover for the death of the insured, the exclusion of a certain part of the attending physician's statement, filed with the notice of death, which was offered in evidence by defendant, without including other questions and answers contained therein, *held* not error.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1691-1693; Dec. Dig. ☞659.]

In Error to the District Court of the United States for the Western District of New York.

This cause comes here upon writ of error to review a judgment of the District Court, Western District of New York, in favor of defendant in error, who was plaintiff below. The action was brought to recover upon an accident insurance policy issued to plaintiff's husband,

providing for the payment to her of \$4,000 if he should receive bodily injuries through external, violent, and accidental means, and death should result from said injuries alone within 120 days.

F. A. Robbins, of Rochester, N. Y., for plaintiff in error.

J. W. Hollis, of Hornell, N. Y., and H. A. Heminway, of Corning, N. Y., for the defendant in error.

Before LACOMBE, WARD, and ROGERS, Circuit Judges.

LACOMBE, Circuit Judge. [1] The assignment of error to which the argument for defendant was mainly directed is the sending of the cause to the jury against his objection.

There was uncontradicted testimony that the deceased on July 26, 1911, upon returning to the hotel at Tupper Lake where he resided from the mail car in which he worked, made an exclamation of pain, and placed his hand on his abdomen; immediately thereafter, contrary to his usual custom, he went to bed; that he continued to discharge his duties on the mail car until August 1st, acting as if ill or in pain; that on the evening of that day he went to bed, remained there until August 11th, when he was removed to a hospital, where he was operated upon, and died August 13th of general peritonitis. The theory of plaintiff was that Harrington met his death as a result of septic peritonitis, following traumatic appendicitis, caused by external violence.

There was testimony that prior to July 26th he was a healthy, vigorous man, 27 years of age; that subsequent to July 26th a yellowish spot was seen on his abdomen about the size of a half dollar; that as late as May 30th his abdomen was free from any mark or scar; that the mail car in which he worked contained an iron rack, the corner of which was about the same level above the floor that this spot on deceased's abdomen would be if he were standing by the rack; that the roadbed was unusually rough, and that the car sometimes rocked so that letters were thrown out of the boxes; that at the autopsy there were found under the spot, which was located at McBurney's point directly over the veriform appendix, adhesions, which in the opinion of some of the medical witnesses indicated that the spot had been caused by some external violent means, such as a blow; that the appendix was found to be split, not perforated, which also in the opinion of some of the medical witnesses indicated that the wound to the appendix had been caused by external violence; that this rupture of the appendix produced appendicitis, naturally followed by peritonitis, of which Harrington died. Some of the medical witnesses also testified that the appearance of the spot indicated that it was of recent origin.

As to some of these propositions there is conflicting testimony—for example, some of the medical witnesses state that the appendix was perforated, not split; some of them were of the opinion that the appearance of the spot indicated that it was the scar of an old wound. But if the jury accepted the statements enumerated above, and their verdict shows that they did, they were warranted in drawing the conclusion that, in the language of the policy, deceased's bodily injuries were received "through external, violent, and accidental means," that the accident resulted "in producing visible external marks of injury

or violence suffered by the body" of deceased, and that death resulted, within the time specified in the contract, "wholly from the injury."

Defendant relies on our decision in *National Association of Railway Clerks v. Scott*, 155 Fed. 92, 83 C. C. A. 652, which was an action on a similar policy, in which plaintiff recovered a verdict, which this court set aside on the ground that plaintiff had not sustained the burden of proving that death was caused by external, violent, and accidental means, that deceased had suffered an injury, and that such injury alone caused death. The facts in that case are so different from the facts in this case that the decision is not applicable. In the Scott Case deceased had been for years in ill health, suffering from albuminuria, congestion of the liver, palpitation of the heart, and nephritis. The death certificate gave as the chief cause of death nephritis, and as contributing cause valvular heart trouble. The only evidence of a blow was a bruise on the shin. There was no contention that a blow received there would produce any of these troubles; no such causal connection was suggested as there is testified to here between a blow immediately above the appendix and a rupture of the latter. The theory in the Scott Case was that because of the bruise on the shin it might be inferred that at the time it was received he had had a heavy fall, causing general shock, from which, again, it might be inferred that the other ailments ensued.

We found, therefore, that there was a fatal hiatus between the fact that death occurred and the conclusion that it was caused alone by external injury. In the case at bar, if the jury believed the witnesses on whom plaintiff relies, they might fairly find a direct connection between the blow that produced the spot and the rupture of appendix, which caused the disease that proved fatal to this man, theretofore in good health.

The jury was fully and carefully instructed. No exception to these instructions which calls for special comment was reserved. The only two covering any part of the charge are substantially to the submission of the cause to the jury. As stated in the brief of plaintiff in error, these exceptions raised in substance the same question that was raised by motions for nonsuit and for direction of verdict.

[2] Error is assigned to the admission of testimony as to the interior arrangement of the mail car, and the roughness of the road—circumstances from which plaintiff argued that the jury might infer that the blow came from Harrington's being thrown against the corner of the rack. There was no direct testimony to any such accident. There is nothing to indicate that on the regular run of this car there was any one in it except the single clerk in charge. If so, no direct testimony was obtainable. Death kept Harrington off the witness stand. Statements which he may have made to others, after he left the car, as to anything which had occurred to him during the day's run, would be too remote for admission on the theory of *res gestæ*. A similar situation arises when a man is found dead at a place where a railroad train has just passed, there being no eyewitness of his death. Circumstantial evidence, if convincing, may establish the proposition that he died because the train struck him. Harrington's first indication that he was suffering pain was given immediately after he left his car on July 26th,

and it seems to us that it was not error to show the condition of things in the car, and its irregular movements on the rough roadbed, as circumstances to be considered by the jury in deciding whether on that day he received an injury through external, violent, and accidental means.

[3] Error is also assigned to the court's refusal to admit in evidence part of a document offered by defendant. The constitution and by-laws of defendant were made a part of the policy. They were put in evidence, but a portion only is printed in the record. No doubt they provided, as all such documents do, for formal written notice and signed statements as a condition precedent to the allowance of any claim. When the attending physician was on the stand, as witness for the plaintiff, counsel for plaintiff called for the physician's statement, made on a blank form of defendant, which had been filed with plaintiff's claim, and had the witness identify it as the blank he had filled up and signed. Thereupon it was marked "No. 3 for identification." Presumably plaintiff's counsel wished to be prepared with available evidence in case some technical objection were raised as to sufficiency of the papers accompanying the claim.

Upon cross-examination the witness again identified the statement and his signature thereto. Thereupon the defendant offered in evidence a portion of the document, "omitting the question and answer, 'What is the precise nature of the injury, its extent, and your diagnosis?'" The answer to this question given in the document reads: "Struck the projecting corner of the iron mail rack while at work in his car. The blow struck squarely in the region of the vermiform appendix. Traumatic appendicitis." The question immediately preceding reads: "What visible signs did you find of an injury caused by external, violent, and accidental means?" The answer to it reads: "Swelling over region of vermitorm appendix." Defendant wanted to get this last answer in evidence, in order to argue from it that the witness' prior testimony as to the presence of the yellow spot should be discredited. But he did not want the answer to the other question, because it gave what the physician had been told was the "history of the case," on which, as well as what he sees, a physician usually bases his diagnosis.

On the margin of Exhibit 3 for identification, above its title, the physician had also written a memorandum purporting to give the names and addresses of persons whom the deceased had told about his injury. This was not responsive to any question in the printed form; it was in no way connected with the "physician's statement"; it was a gratuitous deliverance of the physician. The circumstance that it was written on the margin of the paper which contained the "statement" did not make it a part thereof, any more than it would have been, had it been inscribed on a scrap of paper and pinned to the statement. Had the offer of Exhibit 3 in evidence with this addendum elided been rejected, it would have been error; but no such offer was made. Defendant insisted on eliding the whole of one question and answer, and rejection of the offer by the court was put on the ground that it was not fair to put in the one answer without the other.

Exhibit 3 was not evidence on any issue raised in the cause. It evidenced the fact that on a certain date a "physician's statement" in the form required by the contract had been prepared and signed; but no question was raised as to noncompliance with technical requirements of this sort. It also showed that on the same date the physician had made certain statements—a wholly immaterial circumstance. The only object of the offer was to base an argument on these statements as to the persuasiveness of the physician's testimony on the trial. The testimony tended to show that if the only basis of diagnosis were a swelling at the place indicated, plus other internal symptoms, a correct diagnosis would have been "appendicitis" merely, arising from natural causes, not "traumatic appendicitis," induced by some violent external means. On the trial the witness testified that the disease was "traumatic appendicitis." If the question and answer which defendant wished put in were admitted, and the other question and answer excluded, a plausible argument might be made that this suggestion of "traumatic appendicitis" was an afterthought of the physician, brought forth for the purposes of the trial; that in his signed "statement," made five days after Harrington's death, he had incorporated nothing to indicate either that he then believed the disease to be "traumatic appendicitis" or had any grounds for such belief. To admit the mutilated statement would have been unfair to the witness, because the entire statement did show that at the time he signed it he had diagnosed the case as one of "traumatic appendicitis," basing his diagnosis on the swelling which he saw and the history of the case which he had had from some one—the patient or some one else—indicating the receipt of a recent blow at the exact place over the appendix where the swelling was located. These would be indicia quite sufficient to induce a careful physician to make such a diagnosis.

Under these circumstances we are satisfied that it was not error to refuse the offer in evidence of Exhibit 3 with the particular question and answer stricken out.

Judgment affirmed.

LA CROSSE PLOW CO. v. VAN BRUNT.

(Circuit Court of Appeals, Seventh Circuit. January 5, 1915.)

No. 2111.

PATENTS ~~328~~—SUIT FOR INFRINGEMENT—ACCOUNTING FOR PROFITS.

On an accounting for profits of infringement of the Van Brunt patent, No. 659,881, for improvement in grain drills, by the use of the scraper for cleaning the furrow opener, covered by claim 5, where the evidence supported the findings of the special master and trial court that defendant had so kept its books and conducted its business as to render it impossible to ascertain what portion of the profits from the sale of drills having the infringing device was due to that feature, and that in a certain portion of the territory covered by defendant's sales, owing to the sticky character of the soil, the use of the infringing scraper was the only thing that made the machines marketable, it was not error to award com-

plainant all of the profits made on the infringing machines sold in such territory.

[Ed. Note.—Accounting by infringer for profits, see notes to *Brickill v. Mayor, etc., of City of New York*, 50 C. C. A. 8; *Clark v. Johnson*, 120 C. C. A. 389.]

Appeal from the District Court of the United States for the Western District of Wisconsin; Arthur L. Sanborn, Judge.

Suit in equity by Willard A. Van Brunt against the La Crosse Plow Company. From a final decree (208 Fed. 281), defendant appeals. Affirmed.

The matters before the court on this appeal involve the accounting based upon the decree of the District Court entered in pursuance of the opinion and order of this court in *Van Brunt v. La Crosse Plow Co.*, 168 Fed. 927, 94 C. C. A. 331, wherein the court found patent No. 659,880, for improvement in grain drills, issued October 16, 1900, to be valid and infringed. The particular feature of the grain drill in question found by this court to constitute infringement is that part of the so-called furrow-opening portion of the drill termed the scraper, whereby the convex face of the disk is kept clean and the tendency of dirt and trash to accumulate and interfere with the operation of the drill is counteracted. The scraper is the device of claim 5 of said patent.

The cause was referred to a special master to take and report the accounting. He reported that, notwithstanding the fact that appellant had produced in evidence several other seeding machines which it claimed were proper standards of comparison, from which appellant claims it appeared that it had realized no profit from the use of the infringing scraper, the record disclosed no proper standard of comparison; that a profit of \$17,396.17 had been received by appellant from the sale of seeders employing the infringing scraper; that owing to the sticky character of the soil in the Northwest territory, the use of the infringing scraper was the feature that made appellant's seeding machines marketable in that locality; and that about 60 per cent. of appellant's sales of seeders using the infringing scraper was made in that region, and that the said profit of \$17,396.17 was attributable to the presence of the scraper in suit. The master further found that appellant had, by its method of keeping its books and its manner of conducting its said business, so commingled the proceeds from its sales of seeders as to make it practically impossible for appellee to ascertain what portion of said profits was realized from the sale of the infringing scraper as distinguished from the rest of the seeder; that appellant had not attempted to make any apportionment of the profits, and that unless it were possible to arrive at some apportionment from the evidence appellant would, under the rule laid down in the *Garretson Case*, 111 U. S. 121, 4 Sup. Ct. 291, 28 L. Ed. 371, be liable for the whole amount of the profits realized from the sale of the complete machine; that the furrow opener is a separable part of the seeder; that the parts of the seeding machine sold by appellant other than the scraper belonged to it; that an approximate apportionment of said profits between the scraper and the other parts of the machine might equitably be made upon the basis of the ratio of the relative cost of the two parts, which he ascertained to be that of two to one in favor of appellant, or \$6,607.76 to appellee and \$10,788.41 to appellant, which adjustment the master favorably suggested to the District Court, with the proviso that, if the court did not approve of that method of apportionment, then appellant should be decreed to pay to appellee the whole sum of \$17,396.17 as aforesaid. The District Court approved the master's findings of fact, but disapproved his apportionment of the profits and the method thereof.

From the master's report, and the evidence in support thereof, the court found that other devices were successful in localities where the drilling for planting was comparatively dry, but that the infringing furrow opener captured the Northwest sticky territory, in which region appellant disposed of about 60 per cent. of its infringing product, while the remaining 40 per cent. was sold for use in localities having less sticky soils. From these premises the District Court proceeded to enter a decree holding appellant for the total

profits received by it in the Northwestern territory, or three-fifths of the total profit from the sale of seeders bearing the infringing furrow openers in all localities, being the sum of \$10,437.70, together with interest from the date of the master's report, and costs.

Seventy errors are assigned by appellant, which may be summed up as follows, viz.:

(1) Appellee had not given appellant notice that the device in suit was patented according to law.

(2) That notwithstanding several available standards of comparison were in evidence showing no profits thereover, the court decreed profits and held the standards offered were not proper standards.

(3) The court failed to require appellee to prove what part of the profits arose from the scraper.

(4) The court held that, owing to the failure to keep and show books, it was impossible to determine what proportion of profits was due to the use of the infringing device.

(5) The court erred in holding that appellee is entitled to recover the entire profits in the Northwest territory, in view of the Court of Appeals' exclusion of claims 1, 2, 3, and 4, and the withdrawal of claim 9, of the patent in suit.

(6) The court held that the infringing device was deemed necessary to success in the Northwest territory.

(7) In granting substantial profits, the court was indulging in speculation.

(8) The court overruled appellant's motion to require appellee to apportion the profits, and in holding that the burden of apportionment was on appellant, since appellee made no attempt to apportion profits.

(9) The court awarded the sum of \$10,437.70 to appellee as profits.

Other facts appear in the opinion.

Fred Gerlach and George P. Fisher, both of Chicago, Ill., for appellant.

Border Bowman, of Springfield, Ohio, for appellee.

Before BAKER, SEAMAN, and KOHLSAAT, Circuit Judges.

KOHLSAAT, Circuit Judge (after stating the facts as above). The ultimate question here involved is: With what sum should appellant be charged, if any, as profits growing out of the sale of seeding machines using the infringing scraper? Having ascertained that appellant realized a profit of \$17,396.17 from machines so equipped, as to which finding no error is assigned, it was the duty of the trial court to determine, if possible, from the evidence, what part of that profit, if any, arose from the use of the infringing furrow opener.

Where, as in the present case, the proceeds of the sales of seeders was so hopelessly confused as to make such discovery impossible from appellant's books and business methods and other facts in evidence, appellee was relieved from making any apportionment of profits, and it became obligatory upon the appellant to take up that burden. *Westinghouse Elec. & Mfg. Co. v. Wagner Elec. & Mfg. Co.*, 225 U. S. 604, 32 Sup. Ct. 691, 56 L. Ed. 1222, 41 L. R. A. (N. S.) 653. This appellant undertook to do by offering in evidence certain other furrow opening devices, in order to show that, by the use thereof, appellant derived no profits "over what it would have had in using other means then open to the public, and adequate to enable it to obtain an equally beneficial result"—following the rule laid down in *Tilghman v. Proctor*, 125 U. S. 136, 8 Sup. Ct. 894, 31 L. Ed. 664, *Sessions v. Romadka*, 145 U. S. 29, 12 Sup. Ct. 799, 36 L. Ed. 609, and *Columbia Wire Co. v. Kokomo*, 194 Fed. 108, 114 C. C. A. 186.

We do not deem it necessary to enumerate the various devices produced in evidence by appellant as so-called standards of comparison. Suffice it to say, no one of them disclosed the infringing scraper in suit. Some of them were not open to appellant; others were too broad or too wide or too thick to meet the requirements of seeding in the Northwest territory; some were double disk furrow openers, some single; some had the single disk with cast scraper; and some were in the form of shoe drills or furrow openers. After going carefully into all these, the master found that none of them compared favorably with the infringing scraper, or could be used as a standard of comparison therewith, and concluded with the finding that in the Northwest territory, with its sticky soil, the seeders equipped with the infringing scraper practically supplanted every other seeding machine, and that, in order to get an entrance into the sticky soil territory, it was essential that appellee's device be employed. It is strongly corroborative of this evidence that appellant and, as the evidence shows, many others have copied it, either as infringers or licensees. We find the conclusion of the master well supported by the evidence.

Appellant introduced evidence to show that subsequent to the infringing period it used a noninfringing single disk furrow opener with a broad scraper, which the master found was successful in the Northwest territory for a short time and then suspended. That the infringed scraper lives, and that the broad scraper died, would seem to negative the claim that the latter was adapted to the sticky territory's requirements, even if the former were competent. Thus we are led to the conclusion that it was the infringing scraper that commanded the planting trade in the Northwest, and that without it the seeding trade of appellant would not have resulted profitably to it. We further conclude that, in view of the fact that appellant made it impossible for appellee or the court to apportion the profits as between the infringing scraper and the other parts of said seeding machine, appellee, under the decisions, is entitled to all the profit realized by appellant from the sales of seeding machines carrying said infringing scraper in said Northwest territory. There seems to be no exception to the finding of the District Court and the master that 60 per cent. of appellant's infringing sales were had in said Northwest territory. This method of apportioning the profits seems fair to us. We are therefore of the opinion that the decree of the District Court, in awarding to appellee profits to the amount of \$10,437.70 against appellant, was right upon the evidence.

We do not deem the objection of want of notice well taken. The filing of the bill and service of process was notice, and the accounting period was then begun. *American Caramel Co. v. Thomas Mills & Bros.*, 162 Fed. 147, 89 C. C. A. 171 (3d Cir., C. C. A.).

The decree of the District Court is affirmed.

UNITED STATES v. GREAT NORTHERN RY. CO.

(Circuit Court of Appeals, Seventh Circuit. January 5, 1915.)

No. 2060.

1. PLEADING ~~420~~—ERRORS—WAIVER—RULING AS TO AMENDMENT.

Plaintiff waived its exception to the ruling that an amendment of the complaint was necessary by subsequently making the amendment.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1408-1412; Dec. Dig. ~~420~~.]

2. MASTER AND SERVANT ~~17~~—HOURS OF SERVICE—ACTIONS FOR PENALTIES—PLEADING.

Under the Hours of Service Act (Act March 4, 1907, c. 2939, 34 Stat. 1416 [Comp. St. 1913, § 8678]) § 2, prohibiting carriers from requiring or permitting trainmen to remain on duty for more than 16 consecutive hours, and section 3 (section 8679) providing that the provisions of that act shall not apply in any case of casualty, unavoidable accident, or act of God, nor where the delay was the result of a cause not known to the carrier or its officer or agent in charge of the employé at the time he left a terminal, and which could not have been foreseen, in an action for penalties for violations, the government is not bound in its complaint to negative all possible legal excuses within the proviso of section 3, since, where a statute put an exception or limitation into the definition of a duty, a plaintiff counting on a breach of that duty must by his pleadings and proof negative the exception or limitation; but where a statute gives a general definition of a duty, and subsequently provides that a violator shall not be liable under certain circumstances, plaintiff need only plead and prove the violation of the duty as defined, leaving it to defendant to plead and prove the circumstances saving defendant from liability.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 16; Dec. Dig. ~~17~~.]

3. MASTER AND SERVANT ~~17~~—HOURS OF SERVICE—ACTIONS FOR PENALTIES—NATURE OF REMEDY—“CIVIL ACTION.”

Actions for violations of the Hours of Service Act are “civil actions.”

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 16; Dec. Dig. ~~17~~.]

For other definitions, see Words and Phrases, First and Second Series, Civil Action.]

4. MASTER AND SERVANT ~~13~~—HOURS OF SERVICE—STATUTORY PROVISIONS.

The Hours of Service Act should be liberally construed to accomplish the intended cure.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 14; Dec. Dig. ~~13~~.]

5. MASTER AND SERVANT ~~17~~—HOURS OF SERVICE—ACTIONS FOR PENALTIES—SUFFICIENCY OF EVIDENCE.

In actions for penalties under the Hours of Service Act, if affirmative defenses are pleaded, the proof should bring the case clearly within the letter as well as within the spirit of the proviso of section 3.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 16; Dec. Dig. ~~17~~.]

6. MASTER AND SERVANT ~~13~~—HOURS OF SERVICE—STATUTORY PROVISIONS—“ACT OF GOD”—“UNAVOIDABLE ACCIDENT”—“CASUALTY.”

Within the Hours of Service Act, an “act of God” consists of violence of nature in which no human agency participates by act or omission, an “unavoidable accident” is one occurring while the railroad company and its employés are in the exercise of due care, while a “casualty,” differing from the others and not so broad as to deprive them of meaning and

use, is an occurrence or happening due entirely to an outside human agency; and if, when a train leaves a terminal, the railroad company, through its inspectors, knows or by the exercise of due care might foresee a cause that would be likely to produce an accident and consequent delay, the delay is not excusable; and hence it was error for the court, in an action for penalties, to charge on the theory that a casualty meant any occurrence or happening, whether unavoidable or avoidable by the exercise of due care, and that all delays, except those knowingly and willfully caused by the railroad, were therefore excusable, and to charge that the question of inspection had no bearing on the case.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 14; Dec. Dig. ☞13.]

For other definitions, see Words and Phrases, First and Second Series, Act of God; Casualty; Unavoidable Accident.]

7. MASTER AND SERVANT ☞17—HOURS OF SERVICE—ACTIONS FOR PENALTIES—EVIDENCE.

In an action for penalties under the Hours of Service Act, defended on the ground of unavoidable accidents, consisting of the bursting of air hose and the pulling out of drawbars, the government was entitled to prove, as tending to show a negligent habit of the officers and agents of the railroad company, that, during several months preceding the accidents in question, instances of like trouble were of daily occurrence, though the purpose and effect of such evidence should have been limited by an instruction if requested.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 16; Dec. Dig. ☞17.]

Hours of service of employés, see note to United States v. Houston Belt & Terminal Ry. Co., 125 C. C. A. 485.]

In Error to the District Court of the United States for the Western District of Wisconsin; A. L. Sanborn, Judge.

Action for statutory penalties by the United States against the Great Northern Railway Company. Judgment for defendant, and the United States brings error. Reversed.

This action was brought to recover penalties for ten alleged violations of the Hours of Service Act. 34 Stat. L. 1415.

So far as trainmen are concerned, Congress enacted in section 2 that no common carrier should require or permit any such employé to be or remain on duty for a longer period than 16 consecutive hours, and declared in section 3 that a violator of section 2 should be liable to a penalty of not more than \$500, with a proviso as follows: "That the provisions of this act shall not apply in any case of casualty or unavoidable accident or the act of God; nor where the delay was the result of a cause not known to the carrier or its officer or agent in charge of such employé at the time said employé left a terminal and which could not have been foreseen."

Two train crews of five men each were involved. As the delay in both instances came from substantially identical causes, an outline of the story of one train will suffice.

Defendant is extensively engaged in transporting iron ore from mines near Kelly Lake, Minn., to docks at Allouez, near Superior, Wis., a distance of 100 miles. Rails, cars, and engines are of the heaviest types. From mines to docks the grade is slightly downhill. On the right-hand track of the two mains the loads are brought down, and on the other the empties are returned. So heavy is the traffic that from 100 to 125 loads are taken in one train; and the trains, following each other less than an hour apart day and night, and progressing at an average speed of little over 6 miles an hour, usually consume nearly the whole of the 16 permitted hours in making the run. On June 18, 1912, the crew of train 1981 began service at 7:45 p. m. and remained on duty for more than 20 consecutive hours. When this train

had covered about 70 miles, the seventh train ahead of it pulled out some drawbars and broke into five pieces. The cripple and the six intermediate trains were put in on sidings and the crews were relieved. But no siding ahead was available for train 1981; it could not back up, either on account of its weight or obstructing other down trains; it could not cross over to the other main track without blocking the stream of returning empties; and the men in charge were required or permitted to proceed on the main track to destination.

Delay in the other instance was caused by the bursting of air hose.

Plaintiff's complaint, as originally filed, did not negative the conditions of the proviso. On defendant's motion the court held that such an amendment was necessary. Plaintiff excepted to the ruling, but later made the amendment.

Plaintiff offered, but was not permitted, to prove that between April 1 and June 18, 1912, from 2 to 7, with an average of at least 3, break in twos on defendant's line were caused each day by the pulling out of drawbars or the bursting of hose.

Plaintiff excepted to the following instructions: "Was the breaking of the drawbar in the one case, and the breaking of the hose in the other, a casualty or an accident? Did it happen by chance, unexpectedly? You do not have to find it was unavoidable. Therefore you do not have to find that the company inspected. If the first exception, casualty, were left out, and it said the company shall be excused on account of unavoidable accident, then you might have to find they had done everything they could reasonably to prevent the thing that occurred. * * * The question of inspection is not one bearing on the case. * * * If you find that it was an accident and it caused the delay, even though it was avoidable, the company could not be bound."

Plaintiff tendered, and the court refused to give, the following instruction: "That the burden is upon the defendant to bring itself clearly within the proviso; that is, that the delay was the result of a casualty, unavoidable accident, or act of God, or of a cause which was not known to the carrier at the time the crew left the terminal, and which could not have been foreseen. It cannot be presumed, in the absence of any proof, that the company's equipment was in good condition, and the mere statement that the delay was the result of a pulled out drawbar in one instance and a bursted air hose in another is not, standing alone, sufficient to excuse the defendant."

John A. Aylward, of Madison, Wis., and Roscoe F. Walter, of Washington, D. C., for the United States.

J. A. Murphy, of Superior, Wis., for defendant in error.

Before BAKER, SEAMAN, and MACK, Circuit Judges.

BAKER, Circuit Judge (after stating the facts as above). [1] By subsequently amending its complaint plaintiff waived its exception to the ruling that required the amendment; and if the record were otherwise free from error, we should not take up this question of pleading. But since a new trial must be ordered on account of errors duly preserved for review, we deem it proper to put plaintiff in position to move the trial court to strike out the amendment.

[2] The principle (for the rule is not a mere artificiality) is this: If a statute puts an exception or limitation into the definition of duty, then a plaintiff, counting on a breach of the duty, must plead and prove the negative of the exception or limitation. Example: A statute requires a railroad to maintain fences along its right of way except at highway crossings and within the limits of cities and towns. Plaintiff, damaged by reason of a break in the fence, must plead and prove, in

order to establish a failure in duty, that the break in the fence existed outside of highway crossings and the limits of cities and towns. If, however, a statute gives a general definition of duty and then subsequently provides that a violator shall not be liable under such and such circumstances, plaintiff need plead and prove no more than the violation of the duty as defined, and defendant must plead and prove the circumstances that save him from liability. Example: A railroad fencing statute in the same words as above, which then adds that the statute shall not apply in any case of casualty or unavoidable accident or act of God unless the railroad has failed to use diligence in making repairs after actual or constructive notice of the break. Under such a statute, plaintiff must plead and prove, as before, the negative of the limitation in the definition, but not the negative of all possible legal excuses; if any such exists, it must be pleaded and proven as a defense against the consequences of the violation of the defined duty. As the proviso in the hours of service statute is not an exception or limitation in the definition of duty, but only subsequently affords certain exemptions from liability for violations of the defined duty, the court erred in requiring plaintiff to amend its complaint by negativing all possible legal excuses for the violations that were duly set forth. *Teel v. Fonda*, 4 Johns. (N. Y.) 304; *Hart v. Cleis*, 8 Johns. (N. Y.) 41; *Smith v. U. S.*, Fed. Cas. No. 13,122; *McGear v. Woodruff*, 33 N. J. Law, 213, and cases cited; *Chicago, B. & Q. Rld. v. Carter*, 20 Ill. 391.

[3-5] To protect the lives of employés and of the traveling public against accidents due to loss of efficiency from overwork was the purpose of limiting the hours of continuous service. Actions for violations are civil; and the statute, in view of its purpose, should be liberally construed to accomplish the intended cure. If affirmative defenses are pleaded, the proof should bring the case clearly within the letter as well as within the spirit of the proviso. *U. S. v. Ill. Centr. Rld.* (D. C.) 180 Fed. 630; *U. S. v. Kansas City So. Rld.* (D. C.) 189 Fed. 471; *U. S. v. Denver & R. G. Rld.* (D. C.) 197 Fed. 629; *U. S. v. Kansas City So. Rld.*, 202 Fed. 828, 121 C. C. A. 136; *U. S. v. Great Northern Rld.* (D. C.) 206 Fed. 838; *U. S. v. Mo. Pac. Rld.* (D. C.) 206 Fed. 847; *Great Northern Rld. v. U. S.*, 211 Fed. 309, 127 C. C. A. 595; *U. S. v. Atchison, T. & S. F. Rld.* (D. C.) 212 Fed. 1000.

[6] A consideration of the proviso will furnish a basis for determining the other assignments of error. If the view that was acted upon by the court throughout the trial is correct, namely, that "casualty" means any occurrence or happening, whether unavoidable or avoidable by the exercise of due care on the part of the railroad, and therefore excuses all delays except those knowingly and willfully caused by the railroad, then it seems clear to us that Congress stands convicted of having followed up "casualty" with a series of meaningless and purposeless expressions. But, if the result can fairly be reached, courts must ascribe a meaning and a purpose to every part of a statute. Looking at the proviso as a whole, and with the intent of leaving, if possible, vitality in all its parts, we conceive that Congress said to the railroads: You need not pay penalties for violations in the following instances: Act of God. You are excusable for delay caused by violence of nature

in which no human agency participates by act or omission. For example, a washout due to an unprecedented flood that was not and could not reasonably have been anticipated. Unavoidable accident. You are excusable if, at the time and place of the accident that caused the delay, you, through your employés, were in the exercise of due care. For example, a switchtender falls dead at an open switch and a collision immediately follows without any one's fault. Last clause of the proviso, explanatory of unavoidable accident. But you are not excusable if, at the time a train leaves a terminal, you, through your inspectors, either knew or by the exercise of due care might have foreseen a cause that would be likely to produce an accident and consequent delay. For example, incompetent trainmen or defective or inefficient drawbars or air hose, particularly if you had notice of a succession of accidents due to those causes. Casualty (which must differ from the other defenses and must not be so broad as to deprive them of meaning and use). You are excusable for delay from an occurrence or happening due entirely to an outside human agency. For example, your train is overturned by a train of another railroad at a crossing by reason of the other road's trainmen's disobedience of the interlock signals. And finally, if you cannot establish one of these defenses by a fair preponderance of the evidence, you must pay the penalty for keeping your employés on duty an excessive time.

Error was therefore committed in giving, and in refusing to give, the instructions quoted in the statement of the case.

[7] Excuse for the delays in this case as shown by the evidence could only come under the head of unavoidable accident. Against defendant's claim of excuse plaintiff was entitled to prove, as it offered, that during several months preceding the accidents in question instances of like trouble were of daily occurrence. A defendant of course is not to be convicted of a particular violation by showing that at other times he committed other violations. And defendant in this case would be entitled to an instruction limiting the purpose and effect of this evidence. But it was clearly admissible "as tending to show a negligent habit of the officers and agents of the railroad company." *Grand Trunk Rld. v. Richardson*, 91 U. S. 454, 470 (23 L. Ed. 356); *District of Columbia v. Armes*, 107 U. S. 519, 2 Sup. Ct. 840, 27 L. Ed. 618; *Cleveland, etc., Rld. v. Newell*, 104 Ind. 264, 3 N. E. 836, 54 Am. Rep. 312; *Rockford Gas Co. v. Ernst*, 68 Ill. App. 300; 29 Cyc. 611, 612. *Phillips v. Town of Willow*, 70 Wis. 6, 34 N. W. 731, 5 Am. St. Rep. 114, relied on by defendant as holding to the contrary, is distinguishable because the court notes that the evidence of the prior accident was offered, not to show notice of defect, but to prove that the stone (the claimed defect) was in the traveled part of the highway.

On the evidence in the record the case was one to be submitted to the jury under proper instructions.

The judgment is reversed for further proceedings not inconsistent with this opinion.

DELANO et al. v. UNITED STATES.

(Circuit Court of Appeals, Seventh Circuit. January 5, 1915.)

No. 2148.

MASTER AND SERVANT ~~13~~—HOURS OF SERVICE ACT—CONSTRUCTION.

A railroad company is not relieved from liability for violation of Hours of Service Act March 4, 1907, c. 2939, § 2, 34 Stat. 1416 (Comp. St. 1913, § 8678), by requiring a train dispatcher in a night and day office to remain on duty for more than 9 hours in each 24-hour period, by the fact that during a part of such time he is employed otherwise than as train dispatcher.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 14; Dec. Dig. ~~13~~.]

Hours of service of employés, see note to United States v. Houston Belt & G. Ry. Co., 125 C. C. A. 485.]

In Error to the District Court of the United States for the Southern Division of the Southern District of Illinois; J. Otis Humphrey, Judge.

Action by the United States against Frederick A. Delano, William K. Bixby, and Edward B. Pryor, receivers of the Wabash Railroad Company, to recover penalties. Judgment for the United States, and defendants bring error. Affirmed.

J. L. Minnis and N. S. Brown, both of St. Louis, Mo., and R. H. McAnulty, Walter McC. Allen, and Otis Scott Humphrey, all of Springfield, Ill., for plaintiffs in error.

Edward C. Knotts, of Carlinville, Ill., for the United States.

Before BAKER, SEAMAN, and KOHLSAAT, Circuit Judges.

BAKER, Circuit Judge. Plaintiffs in error, defendants below, were adjudged to have violated the Hours of Service Act. 34 Stat. L. 1415.

Plaintiff declared that defendants were engaged in operating a railroad in interstate commerce, and that they required a telegrapher, who was employed by them in a day and night station to receive and deliver orders affecting train movements, to be on duty 11 hours and 30 minutes during each 24-hour period.

In a special plea defendants admitted all the averments of the declaration except the one respecting the service of the operator. Concerning that, they alleged that he performed the duties of a train dispatcher during the first six hours of his service and that during the remaining five hours and a half he was set at other duties that did not pertain to or affect the movements of trains.

A demurrer to the plea was sustained; defendants declined to plead further; and judgment followed.

Section 1 enacts that:

"The term 'employees' as used in this act shall be held to mean persons actually engaged in or connected with the movement of any train."

By exclusion or omission ticket sellers and inspectors or repairers of telegraph lines and apparatus are not within the statute. If our

train dispatchers, defendants inquire, may lawfully be employed, after we relieve them from train dispatching, by the Majestic Theater to sell tickets or by the Western Union to inspect and repair telegraph lines and apparatus, why may not we also lawfully employ them in like capacities?

An answer requires an examination of section 2, which is as follows:

"Sec. 2. That it shall be unlawful for any common carrier, its officers or agents, subject to this act to require or permit any employé subject to this act to be or remain on duty for a longer period than sixteen consecutive hours, and whenever any such employé of such common carrier shall have been continuously on duty for sixteen hours he shall be relieved and not required or permitted again to go on duty until he has had, at least ten consecutive hours off duty; and no such employé who has been on duty sixteen hours in the aggregate in any twenty-four hour period shall be required or permitted to continue or again go on duty without having had at least eight consecutive hours off duty: Provided, that no operator, train dispatcher, or other employé who by the use of the telegraph or telephone dispatches, reports, transmits, receives, or delivers orders pertaining to or affecting train movements shall be required or permitted to be or remain on duty for a longer period than nine hours in any twenty-four-hour period in all towers, offices, places, and stations continuously operated night and day."

To protect the lives of employés and of the traveling public against accidents due to loss of efficiency from overwork was the purpose of limiting the hours of service. Actions for violations are civil; and the statute, in view of its purpose, should be liberally construed to accomplish the intended cure. U. S. v. Great N. Ry. Co. (at this session) 220 Fed. 630, 136 C. C. A. 238, and cases cited.

Defendants admit that the employé involved in this case was engaged and used by them as a train dispatcher. Therefore he was within the class defined in section 1. But in protecting him under section 2 Congress stated no class of duties in which he might be overworked by defendants and so rendered inefficient as a train dispatcher. To justify defendants' claim, the statute should read that:

"No train dispatcher shall be required or permitted to be on duty as a train dispatcher for a longer period than nine hours in any twenty-four-hour period, but after he has been relieved as a train dispatcher the carrier may require him to serve as a ticket seller, provided he be given eight consecutive hours off duty."

That, however, is not the way the statute was written. An adoption of defendants' revision would be not only contrary to recognized canons of statutory construction, but also destructive of the intended cure of a recognized evil. It is a matter of common knowledge (attested by the carriers' petitions to the Interstate Commerce Commission immediately after the passage of the act for time in which to secure additional shifts of train dispatchers) that prior to the act carriers were having 24-hours work divided between two shifts, and that at most of the stations the train dispatchers acted also as ticket sellers or in other capacities. If 12 hours of mixed work as train dispatcher and ticket seller is forbidden, it would be simply an evasion to require 6 consecutive hours of duty as a train dispatcher to be followed by 6 consecutive hours of duty as a ticket seller. The evil to be

cured did not come from the employés' selling tickets or doing work for other people when off duty, but from the power of the carriers, customarily exercised, to require their employés who were concerned with train movements to do extra and overtime work.

Our conclusion is supported, we believe, by the decisions in Baltimore & Ohio R. Co. v. Interstate Commerce Commission, 221 U. S. 612, 31 Sup. Ct. 621, 55 L. Ed. 878; Missouri, K. & T. R. Co. v. United States, 231 U. S. 112, 34 Sup. Ct. 26, 58 L. Ed. 144; United States v. Great N. R. Co. (D. C.) 206 Fed. 838; San Pedro, L. A. & S. L. R. Co. v. United States, 213 Fed. 326, 130 C. C. A. 28. And it accords with the contemporaneous construction put upon the act by the administrative officers (In re Georgia Southern & F. R. Co., 13 Interst. Com. Com'n R. 134; In re Various Carriers, 13 Interst. Com. Com'n R. 142; Instructions to Carriers for Reporting Hours of Service, March 16, 1908), whose interpretation is entitled to great weight and should not be overturned without clear and cogent reasons (United States v. Moore, 95 U. S. 763, 24 L. Ed. 588; Heath v. Wallace, 138 U. S. 582, 11 Sup. Ct. 380, 34 L. Ed. 1063; United States v. Trans-Missouri Freight Ass'n, 166 U. S. 290, 370, 17 Sup. Ct. 540, 41 L. Ed. 1007).

The judgment is affirmed.

BALL v. IMPROVED PROPERTY HOLDING CO. OF NEW YORK.

EQUITABLE TRUST CO. OF NEW YORK v. IMPROVED PROPERTY HOLDING CO. OF NEW YORK et al.

In re HOWLAND.

(Circuit Court of Appeals, Second Circuit. January 12, 1915.)

No. 120.

1. RECEIVERS ~~162~~—INCOME—DISPOSITION—MORTGAGES—PRIORITIES.

When a receiver of a corporation's property was appointed, a mortgage on a part of the property was in default, but unsecured creditors believed, if a foreclosure could be delayed, that a settlement and reorganization could be arranged, and the business carried on successfully. By agreement of the complainant, defendant, the receivers, and committees for all classes of bondholders, an order was accordingly made setting aside 10 per cent. of the gross rents and income of the property for expenses, and providing for operating and maintenance charges and expenses, and for the use of the remainder to pay ground rent and charges matured and unpaid prior to the appointment of the receivers. Held, that this operated to set apart the rents of the mortgaged property for the payment of the mortgage, and hence a separate receiver subsequently appointed for the mortgaged property was entitled to the rents from such property due prior to the receivership in preference to a receiver for the general creditors.

[Ed. Note.—For other cases, see Receivers, Cent. Dig. § 277; Dec. Dig. ~~162~~.]

2. APPEAL AND ERROR ~~1008~~—REVIEW—QUESTIONS OF FACT.

Where the District Judge, who heard a petition by a receiver for the general creditors of the property of a corporation to compel receivers of property covered by a mortgage to turn over to him certain rents, was familiar with all the prior proceedings, his statement that the disposition

For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

of such rents was with the consent of the petitioning receiver's predecessors in office, must be accepted.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3955-3960, 3962-3969; Dec. Dig. ☞1008.]

3. RECEIVERS ☞67—RIGHT TO PROPERTY—PRIORITIES.

A petition by the receiver for the general creditors of the property of a corporation to compel the receivers of the property covered by a mortgage to turn over to him certain rents was properly denied, where the money had already been spent and accounted for under the court's direction.

[Ed. Note.—For other cases, see Receivers, Cent. Dig. §§ 117-122; Dec. Dig. ☞67.]

Appeal from the District Court of the United States for the Southern District of New York.

On appeal from an order of the District Court for the Southern District of New York denying the application of Silas W. Howland, as receiver for the general creditors of the property of the Improved Property Holding Company of New York which is not covered by the mortgages of the said company, to compel the receivers of the property of the said company which is covered by its mortgage of June 1, 1906, to turn over to him certain assets which are in his possession.

William M. Chadbourne and Walter Ralston Nelles, both of New York City, for receiver.

Henry H. Pierce, Garrard Glenn, and Edward H. Green, all of New York City, for committee of Series A bondholders.

Before LACOMBE, COXE, and ROGERS, Circuit Judges.

PER CURIAM. [1] The present controversy relates to the disposition of a sum approximating \$8,000, which is made up of various items due to the mortgagor—the Improved Property Holding Company—for rent from its tenants prior to May 21, 1912, when the order appointing Burlingham and O'Donohue temporary receivers was made. By this order they were "authorized to collect the rents, income, tolls, and profits of the said premises and property." This order was continued May 31, 1912, and Robert E. Dowling, an additional receiver, was appointed. They were again appointed receivers of "all the property of said defendant, real, and personal and mixed, of whatsoever kind and description, * * * including * * * rents, issues, profits, and income accruing and to accrue. * * *" It provided further:

"That the said receivers be and they hereby are authorized to run, manage, and operate the said buildings and properties, to collect the rents, income, and profits of the said buildings and properties, acting in all things subject to the supervision of this court."

The first question therefore is: To whom do these sums due for rent prior to the receivership belong? If they were covered by the mortgage of the so-called A properties, they obviously belong to the A receivers; if not so covered, they would, with equal certainty, belong to the Property Holding Company and its receiver. There was a controversy between the A receivers and the general receiver as to

the ownership of these rents. When the Ball suit was instituted in May, 1912, the A mortgage was in default, and a foreclosure action could have been commenced at any time. But the unsecured creditors believed, if such an action could be delayed, that a settlement and a reorganization could be arranged, and the company's business carried on successfully in the future. It was hardly to be supposed, however, that the A bondholders would agree to such a delay, unless some consideration was offered them for their forbearance.

That a modus vivendi was agreed upon is evidenced by the order of June 17, 1912, by which the receivers, after setting aside 10 per cent. of the gross rents and income of the property for expenses and providing for operating and maintenance charges and expenses, were to use the remainder of the fund to pay ground rent and charges matured and unpaid prior to the appointment of the receivers. This order was consented to by the complainant, defendant, the receivers, and the committees for all classes of bondholders, and it is not easy to see why it did not operate to set apart the rents of the A properties for the payment of the A mortgage. It seems to us entirely clear that the sum in question was turned over to the receiver of the properties as a part of the agreement that more time should be given in which to effect a reorganization, that it was an entirely fair and reasonable thing to do, and cannot now be repudiated by those who received the benefit.

[2] Judge Hough, who heard the petition of Mr. Howland in the District Court, was familiar with all the prior proceedings and we must accept his statement that the actual disposition of the past-due rents was made with the consent of the receivers who preceded Mr. Howland in office. In short, we cannot resist the conclusion that the situation was well known to all the creditors, and that with full knowledge of the fact and with the hope that a settlement could be arranged they consented that the A bondholders should not by delay lose the benefit of the rents.

[3] Another exceedingly practical reason why the money which the petitioner seeks to reach cannot be paid is that it has already been spent and accounted for under the direction of the court.

The order is affirmed, with costs.

In re NG WAH CHUNG.

NG WAH CHUNG v. PRENTIS, Immigrant Inspector.

(Circuit Court of Appeals, Seventh Circuit. January 5, 1915.)

No. 2102.

ALIENS ~~32~~—DEPORTATION OF CHINESE—REGULARITY OF PROCEEDINGS.

Evidence considered, in a habeas corpus proceeding by a Chinese person ordered deported, and held insufficient to sustain the charge that he was not given a fair hearing before the immigration inspector.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. §§ 84, 92, 93-95; Dec. Dig. ~~32~~.

What Chinese persons are excluded from the United States, see note to Wong You v. United States, 104 C. C. A. 538.]

Appeal from the District Court of the United States for the Eastern Division of the Northern District of Illinois; George A. Carpenter, Judge.

Habeas corpus proceeding by Ng Wah Chung against Percy L. Prentis, Immigration Inspector in charge at Chicago. Petition dismissed, and petitioner appeals. Affirmed.

Wm. R. Medaris, of Chicago, Ill., for appellant.

John E. Byrne, of Chicago, Ill., for appellee.

Before BAKER, SEAMAN, and KOHLSAAT, Circuit Judges.

BAKER, Circuit Judge. Appellant, a person of Chinese descent, appeals from an order discharging a writ of habeas corpus and remanding him to the custody of the immigrant inspector.

The basis of the petition for the writ was that petitioner was arrested and tried on a warrant charging that he was an alien likely to become a public charge, while the deportation warrant found that charge to be true and also another, namely, that petitioner was unlawfully in this country because of having entered without inspection, regarding which latter charge petitioner was given no notice before trial and no opportunity to defend.

Deportation would be sustained, if petitioner had a fair hearing upon the charge in the warrant of arrest. Appellant challenges the fairness of the hearing on that issue; but we refrain from entering upon that branch of the case, because we find from the record that petitioner and his counsel had notice that the hearing before the immigration officer would include both charges.

The petition and the answer joined issue on this question of notice, and the evidence presented to the court was all embodied in a written stipulation.

It was stipulated, among other things, that:

"A formal hearing under the rules of the Department of Labor was accorded petitioner, at which the following proceedings were had:

"Mr. Eby: Mr. Kan, advise the alien of the nature of the charges against him.

"Mr. Medaris: Let me see the warrant. (Whereupon Mr. Eby exhibited formal warrant containing one charge, as above set forth.)

"Mr. Kan spoke to petitioner in the Chinese language, and Mr. Kan says he advised petitioner he was being given a hearing on the charge of being unlawfully within the United States, because a person likely to become a public charge, and because he entered without inspection."

Mr. Eby was the examining inspector, Mr. Kan the official interpreter, and Mr. Medaris the counsel of petitioner. There was no stipulation of fact, and no testimony to the effect, that petitioner did not understand that the witnesses about to be examined would testify concerning both charges. At the habeas corpus trial the court could make no other finding than that petitioner had notice. Formal pleadings at hearings of aliens before examining inspectors are neither required nor contemplated. Rule 22 of the Department of Labor, promulgated under authority of the statute, provided:

"If during the hearing new facts are proved, which constitute a reason, in addition to those stated in the warrant of arrest, why the alien is in

the country in violation of the law, the alien's attention should be directed to such facts and reason, and he should be given an opportunity to show why he should not be deported therefor."

Hence, if the only question concerning the fairness of the hearing was whether petitioner had notice of the additional charge, this case would be at an end. But petitioner was also entitled to "an opportunity to show why he should not be deported therefor." The stipulation sets out the testimony of petitioner and Mr. Kan. This testimony shows that, against his then claim of having been born in the United States, he admitted, when arrested, that he was born in China; that petitioner at the hearing admitted, on being confronted with the papers, that he stated when he landed at Vancouver, B. C., and there paid a \$500 head tax, that he was born in China; that he went through Canada to Windsor; that from there he traveled to Chicago concealed in a freight car (the route commonly known as the "underground"); that he was not inspected, and evaded inspection by the United States immigrant officers; and that when he emerged from the freight car at Chicago he was arrested. The stipulation admits that petitioner was represented by counsel, and that petitioner and his counsel chose to rest the case upon the testimony of the above-named witnesses. There was no stipulation of fact, and no testimony to the effect, that petitioner had other testimony to offer. So the case is reduced to the contention that petitioner did not have a fair hearing because his counsel, who was present at the hearing, did not understand that both charges were to be investigated. At the habeas corpus trial the burden of establishing this contention, in view of the notice to petitioner and the opportunity given him to meet both charges, was upon petitioner. It is claimed that the contention is established by the facts that counsel asked for and was given the warrant of arrest, which contained but the one charge, and that he limited his cross-examinations to the one charge. But the request to see the warrant of arrest was made in connection with the inspector's direction to the interpreter: "Advise the alien of the nature of the charges against him." There was no stipulation of fact, and no testimony to the effect, that counsel failed to understand that the inspector directed the interpreter to advise petitioner concerning a plurality of charges; that counsel did not observe the interpreter, in obedience, to the inspector's direction, making a statement in Chinese to petitioner; that counsel during the hearing did not confer with his client; that counsel did not understand the Chinese language; or that counsel was ignorant of rule 22 and the nonnecessity of pleadings at a hearing before the inspector. On the other hand, the stipulation shows that the evidence respecting the additional charge was introduced without objection that it was beyond the scope of the inquiry, and that, during the examination of Mr. Kan, counsel facilitated the introduction of his client's signed confession by admitting that the stenographer, if present and sworn, would testify that he correctly reported and transcribed petitioner's statements, and that Government Exhibit B was such transcript. So far from sustaining the contention, the record would rather support the inference that counsel was fully aware of the fact that both charges were being covered by the hearing,

and that he chose to rely upon the untenable technical objection that no fair hearing could be had of a charge that was not stated in writing in the warrant of arrest. The case is therefore ruled by the decision in *Siniscalchi v. Thomas*, 195 Fed. 701, 115 C. C. A. 501, and cases there cited.

The order is affirmed.

FLANDERS MOTOR CO. v. REED.

(Circuit Court of Appeals, First Circuit. February 17, 1915.)

No. 1053.

1. APPEAL AND ERROR ~~900~~—**REVIEW—AGREED STATEMENTS OF FACTS.**

That a proceeding to reclaim from the possession of a trustee in bankruptcy property claimed to have been sold to the bankrupt conditionally was submitted on agreed statements of fact did not restrict the power of the court to draw inferences of fact, as the law and the facts were reviewable as fully as in ordinary equity appeals.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3667-3669; Dec. Dig. ~~900~~.]

2. BANKRUPTCY ~~140~~—**OWNERSHIP OF PROPERTY—CONDITIONAL SALES.**

By a contract between an automobile manufacturer and a dealer, the manufacturer agreed to sell automobiles to the dealer at specified discounts from list prices for resale in certain territory. The contract also provided that on orders for automobile parts the dealer should be allowed a specified discount from list prices, and that title to each automobile and all parts should not pass to the dealer until paid for. There was no provision requiring the dealer to keep such parts distinct from other goods, or to keep the proceeds in case of sale separate, and the dealer sold and delivered parts, for which payment had not been made, as if they were his own, in the ordinary course of his business, and without keeping the proceeds separate from other moneys. The manufacturer knew and recognized what was being done in this respect without objection. Held, that there was no bona fide reservation of title, but only a pretended reservation, as a safeguard in case of need, but not otherwise to govern the rights of the parties or the course of dealings; and hence the manufacturer was not entitled to retake parts in the possession of the dealer when he became bankrupt from his trustee in bankruptcy.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 198, 199, 219, 225; Dec. Dig. ~~140~~.]

Appeal from the District Court of the United States for the District of Massachusetts; James M. Morton, Jr., Judge.

Proceeding by the Flanders Motor Company against George W. Reed, trustee. From an order (*In re Harrington*, 212 Fed. 542), affirming an order of the referee in bankruptcy, dismissing a petition to reclaim property from the possession of the trustee, the Motor Company appeals. Affirmed.

Percy W. Carver, of Boston, Mass. (Carver & Carver, of Boston, Mass., on the brief), for appellant.

George W. Reed, of Boston, Mass., for appellee.

Before PUTNAM, DODGE, and BINGHAM, Circuit Judges.

DODGE, Circuit Judge. [1] The questions here arising were submitted first to the referee and afterward to the District Court on an

"agreed statement of facts," supplemented by a statement of "further agreed facts" and by certain documents made part of the facts agreed by reference in the statements thereof. We find no reason to believe that, in these proceedings, such a submission restricts the power of the court to draw inferences of fact, because we are judges alike of the law and the facts as fully as in ordinary equity appeals.

[2] The petitioner sought to reclaim certain automobile parts claimed to be its property, though in the bankrupts' possession at the time of the bankruptcy. The District Court affirmed the referee's order dismissing the petition. 212 Fed. 542. The parts in question had been furnished to the bankrupts by the Metzger Motor Car Company, of Detroit, in pursuance of a written agreement dated June 28, 1911 (Exhibit D). Though the bankrupts had not kept the parts so furnished separate from their other goods, the trustee was able to separate them after the bankruptcy, and had done so. The petitioner had succeeded to all the Metzger Company's rights.

By Exhibit D the Metzger Company gave the bankrupts the right to sell "Everitt" automobiles within a certain territory, and agreed to sell "Everitt" cars to them, at specified discounts from specified list prices, f. o. b. at Detroit. Another clause of Exhibit D provided that "on orders for parts" the bankrupts should "be allowed 30 per cent. discount from the last list prices" established by the Metzger Company.

Clause 9 of Exhibit D provided that the title to each and every automobile, and to all automobile parts furnished, should not pass to the bankrupts until the same were paid for in full in cash.

There is nothing in the record to show whether or not any cars were actually furnished under the agreement, or, if any, how many were furnished, or what course of dealing was followed regarding them.

According to the first agreed statement of facts, a "great many parts applicable for use in said 'Everitt' cars were furnished"; and the questions here involved relate only to the parts thus furnished. Payment for them in full never having been made, the petitioner asserts that title to them never passed.

The case, as the opinion below states, is to be determined according to the law of Massachusetts, which does not make recording necessary to the validity of an agreement for conditional sale. If the provision for reservation of title in clause 9 expresses an agreement made in good faith, intended by both parties to be actually observed according to its terms in their dealings regarding the parts in question, and in fact so observed by them until the bankruptcy, the petitioner is entitled to the parts as against the bankrupts' trustee.

We do not find in the 14 other clauses of Exhibit D, containing numerous other stipulations between the parties as to their contemplated dealings with the goods to be furnished, any provisions adapted to secure such dealings with the parts furnished or their proceeds, while in the bankrupts' hands, as it would be natural to expect, had retention of title by the vendor been what the parties really intended by their agreement, taken as a whole. Thus, as the opinion below points out, there were no provisions either that the proceeds should be the vendor's in case of sales made by the bankrupts or that the

parts should be kept distinct in any way from the bankrupts' other goods until sold, or that the parts remaining unsold at the end of the year for which the agreement was to continue should be returned to the vendor. In all these respects the agreement in *Ludvigh v. American Woolen Co.*, 231 U. S. 522, 34 Sup. Ct. 161, 58 L. Ed. 345, upon which the petitioner relies, differed from the agreement here.

As to the course of dealing followed with regard to the parts or their proceeds, the bankrupts sold and delivered the parts on hand as if they were their own, in the ordinary course of their business, and without keeping the proceeds of such sales in any way distinct from their other moneys. The parts so sold, of course, became parts of the machines to repair which they were bought from the bankrupts. The petitioner, knowing that the parts furnished, and the proceeds thereof, were being thus dealt with by the bankrupts, recognized what was being done without objection. This seems to us evident, as it did to the District Court, from the petitioner's letter to the bankrupts of October 31, 1912.

Referring again to *Ludvigh v. American Woolen Co.*, above cited, not only did the agreement under which goods were furnished to the bankrupt in that case differ in the above respects from the agreement here; but a very different course of dealing between the parties appears to have been followed with respect to the goods furnished or their proceeds. The proceeds from sales of the goods made by the bankrupt were regularly turned over to the consignor, checks given the bankrupt in payment for such goods were regularly indorsed by the consignor as well as by the bankrupt, and the consignor, through a representative of its own in the bankrupt's place of business, had kept its own account of such sales.

The District Court held the trustee in that case entitled to the goods, notwithstanding the attempted reservation of title (176 Fed. 155); the Court of Appeals reaching the contrary result (188 Fed. 30, 110 C. C. A. 180), and the decision of the Court of Appeals being affirmed by the Supreme Court. In the opinion of the Court of Appeals it was said (188 Fed. 30, 33, 110 C. C. A. 180, 183):

"Contracts of sale under which title is to remain in the vendor, although the vendee may consume the goods, or sell them and apply the proceeds to his own use, are fraudulent as to creditors, because the stipulation that title is to remain in the vendor is entirely inconsistent with the purpose of the contract."

—citing the decision of the same court in *Re Garcewich*, 115 Fed. 87, 53 C. C. A. 510. In the case at bar there were no provisions to prevent the vendee from thus consuming the goods, or selling them and applying the proceeds to his own use, and *Re Garcewich* therefore applies.

In view of the agreement, and of all that appeared regarding the dealings of the parties under it, with reference to these parts and their proceeds, we think it was rightly held that the mere presence in the agreement of the terms expressed in paragraph 9 did not go far enough, as against the indications to the contrary, to establish a bona fide understanding between the parties that the goods should, for all purposes, be the petitioner's until the bankrupts had fully paid for

them. We think the conclusion of the District Court sufficiently supported, that both the consignor and the bankrupts are to be regarded as having intended paragraph 9 to be a safeguard in case of need, but not otherwise to govern their rights or the course of dealing between them.

The judgment of the District Court is affirmed, and the appellee recovers his costs of appeal.

In re RECTOR'S.

In re WARD.

(Circuit Court of Appeals, Second Circuit. January 12, 1915.)

No. 109.

1. SALES ~~477~~—CONDITIONAL SALES—RENEWAL OF NOTES—EVIDENCE.

Where it was obvious that it was the intention of the parties that a note given by a conditional vendee to the vendor should be in renewal of one of the purchase-money notes, this fact was sufficiently proved, though aside from a letter there was no explicit evidence that it was so given, and the parties apparently assumed, without considering it necessary to explicitly agree, that it should be a renewal.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1411-1417; Dec. Dig. ~~477~~.]

2. SALES ~~459~~—CONDITIONAL SALES—PAROL MODIFICATION OF CONTRACT.

A provision in a contract for the conditional sale of personal property against modifications of the contract, except in writing, did not prevent the parties from agreeing that the title should remain in the seller until a note given in renewal of one of the purchase-money notes was paid, as the parties could agree to disregard such provision.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1337-1347; Dec. Dig. ~~459~~.]

3. SALES ~~477~~—CONDITIONAL SALES—WAIVER OF SECURITY—SALE OF PURCHASE-MONEY NOTES.

Where, though a conditional seller of personal property sold the purchase-money notes, they were not sold without recourse, and the seller remained liable as indorser and had taken them up, the sale of the notes was not an election to consider them as final payment and a waiver of the reservation of title.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1411-1417; Dec. Dig. ~~477~~.]

4. SALES ~~477~~—CONDITIONAL SALES—WAIVER OF SECURITY—SURRENDER OF NOTES.

Under Personal Property Law N. Y. (Consol. Laws, c. 41) § 65, providing that whenever articles are sold upon the condition that the title shall remain in the vendor until payment of the purchase price, and they are retaken by the vendor, they shall be retained for 30 days, during which period the vendee may comply with the terms of the contract, and thereupon receive the property, and that after the expiration of such period the vendor may cause them to be sold at public auction, and unless so sold within 30 days after the expiration of such period the vendee may recover the payments on such articles, the refusal of a seller to surrender the purchase-money notes on demand was not a waiver of his right to retake the property, even assuming that the notes could not be enforced in addition to retaking the property.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1411-1417; Dec. Dig. ~~477~~.]

5. BANKRUPTCY ~~267~~—CONDITIONAL SALES—SALE OF PROPERTY BY TRUSTEE
—SURRENDER OF NOTES.

If a surrender of the notes was necessary, it was sufficient for the seller, in a bankruptcy proceeding against a lessee or purchaser of the property from the conditional vendee, to offer to surrender the notes on the hearing upon a master's report and before final decree.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 371, 380; Dec. Dig. ~~267~~.]

What constitutes a contract of conditional sale, see note to *Dunlop v. Mercer*, 86 C. C. A. 448.]

6. SALES ~~473~~—CONDITIONAL SALES—RIGHTS OF THIRD PARTIES.

Where a contract for the sale of property had annexed thereto as an exhibit a form of bill of sale providing that title should remain in the seller, bills of sale subsequently executed, reserving title to the seller, were valid as against one who leased or purchased the property from the conditional vendee with knowledge of the agreement, though the bills of sale were not executed until after the delivery of the property; the statute at the time protecting only purchasers without notice from the seller's title reserved in a bill of conditional sale.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1377–1390; Dec. Dig. ~~473~~.]

7. BANKRUPTCY ~~267~~—SALE BY TRUSTEE—CLAIMS BY THIRD PERSONS.

Where property sold with a reservation of title to the seller was sold or leased by the conditional vendee to a party which subsequently became bankrupt, though the strictly proper course was for the vendor to retake the property and sell it under Personal Property Law N. Y. § 65, returning the surplus, where the property had been sold in the bankruptcy proceeding, the question whether the vendor had a lien was wholly academic.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 371, 380; Dec. Dig. ~~267~~.]

Petition to Revise and Appeal from Order of the District Court of the United States for the Southern District of New York.

The opinion of Learned Hand, District Judge, is as follows:

[1] The trustee raises five points, which I shall take up seriatim. The first point is that the fifth note was paid and the ninth note was a loan. This rests upon the fact that the fifth note was paid before the ninth was given, and that, therefore, the ninth could not be in renewal of it. There is not the slightest question about the intention of the parties, Stoddard's letter of August 24, 1912, is only one bit of evidence which happens to be explicit. No other evidence is necessary, because the intention is so obvious from the situation of the parties and from the oral testimony of the various interviews that occurred. It is inconceivable that the new note should not have been expected to have all the security of the old, or that the seller should have advanced new money at the very moment that he found the debtor embarrassed. It is perhaps true that outside of Stoddard's letter there is not any explicit recognition of this feature, but people do not feel it necessary in talk to expatiate upon what is the obvious purport of the whole interview. Nothing is commoner in such matters than to find the whole interview taken up with the discussion of details which presuppose, but do not expressly embody, the fundamental assumption upon which the whole proceeds. Stoddard's letter, he swears, was made in execution of the arrangements theretofore made, and all the testimony corroborates, without contradiction, the interpretation which the petition puts upon the transaction.

[2] I have not been able to find out with certainty whether the trustee contends that, if the parties did so intend, there was any legal obstacle in the way of their intention. If so, I must overrule it, for there is no reason whatever which prevented them from agreeing that the title should remain

in Stern until the ninth note was paid quite as easily as all the rest. That was the upshot of the agreement. The provision against modifications of the contract, except in writing, cannot, of course, bind the parties, if they subsequently agree to disregard it, though it may prove a strong bit of evidence, if they disagree as to whether they did subsequently modify it. Here there is no conflict of evidence. It seems hardly necessary to go over the question of consideration, if we once see that the money lent in August was in pursuance of a prior arrangement.

[3] The second point is that the sale of the notes was an election to consider them as final payment. The notes were not sold without recourse, as was presumed in *Hawks v. Hinchcliff*, 17 Barb. 492. They were indorsed over. It makes not the slightest difference whether we call it a sale or a discount for the purposes of this case. The point raised, perhaps, justifies an analysis of the whole situation. The notes were given and the property was delivered, but with a condition that title should not pass until all the notes were paid, and if not paid the property might be retaken. Two notes were not paid, and the conditional seller, who was indorser, has taken them up. It is now urged that, though he remained liable as indorser, and though he has taken up the notes, his sale waived the security in his favor arising from the condition in the title, and left him without protection. By what process of reasoning this result is reached I confess I cannot conceive. It attributes an intention to the parties quite absurd and destructive of the very purpose of the whole undertaking. The condition in the title certainly continued so long as was necessary for the protection of the conditional seller, and enabled him to retake until he was free of the notes.

[4, 5] The third point is that the notes should have been surrendered, and that the refusal to do so is an election to waive the right to reclaim. No doubt equity might, unassisted, have provided that the retaken title should be held in fact only as a security for the unpaid balance. This it might have done in consonance with its general relief against forfeitures, but the statute in New York has stepped in and done the same thing. Personal Property Law, § 65. The corollary of this would seem to allow the seller to sue for the balance in case the property did not bring the full amount, which would convert the transaction into a chattel mortgage and nothing more. The contrary was, however, held in *Earle v. Robinson*, 91 Hun, 363, 36 N. Y. Supp. 178, affirmed on opinion below in 157 N. Y. 683, 51 N. E. 1090.

That question is, however, somewhat different from whether the notes must be surrendered as a condition of retaking. Granting that they may not be enforced, it may be that they need not be surrendered. The decision in *Brewer v. Ford*, 54 Hun, 116, 7 N. Y. Supp. 244, and 59 Hun, 17, 12 N. Y. Supp. 619; *Id.*, 126 N. Y. 643, 27 N. E. 852, can be explained only on the theory that the seller need not surrender the notes, and it is so explained by Justice Van Brunt in *Earle v. Robinson*, supra, in an opinion which was accepted by the Court of Appeals. It must be taken that a suit may be brought to retake property held under conditional sale without surrender. Yet, even were it not so, I think that it is sufficient that the seller in the case at bar, which was begun by a receiver and is still in this court upon a master's report, offers now to surrender the notes. It is certainly his right to reserve his option until he is put to an election, and to elect before final decree.

[6] The fourth point is that the delivery was made on or before December 28, 1910, and that no bills of sale were executed until after that time. There was a contract of April 15, 1910, with a form of bill of sale annexed as an exhibit which in the most explicit way provided that the title of all the property delivered should remain in the seller. Rector's, the bankrupt, took its lease with full knowledge of this agreement, and was as much bound by it as the buyer, the Hotel Rector Company, whether the lease of the latter was a lease proper or a purchase. At that time the statute protected only purchasers without notice from the seller's title reserved in the bill of conditional sale. Just how the trustee seeks to avoid the contract of April 15, 1910, because it was not observed to the letter, I cannot understand. Apparently his contention rests upon the fact that the delivery of

the chattels took place before the bills of sale were executed. It seems hardly necessary to discuss that position.

[7] The last point is that in this proceeding the petitioner should not assert a lien. I agree that in this proceeding the strictly proper course was to re-take the property and to sell it under section 65 of the Personal Property Law, giving back the surplus. It really makes small difference whether you call the right a lien or not, for it certainly has exactly the same effect in the end as a lien. The property has in fact been sold, and the whole question is academic.

The petitioner may take a decree for the amount of the notes, with interest to date, together with its disbursements and a docket fee, upon surrender of the notes. If there is any surplus, it will go to the estate. I direct the trustee not to take an appeal from the decree to be entered, without submitting the matter to a meeting of creditors called for that purpose, and thereafter getting the consent of this court.

J. F. McNaboe, of New York City, for petitioner.

A. H. Townley, of New York City, for respondent.

Before LACOMBE, COXE, and WARD, Circuit Judges.

PER CURIAM. Order affirmed on opinion of the District Judge.

THE A. G. BROWER.

(Circuit Court of Appeals, Second Circuit. January 12, 1915.)

No. 116.

1. ADMIRALTY ☞118—APPELLATE PROCEEDINGS—FINDINGS OF FACT.

An appeal in admiralty operates as a new trial, whether the case was tried by the judge alone or with a jury, and findings of fact are not binding on the appellate court, although they will be given due consideration, and will not be disregarded, unless the court is well satisfied that they are contrary to the weight of evidence.

[Ed. Note.—For other cases, see Admiralty, Cent. Dig. §§ 758-775, 794; Dec. Dig. ☞118.]

2. SHIPPING ☞86—LIABILITY OF VESSEL—INJURY TO STEVEDORE.

Evidence held to sustain a finding that an injury to a stevedore helping to discharge a cargo of grain, by falling over a mooring cable stretched a foot above the deck, while walking along the pier side of the deck after dark on his way to the hatch where he was working, was chargeable to the fault of the vessel in failing to mark the cable by a light, as shown to have been customary.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 343, 353-360; Dec. Dig. ☞86.]

Appeal from the District Court of the United States for the Western District of New York.

This cause comes here on appeal to review a decree of the District Court, Western District of New York, sitting in admiralty, for \$500 in favor of libelant. He was a grain shoveler in the employ of the Lake Carriers Association, which was engaged in discharging the vessel's cargo, and sustained personal injuries by tripping over the vessel's after mooring cable, while passing along the deck on the port (dock) side.

There were three mooring cables leading from winches on the vessel to the dock. These wire cables were about a foot above the deck. Libelant came

☞ For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

on board about 7 a. m. by a ladder—which was shifted from place to place as occasion required. At that time the ladder was placed just aft of the forward cable and from it he walked between hatches 3 and 4 across the deck to the scuttle which led to holds 1 and 2, where he was set to work. At noon he went off the boat for lunch, going from and returning to this scuttle by the same ladder, still located in the same place. A little after 7 p. m.—it was dark then (October 17th)—he left the boat to get a sandwich and a glass of beer. At that time the vessel had been moved along so that the leg of the elevator which was discharging her, was in hatch 6, leading into hold 3. He had been at work just before he left cleaning the leg of the elevator and went ashore, not by the ladder, but by a "door" which let down from the elevator to vessel, a way sometimes used by the shovelers. Upon his return he knew he was to go to work through the after scuttle, located between hatches 7 and 8, and leading to holds 3 and 4. Returning, he found the ladder placed at the dock side of the ship between hatches 9 and 10—hatch 10 was $2\frac{1}{2}$ feet forward of the boiler house. He mounted the ladder, proceeded forward along the port (dock) side of the deck, and tripped over the mooring cable leading from the after winch, which was located between hatches 8 and 9. He testified that he did not see the cable, because it was dark, and did not know the after winch was located so far forward.

F. W. Ely, of Buffalo, N. Y., for appellant.

Irving W. Cole, of Buffalo, N. Y., for appellee.

Before LACOMBE, COXE, and ROGERS, Circuit Judges.

LACOMBE, Circuit Judge. [1] The cause was tried with a jury under the statute providing for such procedure in causes arising on the Lakes. The practice in such cases is discussed in our opinion in Sweeting v. S. S. Western States, 159 Fed. 354, 86 C. C. A. 354. Appeal in admiralty operates as a new trial whether it was tried below by the judge alone, or with a jury.

The jury's findings as to the facts are not conclusive here, as they would be on a writ of error, where the issues had been submitted to them under a charge to which no sound exceptions had been reserved. Nevertheless the findings of the trial court, whether by judge or jury, on the questions of fact, being the conclusions reached by the tribunal which heard and saw the witnesses, are given due consideration and will not be disregarded, unless the appellate court is well satisfied that they are contrary to the weight of evidence.

[2] Examination of the testimony leads us to the conclusion reached in the District Court. This cable was an obstruction to the passageway on the port side of the vessel—a necessary obstruction, no doubt. By daylight, when its presence could be observed, the passageway was not thereby rendered unsafe. After nightfall the condition was this. On the elevator tower there was a cluster of electric lights, with a reflector behind them so arranged as to throw the light straight out from the tower; some of these lights were out of commission (bulbs broken or filaments burnt out); the reflector was rusty. Eighty or more feet aft of these tower lights was a 32-candle electric lamp, with reflector, on the port side of the boiler house, and a similar one on the starboard side. The electric lighting current of the ship was turned on, but there is a conflict of testimony as to whether the particular port lamp was burning at the time; witnesses who passed close to it, and one witness who at the time of the accident was looking aft,

did not notice that it was burning. Whether it was burning or not, we are satisfied that neither it nor the tower lights sufficiently illuminated that part of the passage, which this cable crossed, to disclose the presence of the cable to a person walking along the passageway. Two or three others besides the plaintiff tripped over it that same night.

There is evidence that when men are at work on the ship, and one of these cables is not sufficiently illuminated to be readily observed, it is usual to hang a lantern on such cable to advise those using the passageway of its presence. We think the situation on the night in question called for some such precaution. No doubt there was a safe passage fore and aft on the starboard side, no better lit than the port side. But except for the cable the port side afforded as safe a passageway as the starboard, and it might be expected that it would be used by any one working there who was not advised, or had no reason to expect, there was a cable in that part of the passageway he was using. The midship cable at that time was forward of the scuttle which led to holds 3 and 4. The ladder provided for their access to the ship was at that time located aft; between these two points this after cable ran above the deck from the after winch to the dock. There is testimony that this after winch was considerably further forward of the stern than is usual, and it might well be expected that any one coming up the ladder, and seeing no lantern between the ladder and the scuttle he was bound to, would suppose that the ladder had been placed forward of the after cable expressly to afford access to the vessel at a place whence one could go with safety to the scuttle.

Nor do we think libelant was negligent. He said that was the only boat he ever saw with the after winch so far forward of the boiler house, and that he supposed the ladder in the evening had been placed forward of the after cable, just as, when he came on board in the morning and the ladder was further forward, it was placed aft of the forward cable.

Decree affirmed, with interest and costs.

S. R. FEIL CO. v. JOHN E. ROBBINS CO.

(Circuit Court of Appeals, Seventh Circuit. January 5, 1915.)

No. 2089.

1. TRADE-MARKS AND TRADE-NAMES **3**—INFRINGEMENT—COMPOUND WORD.

Where a trade-mark consists of a hyphenated word, one part of which is descriptive, and not subject to exclusive appropriation, while the other is purely arbitrary, the appropriation by another of the descriptive part only is not an infringement.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. §§ 4-7; Dec. Dig. **3**.]

2. TRADE-MARKS AND TRADE-NAMES **57**—INFRINGEMENT.

One is not required to so distinguish his goods that careless buyers will know by whom they are made and sold.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 65; Dec. Dig. **57**.]

3. TRADE-MARKS AND TRADE-NAMES \Leftrightarrow 59—INFRINGEMENT—SAL-VET.

The trade-mark "Sal-Vet" *held* not infringed by the word "SalTone."

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. §§ 68-72; Dec. Dig. \Leftrightarrow 59.]

4. TRADE-MARKS AND TRADE-NAMES \Leftrightarrow 93—UNFAIR COMPETITION.

That defendant, which made and sold a veterinary remedy similar to one sold by complainant, paraphrased complainant's advertising literature, including its cuts and pictures, and also in response to decoy letters ordering complainant's remedy sent its own, *held* insufficient to establish unfair competition in a legal sense; defendant having distinguished its product by its dress and name of maker, so that any purchaser using any care would not be deceived.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. §§ 104-106; Dec. Dig. \Leftrightarrow 93.]

Unfair competition in use of trade-mark or trade-name, see notes to Scheuer v. Muller, 20 C. C. A. 165; Lare v. Harper & Bros., 30 C. C. A. 376.]

5. WORDS AND PHRASES—"SAL."

The word "sal" means salt, and is used commonly as a prefix to scientific terms, in which connection it signifies that some form of salt is the substantial element of the preparation.

Appeal from the District Court of the United States for the District of Indiana; Albert B. Anderson, Judge.

Suit in equity by the S. R. Feil Company against the John E. Robbins Company. Decree for defendant, and complainant appeals. Affirmed.

Henry M. Dowling, of Indianapolis, Ind., and Homer C. Underwood, of Ft. Wayne, Ind., for appellant.

Ferdinand Winter, of Indianapolis, Ind., and Mr. Craig, for appellee.

Before BAKER, SEAMAN, and KOHLSAAT, Circuit Judges.

KOHLSAAT, Circuit Judge. The bill in this case first charges the appellee, hereinafter termed defendant, with infringement of the registered trade-mark "Sal-Vet," hyphenated, belonging to appellant, hereinafter called complainant, by the use of the registered trade-mark "SalTone," not hyphenated, and then, secondly, charges unfair competition. On final hearing the District Court dismissed the bill for want of equity.

[5] It will be noted that complainant's trade-mark consists of two distinct terms—Sal, and Vet. From the evidence it appears that complainant's trade-mark was well established when defendant began to employ the term "SalTone"; that one of the principal ingredients of both remedies is salt; that the dictionary definition of the word "sal" is "salt," and that the word "sal" is principally used in connection with scientific subjects, as chemistry. It is the common prefix for names of various preparations, such as the well known sal volatile, sal soda, and sal ammoniac, in which connection it is always understood to mean that some form of salt is a substantial element of the preparation. It is one of those descriptive words which the courts have held could not be appropriated as a trade-mark. Thus, in Standard Paint Company v. Trinidad Asphalt Company, 220 U. S. 453, 31 Sup. Ct. 457, 55 L. Ed. 536, with reference to the word "rubberoid," the court says:

"No sign or form of words can be appropriated as a valid trade-mark, which from the nature of the fact conveyed by its primary meaning, others may employ with equal truth, and with equal right, for the same purpose. * * * Nor can a generic name, or a name merely descriptive of an article of trade, of its qualities, ingredients, or characteristics, be employed as a trade-mark, and the exclusive use of it be entitled to legal protection."

In the opinion rendered by the Circuit Court of Appeals for the Eighth Circuit in said cause—163 Fed., pp. 979 and 980, 90 C. C. A. 195—the authorities upon this subject are exhaustively cited.

[1-3] There is no such word as "Vet" in the dictionaries, nor does the evidence disclose any, except as used by complainant. It is alleged by defendant to be an abbreviation of the word "veterinary," but such definition is a mere assumption from the fact that it is a veterinary remedy. If it be assumed that the use of the common word "sal," in hyphenated association with the arbitrary term "Vet," may constitute a proper trade-mark, as was held in *Wolfe v. Barnett*, 24 La. Ann. 97, 13 Am. Rep. 111, *Clinton Metallic Paint Co. v. N. Y. Metallic Paint Co.*, 23 Misc. Rep. 66, 50 N. Y. Supp. 437, *Solis Cigar Co. v. Pozo*, 16 Colo. 388, 26 Pac. 556, 25 Am. St. Rep. 279, and *Paul on Trade-Marks* (1903) § 40, yet where only the common and nonexclusive feature is used, there is no infringement. 38 Cyc. p. 755, and cases cited. In the present case defendant has appropriated only the term "Sal," which he and every one else was at liberty to use. As between the arbitrary term "Vet" and the word "Tone," there can be no reasonable claim to resemblance. No ordinary purchaser would take the one for the other, even in combination with the word "Sal." One is not required to so distinguish his goods that careless buyers will know by whom they are made and sold. *Wrisley Co. v. Iowa Soap Co.*, 122 Fed. 796, 59 C. C. A. 54; *Johnson v. Parr, Russ, Eq. Cases (Nova Scotia)* 98. In this view of the law as applied to the facts of this case, it is of no consequence that consumers of complainant's product recognized the goods bearing the term "Sal-Vet" as the goods of complainant. Nor is it necessary to determine whether the term "Sal-Vet" had acquired a secondary meaning as representing complainant's product. Defendant has not used that term, and consequently has not infringed it.

[4] With reference to the charge of unfair competition, it appears from the record that defendant practically paraphrased complainant's circulars and other advertising, including its cuts and pictorial matter, and that it followed complainant in the use of blank order forms or coupons. It is also in evidence that, when complainant caused five decoy letters to be sent asking defendant for "Sal-Vet," defendant filled the orders with "SalTone," and that a number of people—eight in all—bought "SalTone" when they supposed they were getting "Sal-Vet." Defendant even followed complainant in using cuts in which the animals were shown to be so eager for the preparation that they besieged and partook from a barrel in which it was shipped.

In the paraphrasing of complainant's advertising literature and the approximation of its pictorial matter, defendant's actions were unethical rather than fraudulent. It is not shown that defendant ever sought, in its regular trade, to sell its product for that of complainant, but has insisted that "SalTone" was much the same and just as good as "Sal-

Vet." The marketing of the two remedies ran side by side for several years in a friendly manner. Salesmen were advised by defendant to do no "knocking," and not to seek to sell to those merchants dealing in "Sal-Vet." The diseases sought to be cured were the same, as were the animals. The evidence discloses that the two mixtures accomplished the same result. Naturally the advertising would be more or less similar both in language and pictures. There was no bad faith in using the order forms or coupons, since these are shown to be in common use in the mail order business. With the exception of the five decoy orders sent by parties under complainant's direction, and filled by sending "SalTone," it does not appear that defendant's object was to secure complainant's trade unfairly. Both seem to have been liberal advertisers in the same journals, which the record shows were such media as were likely to reach the owners of stock.

The evidence discloses somewhat overzealous business competition rather than unfair competition or fraud. There is shown no imposition upon nor complaint by the public with regard to the five decoy orders. It appears that no one was defrauded or deceived. The goods shipped to fill the same, while of similar packages to those of complainant, in shape, were plainly marked "SalTone," and carried in distinct form and colors the notice that they were made by the defendant, as did all defendant's other goods on the market. While the action of defendant in filling these orders was reprehensible as a business transaction, it did not amount to such a degree of unfairness or fraud as would justify penalization by the granting of the relief asked for by the bill. Throughout the record it appears that defendant always used its own name as proprietor, and the trade-mark of its product, "SalTone," and that the packages did not so closely resemble each other as to be misleading to one with any discriminating sense. The confusion, if it amounts to that, was brought about by the carelessness of purchasers, who appear to have been more anxious to procure a specific for the cure of animal diseases than to buy any particular preparation.

The facts do not bring the case within the rule obtaining in cases of unfair or fraudulent competition.

The decree of the District Court is affirmed.

WILLIAMSON v. OSENTON.

(Circuit Court of Appeals, Fourth Circuit. February 2, 1915.)

No. 1167.

1. APPEAL AND ERROR ~~1004~~—REVIEW—EXCESSIVENESS OF DAMAGES.

While there is no more salutary judicial power than that of relieving against excessive verdicts, and while the exercise of this power with moderation and firmness is important, under Const. U. S. Amend. 7, providing that no fact tried by a jury shall be otherwise re-examined in any court of the United States than according to the rules of the common law, the refusal of the District Court to grant a new trial for excessive-

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ness of the verdict in a wife's action for the alienation of her husband's affections is not reviewable.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3944-3947; Dec. Dig. ☞1004.]

2. HUSBAND AND WIFE ☞335—ALIENATION OF AFFECTIONS—INSTRUCTIONS.

In a wife's action for the alienation of her husband's affections, defendant had no reason to complain of an instruction that such an accusation against a woman should be proved by evidence convincing to the minds and consciences of the jury.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 1126; Dec. Dig. ☞335.]

3. HUSBAND AND WIFE ☞335—ALIENATION OF AFFECTIONS—INSTRUCTIONS.

In a wife's action for alienation of her husband's affections, defendant had no reason to complain of instructions that if defendant enticed plaintiff's husband into sexual intercourse with her, by allurement held out, not purposely, but under the influence of passion, actual damages only could be recovered, but that, if the sexual association imputed to defendant and plaintiff's husband was sought by defendant with design to induce the husband to withdraw his affections from his wife and bestow them on defendant, plaintiff would be entitled to recover punitive damages.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 1126; Dec. Dig. ☞335.]

4. HUSBAND AND WIFE ☞334—ALIENATION OF AFFECTIONS—DEFENSES.

In a wife's action for alienation of her husband's affections, the estrangement of the husband from his wife could be taken into consideration in mitigation of the damages only, and was not a bar to the recovery of either compensatory or punitive damages.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 1125; Dec. Dig. ☞334.]

5. APPEAL AND ERROR ☞1067—HARMLESS ERROR—REFUSAL OF INSTRUCTIONS.

In an action for alienating the affections of plaintiff's husband, where defendant and the husband denied all sexual intercourse, while the evidence for plaintiff, if true, showed beyond doubt deliberate and active initiative and co-operation of both parties in the infliction of the wrong on plaintiff, the error, if any, in refusing to charge that if the enticement was on the part of the husband, and not on the part of defendant, there could be no recovery, was harmless.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4229; Dec. Dig. ☞1067.]

In Error to the District Court of the United States for the Southern District of West Virginia, at Charleston; Benjamin F. Keller, Judge.

Action by Katherine Osenton against Margaret H. Williamson. Judgment for plaintiff, and defendant brings error. Affirmed.

See, also, 211 Fed. 1023, 127 C. C. A. 667.

W. E. Chilton and A. M. Belcher, both of Charleston, W. Va. (Chilton, MacCorkle & Chilton, of Charleston, W. Va., S. W. Walker, of Martinsburg, W. Va., and Arthur English, of New York City, on the briefs), for plaintiff in error.

Connor Hall and R. G. Linn, both of Charleston, W. Va. (C. Beverley Broun, of Charleston, W. Va., on the briefs), for defendant in error.

Before PRITCHARD, KNAPP, and WOODS, Circuit Judges.

WOODS, Circuit Judge. In this action for the alienation of the affections of her husband, C. W. Osenton, Katherine Osenton recovered against Margaret H. Williamson a verdict of \$35,000. A motion for a new trial was refused. Careful examination of the law of the case leads to the conclusion that all the rulings of the District Court were sound.

[1] In such an action for damages this court cannot review the action of the District Court in refusing to grant a new trial for excess in the verdict. The provision of the seventh amendment of the Constitution that "no fact once tried by a jury shall be otherwise re-examinable in any court of the United States, than according to the rules of the common law," was held in *Parsons v. Bedford*, 3 Pet. 433, 7 L. Ed. 732, to deny to a federal appellate court that power. *N. Y. C. & H. R. R. Co. v. Fraloff*, 100 U. S. 24, 25 L. Ed. 531; *Blitz v. United States*, 153 U. S. 308, 14 Sup. Ct. 924, 38 L. Ed. 725. There is no more salutary judicial power than that of relieving against excessive verdicts. With the changes which modern life has brought, the importance of the exercise of the power with moderation and firmness becomes more and more important, especially when it is considered that the refusal of the trial court to give relief cannot be reviewed. Large as this verdict is, the motion to reduce by granting a new trial nisi was in the discretion of the District Court and beyond the consideration of this court.

[2-4] It would unnecessarily incumber the record to consider in detail the assignments of error in the instructions to the jury. The charge was to the effect (1) that an accusation like this against a woman should be proved by evidence convincing to the minds and consciences of the jury; (2) that if the jury believed from the evidence the defendant had enticed the husband into sexual intercourse with her by allurement held out, not purposely, but under the influence of passion, then the plaintiff could recover only actual damages; (3) that if, on the other hand, they believed that the sexual association imputed to the defendant and Osenton by some of the witnesses, in her own house and on journeys together, was sought by the defendant with the design to induce the husband to withdraw his affections from his wife, and bestow them on defendant, then the plaintiff would be entitled to recover punitive damages; (4) that if the jury found the plaintiff was entitled to damages, and credited the evidence of estrangement of Osenton from his wife, this should be taken into consideration in mitigation of the damages to be awarded.

The defendant has no reason to complain of the first three of these propositions. In *Tinker v. Colwell*, 193 U. S. 473, 24 Sup. Ct. 505, 48 L. Ed. 754, the Supreme Court referring to a judgment for damages in favor of a husband for criminal conversation with his wife uses this language:

"The injury for which it was recovered is one of the grossest which can be inflicted upon the husband, and the person who perpetrates it knows it is an offense of the most aggravated character; that it is a wrong for which no adequate compensation can be made, and hence personal and particular malice towards the husband as an individual need not be shown, for the law implies that there must be malice in the very act itself, and we think Con-

gress did not intend to permit such an injury to be released by a discharge in bankruptcy."

We decline to make any distinction between the character of the wrong of alienating the affections of the wife from the husband by alluring with habitual criminal intercourse and that of alienating the affections of the husband from the wife by like means. The bearing of the evidence as to estrangement was properly limited in the charge to the subject of mitigation of damages. Estrangement is obviously not a bar to the recovery of either compensatory or punitive damages.

[5] The charge was a strong and comprehensive statement of all the law of the case. But if it be assumed, as defendant's counsel earnestly contended, that their requests more specifically laying down the proposition that if the enticement was on the part of Osenton, and not on the part of Mrs. Williamson, then there could be no recovery, should have been given, the error would be entirely immaterial. Looking at the case in a practical way, it is clear that the real and sole issue was that of the credibility of the witnesses. Osenton and the defendant denied all sexual intercourse, saying that their association began and continued in the relation of attorney and client and was altogether innocent, and defendant's witnesses testified in support of their statements. Witnesses for the plaintiff testified, on the other hand, to the defendant's keeping a special room for Osenton at her home adjoining her own room, and to the most brazen intercourse between them on his visits, which were very frequent; to several trips taken by Osenton and the defendant together in flaunting defiance of his marital obligations and the feelings of the plaintiff; and to vulgar indulgence by the defendant of her passion for Osenton on their trips. The jury accepted this testimony on plaintiff's behalf as true, and it showed, beyond doubt, deliberate and active initiative and co-operation of both parties in the infliction of this grievous wrong on the plaintiff. If the jury had believed the testimony of Osenton and the defendant and their witnesses, then they could not have found any verdict for the plaintiff under the charge; on the other hand, the jury's acceptance of the testimony on behalf of the plaintiff required at their hands a verdict for both compensatory and punitive damages. The sole issue being this broad one of fact, even if there had been error in not giving the specific instructions requested, it would be immaterial.

Affirmed.

BAKER v. BISHOP-BABCOCK-BECKER CO. et al.

(Circuit Court of Appeals, Fourth Circuit. February 2, 1915.)

No. 1303.

1. BANKRUPTCY ☞415—APPLICATION FOR DISCHARGE—REFERENCE TO REFEREE OR SPECIAL MASTER—REVIEW.

On a bankrupt's application for a discharge, the findings of a referee or special master on conflicting testimony should not be disturbed, unless it appears that he has made a plain mistake, especially in cases involving the concealment of assets, where the motive and intent of the bankrupt becomes material.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 698-708, 719, 723, 724, 726, 728; Dec. Dig. ☞415.]

Appeal and review in Bankruptcy cases, see note to *In re Eggert*, 43 C. C. A. 9.]

2. BANKRUPTCY ☞408—GROUNDS FOR REFUSAL OF DISCHARGE—CONCEALMENT OF PROPERTY.

Where a bankrupt's omission from his schedules of furniture which cost \$50 or \$60, and sold for \$15, was not with any fraudulent intent, it was not ground for denying a discharge; the key to the room containing the furniture having been turned over to the trustee.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 732-736, 759, 762, 763; Dec. Dig. ☞408.]

Appeal from the District Court of the United States for the Southern District of West Virginia, at Bluefield, in bankruptcy; Benjamin F. Keller, Judge.

In the matter of B. F. Baker, bankrupt. From an order sustaining objections by the Bishop-Babcock-Becker Company and others to the bankrupt's application for a discharge, and denying a discharge, the bankrupt appeals. Reversed.

Joseph M. Sanders and Lucius J. Holland, both of Bluefield, W. Va. (Sanders & Crockett, of Bluefield, W. Va., on the brief), for appellant.

D. E. French, of Bluefield, W. Va., and R. E. Scott, of Richmond, Va. (Russell S. Ritz and French & Easley, all of Bluefield, W. Va., on the brief), for appellees.

Before KNAPP and WOODS, Circuit Judges, and WADDILL, District Judge.

WADDILL, District Judge. This is an appeal from an order of the United States District Court for the Southern District of West Virginia, denying a discharge to the bankrupt, the appellant. The facts are briefly that in October, 1911, the bankrupt and L. A. Jaffee formed a copartnership for the purpose of conducting a news and cigar stand at the Altamont Hotel, Bluefield, and also a news, cigar, and soda fountain stand in the L. Kaufman Building, Bluefield; the latter business being known as the "Idle Hour." The copartnership continued a few months only, and in February, 1912, Baker bought out his partner's interest, and continued business in his own name until the 8th of April, 1912, when he filed a voluntary petition in bankruptcy. The case was regularly proceeded with, W. C. Pollock selected as trustee, and

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on the 11th of March, 1913, the bankrupt made his application for discharge.

On the return day of the notice to show cause against the granting of the same, certain creditors, the appellees herein, noted their appearances, and filed specifications of objection to the granting of the discharge, whereupon, pursuant to the rules of practice of the district (section 1, rule 44, of Rules of Practice of the District Court), the matters arising upon said specifications were referred to H. B. Lee, Esq., referee in bankruptcy, as special master, to report upon the same. Six specifications of objection were filed, only one of which is necessary to be set out herein, namely, the first, that the bankrupt—

"within four months prior to his adjudication in bankruptcy, and while a bankrupt, he knowingly and fraudulently concealed from the trustee certain property, consisting of bedroom furniture, located immediately overhead in the second floor of the building where he conducted one of his places of business, which property the said bankrupt used for his private purposes in private apartments occupied by him, which property belonged to his estate in bankruptcy, and is worth probably the sum of \$75, with intent to hinder, delay, and defraud his creditors."

The referee and special master duly made and filed his report, certifying that only the testimony of the bankrupt and that of the trustee of his estate had been adduced before him, which he caused to be taken down stenographically and returned with his report, and he found and certified to the court that there was no testimony whatever to support two of the specifications of objection, and only testimony as to the first charge herein set forth, stated in three different specifications, and another regarding a certain diamond ring set forth in another specification, and that there was not sufficient evidence to sustain the objection to the discharge as to either of the four specifications concerning which some testimony was introduced, and he recommended accordingly that the bankrupt be granted his discharge. To this action of the referee and special master, the appellees excepted, and asked that the District Court review and revise the same. The case was thereupon duly presented to the District Court, and that court on the 21st of May, 1914, entered its order in the following language:

"Ordered, that the report of the said special master be and it hereby is in respect of the first specification of objection, overruled and set aside; that the said first specification of objection of the Bishop-Babcock-Becker Company, a corporation, a creditor and party in interest herein, be and the same is hereby sustained; that the application for discharge of the said B. F. Baker, a bankrupt, be and the same hereby is denied."

From the action of the District Court this appeal was taken by the bankrupt. But two questions are presented for the consideration of this court upon the record, namely, whether or not the lower court erred in setting aside the action of the referee and special master in reference to the first specification of objection, and in holding that the evidence sustained the objection to the discharge, and in refusing the same.

[1, 2] Just what weight should be given to the finding of a referee or special master upon an application for a discharge, has been the

subject of some difference of opinion among the courts; but we think it may fairly be stated that the consensus is that where a referee and special master's action is based upon conflicting testimony, and he heard and saw the witnesses, that his findings ought to be accepted, and not disturbed, unless it appears that he has made a plain mistake; and this is particularly true in cases involving the concealment of assets, where the motive and intent of the bankrupt becomes material. In this class of cases much weight is necessarily due to the conclusions of the tribunal which had the opportunity of seeing and observing the manner and deportment of the witnesses whose acts were called in question, or of those who may have been cognizant of the transaction. *In re Lafleche* (D. C. Vermont) 109 Fed. 307; *Ohio Valley Bank v. Mack*, 163 Fed. 155, and cases cited, 89 C. C. A. 605, 24 L. R. A. (N. S.) 184; *In re Wheeler*, 165 Fed. 188, 91 C. C. A. 222 (C. C. A. 7th Circuit); *Epstein v. Steinfeld*, 210 Fed. 236, 127 C. C. A. 24 (C. C. A. 3d Circuit). In this case we have the findings of fact by the referee and special master, and have carefully and critically examined the testimony; and our conclusion is that he was correct in his finding, and that the evidence is entirely insufficient to justify a refusal of the discharge.

The objection thereto related especially to the alleged failure to list certain bedroom furniture used by the bankrupt and his clerk in a room over the store in which he did business, and while it is averred that his misconduct in this regard was fraudulent, and with intent to conceal property from his creditors, we do not think the testimony taken as a whole, or any reasonable inference that can be drawn therefrom, justifies that conclusion. On the contrary, the circumstances support a different conclusion; that is, that the small amount of household effects, that cost only some \$50 or \$60 and sold for \$15, was not purposely and with fraudulent intent left out of the schedules. The bankrupt's explanation is that he thought it would be included in the furniture in the place of business itself, and that he gave to his trustee his key to the room in which it was, and called his attention to the same. The trustee admits receiving the key, but does not recall having had his attention called especially to the property; but it is quite evident from the entire case that what the bankrupt did was not with any fraudulent intent, and the mere omission of the articles from his schedule is not in itself sufficient to justify the denial of the discharge. *In re Slingluff* (D. C.) 105 Fed. 502. Moreover, the property was partly owned by the clerk of the bankrupt, who used the same, which might in part explain its omission, aside from the improbability of the bankrupt's attempting in giving his assets, scheduled at a considerable amount, to knowingly and purposely commit a fraud which would disentitle him to a discharge about so small a matter as that involved in the exception.

It follows from what has been said that the action of the lower court should be reversed, at the cost of the appellees.

Reversed.

TALBOT et al. v. INDEPENDENT ORDER OF OWLS et al.

(Circuit Court of Appeals, Eighth Circuit. February 25, 1915.)

No. 4091.

*(Syllabus by the Court.)***1. CORPORATIONS** ☞49—**NAME—USE OF SIMILAR NAME—INJUNCTION.**

An established voluntary association for religious, fraternal, benevolent, or social purposes is entitled to an injunction against the use by another person, association, or by any corporation, of its name or emblem, and of any name or emblem so similar to it as to be likely to create confusion, or to deceive, or induce persons to join or treat with the latter as the former, because such a use of such a name or emblem in effect perpetrates a fraud upon the former, and upon the persons confused or deceived.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 137; Dec. Dig. ☞49.]

2. EQUITY ☞65—**RIGHT TO RELIEF—CLEAN HANDS.**

The principle, "He who comes into equity must do so with clean hands," repels or defeats a complainant only when his iniquity consists of wrongful conduct in the very act or transaction which raises the equity he seeks to enforce.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 185-187; Dec. Dig. ☞65.]

Appeal from the District Court of the United States for the Southern District of Iowa; Smith McPherson, Judge.

Suit by John W. Talbot and others against the Independent Order of Owls, a corporation, and others. From decree for defendants, plaintiffs appeal. Reversed and remanded, with directions to render decree for plaintiffs.

W. J. Roberts, of Keokuk, Iowa, for appellants.

Charles A. Houts, of St. Louis, Mo., *amicus curiae*.

F. M. Ballinger, of Keokuk, Iowa, for appellees.

Before SANBORN, ADAMS, and SMITH, Circuit Judges.

SANBORN, Circuit Judge. In November, 1904, John W. Talbot, George D. Beroth, and five other persons signed a constitution by which they and those who subsequently became members agreed with each other to be bound, and organized a voluntary secret ritualistic degree association under the name the "Order of Owls." The constitution provided that the object of the order should be the advancement of its members socially, morally, intellectually, and otherwise, that the governing body of the association should be the "Home Nest," which should consist of the organizers thereof and of their successors, elected by the unanimous vote of the survivors to fill any vacancy caused by the death, resignation, or removal of any member; that the legislative power of the order was vested in the Home Nest sitting in January of each year; that the sole executive power of the order was vested in the Home Nest when it was in session, and when it was not in session in the Supreme President, who should be elected by

the Home Nest annually; that the subordinate or local bodies of the order should be called "Nests," and each of them should pay to the Home Nest 10 cents quarterly for each of its members. John W. Talbot became and has continued to be the Supreme President of the order, whose membership increased until it had about 200,000 members and about 1,500 nests scattered throughout the United States, Canada, and the Philippines. In 1907 this order adopted an emblem, consisting of a design of three owls, each bearing the letter "O" on its breast and sitting side by side on the same rod facing the observer. In July, 1911, the Supreme President revoked the charter of subordinate nest No. 1227, stationed at Keokuk, Iowa. Thereupon F. M. Ballinger, one of the defendants, and others, who had been members of nest No. 1227, organized a corporation under the laws of Iowa under the name "Independent Order of Owls" for the same purposes as those for which the Order of Owls was organized, adopted the same emblem as that of the original order, except that, instead of placing an "O" on the breast of each of three owls, it placed the letters "I. O. O." above the owls and the word "Honesty" below them. This new corporation then proceeded to conduct its operations—to solicit and receive members in competition with the original Order of Owls. Talbot and Beroth, as the sole members of the Home Nest of the Order of Owls, in their own behalf and in behalf of all the members of that order, brought this suit in equity against the Independent Order of Owls and F. M. Ballinger, to prevent them from using the name "Independent Order of Owls," or any name which contains the word "Owls," or the emblem that the Independent Order of Owls had adopted. At the final hearing the court below rendered a decree of dismissal of the complaint, on the grounds that the words Independent Order of Owls so distinguished the defendant corporation from the Order of Owls, and the emblem of the former so distinguished it from the emblem of the latter, that the plaintiffs were entitled to no injunction against their use, and that the plaintiffs had not come into court with clean hands.

[1] An established voluntary association for religious, fraternal, benevolent, or social purposes is entitled to an injunction against the use by another person, association, or corporation of its name or emblem, and of any name or emblem so similar to its as to be likely to create confusion, or to deceive or induce persons to join or treat with the latter as the former, because such a name or emblem in effect defrauds the former and the persons so confused or deceived. McGlynn v. Post, 21 Abb. N. C. (N. Y. 1887) 97, 98; Black Rabbit Association v. Munday, 21 Abb. N. C. (N. Y. 1887) 99, 103, 104; Creswill v. Grand Lodge K. P. of Georgia (1910) 133 Ga. 837, 67 S. E. 188, 190, 192, 193, 184 Am. St. Rep. 231, 18 Ann. Cas. 453; Society of the War of 1812 v. Society of the War of 1812 in the State of New York, 46 App. Div. 568, 62 N. Y. Supp. 355; Benevolent & Protective Order of Elks v. Improved Benevolent & Protective Order of Elks of the World, 60 Misc. Rep. 223, 111 N. Y. Supp. 1067, 1069; Salvation Army in United States v. American Salvation Army (1909) 135 App. Div. 268, 120 N. Y. Supp. 471, 475, 476; International Committee of Young Women's Christian Association v. Young Women's

Christian Association of Chicago, 194 Ill. 194, 62 N. E. 551, 56 L. R. A. 888; Benevolent & Protective Order of Elks v. Improved Benevolent & Protective Order of Elks of the World (1912) 205 N. Y. 459, 463, 466, 98 N. E. 756, Ann. Cas. 1913E, 639. That this principle of equity is just and salutary, and that it should be liberally applied and enforced, is self-evident. That the use by the defendants below of the name Independent Order of Owls and the emblem it adopted to conduct the operations of a corporation for the same purposes as the purposes for which the Order of Owls had used its name and its emblem for years before the junior organization was formed, and until its subordinate nests had become 1,500 and its members 200,000, would be likely to create confusion among those interested in their operations, and to deceive and induce strangers to join and treat with the junior organization in the belief it was the senior and well-known association, is too clear for discussion. The testimony of the eyes, when a glance at the two names and the two emblems is taken, is a demonstration of this proposition.

[2] Nor does the evidence which is found in this record upon which the defendants rely to defeat the plaintiffs, and to bring this suit under the ban of the principle, "He who comes into equity must come with clean hands," sustain that defense. That principle does not repel all sinners from the precincts of courts of equity, nor does it disqualify any plaintiff from obtaining full relief there who has not done iniquity in the very transaction concerning which he complains. The wrong which may be invoked to defeat him must have an immediate and necessary relation to the equity for the enforcement of which he prays. Dering v. Earl of Winchelsea, 1 Cox, Chan. 318, 319; Lewis & Nelsen's Appeal, 67 Pa. 153, 166; Bateman v. Fargason (C. C.) 4 Fed. 32, 33; Shaver v. Heller & Merz Co., 108 Fed. 821, 824, 48 C. C. A. 48, 51, 65 L. R. A. 878; Trice v. Comstock, 121 Fed. 620, 627, 57 C. C. A. 646, 653, 61 L. R. A. 176; Cunningham v. Pettigrew, 169 Fed. 335, 344, 94 C. C. A. 457, 466. The equity which the plaintiffs are endeavoring to enforce is the prevention of the fraudulent use by the defendants and their rival organization of a name and an emblem so similar to those of the Order of Owls that they are calculated to create confusion between the two organizations and to induce strangers to deal with the junior body in the belief that it is the senior one. The iniquity the defendants seek to present for the purpose of defeating the plaintiffs' recovery has no necessary or other relation to that equity. Even if all the iniquity charged were proved, there is no evidence in this record that any of it induced or in any way affected the unlawful action of the defendants in their use of the name or emblem they adopted for the evident purpose of appropriating to themselves the reputation and prestige of the Order of Owls. That alleged iniquity consisted of claimed personal delinquencies of John W. Talbot in his relations with strangers to both organizations and in his relation to the Order of Owls, concerning which the defendants, a rival organization and its members, have no warrant to call him or the Order of Owls to account. No defense to the plaintiffs' cause of action was established in this case, and their title to the relief they sought is clear.

Let the decree below be reversed, and let the case be remanded to the District Court, with directions to render a decree for the plaintiffs for the relief prayed in their complaint.

BACON v. GENNETT.

(Circuit Court of Appeals, Fifth Circuit. February 9, 1915.)

No. 2721.

COURTS ~~C~~405—CIRCUIT COURT OF APPEALS—DECISIONS REVIEWABLE—FINALITY OF DETERMINATION.

In a suit by the United States to require conflicting claimants to land sought to be condemned to set up their claims by interpleader, B. and G. filed conflicting claims to six lots. Their claims were tried before a jury, resulting in a verdict for B. as to one lot and for G. as to the other five lots, and judgment was entered thereon. A motion by B. for a new trial was granted as to one of such five lots. Held, that as the judgment fully disposed of only five of the lots, leaving the title to one lot undetermined, and as the Circuit Court of Appeals has no jurisdiction, except in certain exceptional cases, to hear appeals from other than final decrees, the appeal was premature, and should be dismissed, since the judgment was not final, even considering the case between the parties as one at law, while the matter was in the nature of an issue out of chancery, as to which the verdict and judgment were advisory only, and required a decree in the main case to make them effective.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 1097-1099, 1101, 1103; Dec. Dig. ~~C~~405.]

Finality of judgments and decrees for purposes of review, see notes to Brush Electric Co. v. Electric Imp. Co. of San Jose, 2 C. C. A. 379; Central Trust Co. v. Madden, 17 C. C. A. 238; Prescott & A. C. Ry. Co. v. Atchison, T. & S. F. R. Co., 28 C. C. A. 482.]

Appeal from the District Court of the United States for the Northern District of Georgia; William T. Newman, Judge.

Suit by the United States to require conflicting claimants to land sought to be condemned to set up their claims by interpleader. From a judgment in favor of N. W. Gennett as to certain lots, Hal H. Bacon appeals. Appeal dismissed.

Arthur Heyman and P. H. Brewster, both of Atlanta, Ga., for appellant.

Andrew Bennett, of Franklin, N. C., for appellee.

Before PARDEE and WALKER, Circuit Judges, and MAXEY, District Judge.

PARDEE, Circuit Judge. The case shows that the United States of America instituted its condemnation proceedings to condemn 32,000 acres of land lying in Fannin, Gilmer, Murray, and other counties in the northern part of Georgia. An examination of the title to said various tracts of land, including a great many land lots, showed that there were possibly hundreds of claimants in many cases having apparently conflicting interests, whereupon, in aid of said condemnation proceeding, a bill was filed by the United States of America on the

equity side of the District Court of the United States for the Northern District of Georgia, making all of these various conflicting claimants parties, and requiring them to come into court and set up by interpleader what, if any, claim they had to these respective properties. In response to the notice and service in said bill, Hal H. Bacon filed a claim to six land lots, to wit, Nos. 78, 104, 114, 145, 180, and 213, lying in the Sixth district and First section of Fannin county, Ga. N. W. Gennett also filed claim to said land lots Nos. 78, 104, 114, 145, 180, and 213 in the Sixth district and First section of Fannin county, Ga.

The disputed claims to said respective land lots between said Hal H. Bacon and N. W. Gennett were brought to trial before a jury, resulting in a verdict of the jury finding lot 114 to be the property of Hal H. Bacon, and lots 78, 104, 145, 180, and 213 to be the property of N. W. Gennett. A judgment was entered in accordance with this verdict. Counsel for Hal H. Bacon filed a motion for a new trial, complaining that said verdict and judgment, finding lots 78, 104, 145, 180, and 213 to be the property of N. W. Gennett, were contrary to law and contrary to the evidence. Said motion for new trial was continued until the March term, 1914, of the said court, at which time, to wit, on March 31, 1914, the court rendered a judgment granting said motion for new trial as to lot 104, and overruling said motion for new trial as to lots 180 and 214. Thereupon Bacon petitioned for and was allowed an appeal to this court.

The suit between Bacon and Gennett in the District Court was practically an interpleader covering the whole six lots involved, and the judgment of the District Court fully disposes of only five of them, leaving the title to one lot undetermined. As this court does not have jurisdiction (save in certain exceptional cases, of which this is not one) to hear appeals from other than final decrees, this appeal is premature and should be dismissed. See *Menge v. Warriner*, 120 Fed. 816, 57 C. C. A. 432; *Rexford v. Brunswick-Balke-Collender Co.*, 228 U. S. 339, 346, 33 Sup. Ct. 515, 57 L. Ed. 864.

As against dismissal it was argued that the judgment appealed from was final as to five lots in controversy, and that if the appeal should be dismissed that judgment could be executed, and it would then be too late, after a final decree for appellant, to obtain full relief by appeal; but we consider that the judgment appealed from covering only part of the issues and not disposing of the whole controversy, was not final, even considering the case between the parties as one at law and on the law side of the court. But the case was one in equity, and the verdict of the jury and the judgment thereon—the matter being in the nature of "an issue out of chancery"—were not conclusive, but advisory, having no more effect than a master's report confirmed, and required a decree in the main case to be made effective. And here we may notice that, if the proceeding before the jury was really a trial at law, a writ of error, instead of an appeal, would have been required to authorize this court to review the same.

The appeal is dismissed.

In re HAGY.

(Circuit Court of Appeals, Sixth Circuit. March 2, 1915.)

No. 2499.

1 BANKRUPTCY ☞408—GROUNDS FOR REFUSAL OF DISCHARGE—CONCEALMENT OF PROPERTY.

A bankrupt claimed to have sold an interest in a partnership, for which he paid \$1,400, to H. for \$1,000, and to have taken H.'s note in payment, and to have turned the note over to his father-in-law on a pretended debt. H. made no inquiry as to the assets, liabilities, or profits, never received any profits, and understood that the stock of goods was security for his note. The bankrupt agreed that he should not be pushed for payment, and this arrangement was understood by the father-in-law. H., wishing to be relieved of liability, at the bankrupt's direction transferred the interest to the bankrupt's uncle, who gave his note therefor, but who made no inquiry as to the condition of the business, and did not notify the other partner of the transfer. He expected to surrender the business when his note was paid. No notice of the dissolution of the partnership was given, and no change was made in the merchant's license required by statute. *Held*, that the facts showed that the transfers were pretended, and not in good faith, and were mere devices to obtain the use of the alleged vendee's notes, and that the bankrupt was all the time the owner of the interest, and hence his intentional and fraudulent concealment of his ownership of such interest justified the denial of a discharge.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 732-736, 759, 762, 763; Dec. Dig. ☞408.]

2 BANKRUPTCY ☞413—DISCHARGE—CREDITORS ENTITLED TO OPPOSE DISCHARGE.

A creditor, whose claim against a bankrupt arose out of a partnership with the bankrupt, which was terminated prior to the bankrupt's pretended sales of his interest in a partnership with a third party, and who neither participated in nor had knowledge of such sales, was not estopped from objecting to the bankrupt's discharge because of the concealment of his interest in the partnership with the third person.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 712-718, 725, 727; Dec. Dig. ☞413.]

Appeal from the District Court of the United States for the Western District of Tennessee; John E. McCall, Judge.

In the matter of the bankruptcy of O. C. Hagy. From an order denying a discharge, the bankrupt appeals. Affirmed.

F. S. Elgin, of Memphis, Tenn., for appellant.

W. G. Timberlake, of Jackson, Tenn., and E. W. Ross, of Savannah, Tenn., for appellee.

Before KNAPPEN and DENISON, Circuit Judges, and SATER, District Judge.

SATER, District Judge. The bankrupt's application for a discharge was resisted by his principal creditor, Allen, on the ground that the bankrupt knowingly and fraudulently concealed from and refused to surrender to the trustee in bankruptcy various items of property, the

☞ For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

only one of which that need be considered is a half interest in a store located at Ramer, Tenn. The District Court approved the recommendation of the referee and refused a discharge; hence this appeal.

[1] The bankrupt paid \$1,400 for his interest in the Ramer store. He claims to have sold it to one Houston for \$1,000, and to have taken his note for that amount in payment. He turned the note over to his father-in-law, N. A. Erwin, to be credited, as he claims, on a debt owing by him to Erwin. At the time of the purported sale, no inquiry as to the assets, liabilities, or profits of the store was made. Houston never asked for or received any profits from the business, or any statement regarding it, or took any interest therein other than to inquire of Kerr, who owned the other half of it, as to how the store was doing. He understood that he took the stock of goods as security for his note, and intended to turn the goods back when his note was surrendered to him. He "aimed for somebody else to pay it." The bankrupt agreed with him that Erwin should be kept "off" of him and should not push him for payment. This arrangement was known to and understood by Erwin himself. Subsequently, not wishing to carry the risk of having to pay the note, Houston applied to the bankrupt and was told that he might relieve himself of liability by transferring his half interest in the store to John R. Erwin, a half-uncle of the bankrupt's wife. This was accordingly done in March, 1909, and Houston received for it the note of John R. Erwin for \$1,000, and, through the bankrupt, the return of his own note for a like amount theretofore held by N. A. Erwin. He indorsed the John R. Erwin note, and delivered it to the bankrupt, who was to take it to the bank of Hamburg. John R. Erwin made no inquiry, at the time the property was transferred to him, as to the condition of the business, or as to whether it was profitable or not, and did not notify Kerr of the transfer until he was about to testify in the bankruptcy proceeding in the latter part of the following August. He never paid the note, or any part of it, and expected to surrender the business to the bankrupt when his note was paid. The bankrupt, subsequent to the alleged sale to Houston, gave no notice of a dissolution of his theretofore existing partnership with Kerr; nor did either Houston or John R. Erwin make any change in the merchants' license required by Shannon's Tennessee Code, c. 9, art. 1, §§ 973-986, to show who constituted the firm of which they in turn were respectively purported members. The referee was warranted in finding that, after the alleged purchase of a half interest in the store by Houston, the control and management of the same was left largely, if not entirely, to the bankrupt. It is quite clear that the bankrupt was all the while the owner of the half interest in question, and that the purported transfers were pretended and not in good faith—mere devices to obtain the use of the alleged vendees' paper, for which such vendees in turn held such half interest as security. The charge of intentional and fraudulent concealment is abundantly sustained by the evidence.

[2] The bankrupt's indebtedness to Allen arose out of a partnership between the two which was terminated in 1907, prior to the bankrupt's pretended sales to Houston and John R. Erwin. Allen did not

participate in and had no knowledge of either of such sales. He is not, therefore, estopped from objecting to the bankrupt's discharge.

In view of the conclusion reached, other questions need not be considered.

The lower court is affirmed.

THE BERTHA F. WALKER.

(Circuit Court of Appeals, Second Circuit. January 12, 1915.)

Nos. 95-97.

COLLISION ~~74~~—VESSEL BREAKING FROM MOORINGS—INSUFFICIENT LINES.

Evidence held to sustain findings that the breaking away and consequent injury of three boats moored in Newtown creek in a summer squall was caused by being struck by another schooner, which broke from her moorings and drifted upon them, and also that the schooner was in fault for not using mooring lines of sufficient strength.

[Ed. Note.—For other cases, see Collision, Cent. Dig. § 104; Dec. Dig. ~~74~~.]

Appeal from the District Court of the United States for the Southern District of New York.

These causes come here upon appeal from decrees of the District Court, Southern District of New York, holding the schooner Bertha F. Walker solely in fault for a collision between herself and three other boats in Newtown creek during a heavy summer squall. The collision occurred after the schooner had broken away from her moorings. It is disputed whether or not the flotilla, consisting of the three other boats, had also broken loose before collision. The condition and sufficiency of the lines by which the schooner was made fast were also in controversy. The opinion of Judge Hand in the trial court is as follows:

There are two questions to be determined in this case: First, whether the flotilla broke away before the schooner struck them; and, second, if the schooner broke them from their moorings, whether that accident was unavoidable or was due to the faulty mooring of the Walker.

As to the first, I am satisfied with the libelant's testimony. Of the libelant's witnesses, McMann, the master of the Helen P., although directly interested, impressed me as a very honest witness. Of Turner and Campbell the less I can say the better; they were utterly discredited. Wenburg or Knee did not carry conviction. On the other hand, Clyde Glasman and Bedell, who were in a position to see—being directly opposite to the flotilla—were exceedingly good witnesses. They told as much as, and no more than, was reasonable from one in their position. It is quite impossible to reconcile their stories with anything but the fact that it was the schooner which broke the flotilla loose. The fact that they speak of the flotilla as on their right hand seems to me entirely natural. For the claimants, Maloney, Colgan, and Bosworth, apparently disinterested men, who stood in a place where they could observe, all say that the Walker did not foul the flotilla until the latter was within 230 feet of the bridge. They say that the flotilla was delayed because the Helen P.'s sprit became fouled in a house and so impeded its movement up the stream. That story is certainly not impossible, and it is corroborated by Falker, who swore that the flotilla broke loose before

~~74~~—For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

the Walker. Such disputes are sometimes difficult to determine, but I must say that I do not feel that this is one.

The engine crew did not carry conviction to me, just why I should find it hard to say. Had they been uncontradicted I should have followed their story, especially when followed by Falker who made a better showing. But their testimony was not uncontradicted and Falker was an eleventh hour witness, produced after I had already indicated a decided opinion. Taking the conflict as it is and even laying out of consideration the libellant's interested witnesses, though that ought in fairness not to apply to McMann—the weight is decidedly with the libelants. It is suggested that the depositions of the crew of the Helen P. may be reconciled with the theory that the flotilla broke adrift and was fouled by the Walker after the Helen P. had impaled a house, since removed, with her spirit, I do not at all agree with any such reconciliation, for it seems to me perfectly apparent that the crew meant to say that the dredge had not moved when the Walker struck her. There is, to be sure, considerable vagueness in that testimony, but it does not serve to help me to believe the story of the engine crew, but rather the contrary. That story seems to me to be made rather to fit into those ambiguities in the testimony of the crew of the Helen P. which was accessible before the trial. In so far as such an agreement is shown, it does not help to remove the impression which I got at the time. At least I have no trouble whatever in choosing the libelant's story upon this branch of the case.

The case therefore resolves itself into that of a moving vessel striking and fouling a moored vessel, and Mr. Goodrich quite frankly concedes that in this situation the burden is upon him to show himself free from fault. What, then, are the facts? That the Walker, although thoroughly moored so far as concerned the number of her ropes and the method of lashing, was blown adrift in a squall of no greater violence than is to be expected after a very hot and sultry day, say once a summer, or once in two summers. Such squalls are no doubt unusual, but are certainly not out of any expectation in the harbor during the summer. Hardly a season passes without damage to the smaller shipping being caused by heavy squalls, nor was the wind record abnormally high in the case of this one. This was not a case like the great storm of February 22, 1912, or that in the early days of this year when the gale rose to over 90 miles an hour. The maximum velocity was 58 miles which is very different. Besides, the schooner was not in an unusually exposed place; indeed, I think, I may say that she probably had some shelter from the buildings near at hand.

Under these circumstances, it is hardly possible to say that the accident was inevitable. It really speaks for itself. Had the vessel been properly moored, she could not have broken away under the circumstances. If I look for an explanation, it seems to me that the character of the rope shows pretty clearly what was the reason. There was presented before me both the Golden Rod's towing hawser and this rope itself. It is true that 2½ years have elapsed in the case of each since the date of the accident, but the condition to-day of each is quite different. It is very easy, merely by twisting the hawser of the Walker, to burst out its rotten strands. It is indeed true that the ropes were originally of different grades, and that there is a conflict in the testimony as to whether it is customary to employ bolt lines, such as tugs use, for fast lines in schooners. That dispute I do not feel called upon to determine, for it is quite clear that the claimant is in this position: If it be customary to employ for fasts rope of the character which he used, it is at least necessary that it should be watched, so that it may be able to withstand such strains as are within reasonable expectation. This rope was at least six or seven months old; at the present time it is rotten, and the only expert testimony on its condition at the time it was injured—testimony which is apparently disinterested—is to the effect that it was then rotten. Moreover, why, with the burden upon him, does not the claimant make some proof? Claim was made almost at once for the damage while all the evidence was at hand. Then disinterested testimony was possible, and the ropes could be saved for the trial; but not a single

piece of these lines was offered in evidence. This, in view of the nature of the issue, is certainly a very significant consideration, at least when the burden is on the claimant. In such a case the best proof of the condition of the rope is the rope itself, and the only specimen we have was and is in unfit condition. Can the claimant complain that I should judge from that piece, when all the means of correcting any error lay, and for aught we know still lie in his hands?

The usual decree of reference will therefore pass in favor of the libelant.

H. W. Goodrich, of New York City, for appellant.

Peter Alexander, of New York City, for the Golden Rod.

W. J. Martin, of New York City, for appellees.

Before LACOMBE, COXE, and WARD, Circuit Judges.

PER CURIAM. These causes present only two questions, both wholly of fact, on testimony sharply conflicting and manifestly irreconcilable. We have carefully examined the whole testimony, and do not find in it sufficient to justify a reversal of the findings, on these two questions, of the District Judge, who saw, heard, and himself questioned the witnesses. Discussion of the evidence seems superfluous; it would contribute nothing illuminative of admiralty law or practice.

The decrees are affirmed, with interest and costs.

TWENTIETH CENTURY MOTOR CAR & SUPPLY CO. v. HOLCOMB CO.

(Circuit Court of Appeals, Second Circuit. January 12, 1915.)

No. 49.

1. PATENTS ☞66—ANTICIPATION—PRIOR PATENT.

A patent granted and published is a part of the prior art with respect to another patent not applied for until afterward, although the patentee in the first patent was a foreigner.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 79, 81; Dec. Dig. ☞66.]

2. PATENTS ☞36—DATE OF INVENTION—EVIDENCE.

A mere statement, printed at the head of an application for a patent, that the original application was filed at a prior date, cannot be considered as evidence to carry the date of invention back to the time stated.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 40; Dec. Dig. ☞36.]

3. PATENTS ☞328—VALIDITY AND INFRINGEMENT—WIND-SHIELD FOR MOTOR CARS.

The Williams patent, No. 1,011,892, for a wind-shield for vehicles, held not for a useful invention, and also, as limited by the prior art, not infringed.

Appeal from the District Court of the United States for the District of Connecticut.

On appeal from a decree of the District Court for the District of Connecticut dismissing the bill in an action based on letters patent No. 1,011,892 granted to Martin L. Williams December 12, 1911, for an improvement in wind-guards for vehicles. The original application was filed February 11, 1908, but was divided and the present application was filed November 21, 1908.

Patents to Tolman, Bertram & Lamoreaux, Sprague and Holbrook have been introduced in the record improperly, as they are all subsequent to November 21, 1908, the filing date of Williams' application now under consideration. Why the record is incumbered with such irrelevant matter has not been explained.

The decision of the District Court is reported in 208 Fed. 155.

Albert H. Graves and Frank L. Belknap, both of Chicago, Ill., for appellant.

Ward Church and Harrison Hewitt, both of New Haven, Conn., for appellee.

Before LACOMBE, COXE, and ROGERS, Circuit Judges.

COXE, Circuit Judge. The patent is for an improvement in wind-shields for use, principally, in motor cars. It relates to that type of collapsible wind-shields in which the upper sash is adapted to be lowered or folded over the lower one when not in use. In the early history of the art the wind-shield consisted of a single glass so mounted that it shielded the chauffeur and the occupants of the car and when not needed for that purpose could be turned down over the hood of the car. The difficulty with this arrangement was that when the glass became blurred by rain or fog so that the chauffeur could not see ahead, the entire shield had to be lowered or else the occupants of the car were subjected to the danger of collision with an approaching car or other obstacle on the road. The difficulty was obviated, to a great extent, by dividing the shield into two sections, on a line a little below the chauffeur's range of vision, and turning down the upper section out of the way. This arrangement was not entirely satisfactory for two reasons—when the movable section was up it prevented the free circulation of air, and, when covered with mist, it was impossible to see ahead. When the upper section was turned down there was practically little protection for the occupants of the car from rain, dust and the rush of the air, especially when proceeding at high speed.

Williams undertook to improve upon these conditions by providing an upper sash which may be lowered as in the previous structures, and also may be shifted to an intermediate position to permit the chauffeur to see the road ahead through the space left between the two sections, which the trial judge found not to exceed three inches. The complainant's structure is sufficiently described by the third claim, which is as follows:

"3. A wind-guard for vehicles comprising an upright lower sash, bracket supports connected with the upper portion of said sash at each side thereof, and extending laterally therefrom, an upper sash, links connected to the sides of the upper sash and to the respective bracket supports at points remote from the lower sash, said brackets supporting the lower edge of said upper sash in tilted relation to the lower sash with its lower edge offset and spaced away from the upper edge of said lower sash, and means for locking the lower edge of said upper sash in either its alined or tilted position."

The novel feature which, it is alleged, distinguishes the Williams structure from the prior art is the arrangement by which the upper portion is so tilted as to afford protection to the inmates of the car in

case of rain, snow or fog and at the same time to permit the driver to see the road ahead. It is unnecessary to discuss all of the patents properly in evidence. The patent to Lingley of June 16, 1908—application filed May 6, 1907—discloses the alleged novel feature of the Williams patent, although the difficulties are remedied in a slightly different manner. Lingley says:

"Weather screens as at present constructed are formed of two frames pivotally and concentrically connected together and each carrying a sheet of glass, there necessarily being a space or crack between the two frames or sheets of glass at the joint which admits a considerable draft and also rain in the case of wet weather and this is the case whether the upper part of the screen is arranged either in a vertical or inclined position.

"Now the objects of the present invention are to remedy these defects and also to provide means whereby perfect protection from the weather will be afforded in any position of the screen while in certain positions a clear view of the road will be left between the screens and which is of great importance in wet weather when the screens are more or less opaque.

* * * * *

"The parts may be so set that a clear space is left between the top of the lower part of the screen 6 and the bottom of the upper part 8 thereof as shown by the full lines in Fig. 14 so as to give a clear view of the road more especially in rainy weather when the screen is more or less obscured but generally the glass of the upper part 8 of the screen overlaps the lower part 6 thereof so that weather, that is rain or the like, is effectually excluded and in certain positions such as that shown at Fig. 4, draft is also largely prevented."

[1] It is true that Lingley is, as stated in his description, a British subject, but he has been granted a patent by the United States applied for May 6, 1907, and granted June 16, 1908, 5 months before the Williams application was filed and 3½ years before the Williams patent was granted. We know of no reason why this patent should not be considered. It was actually published and part of the prior art when Williams filed the application on November 21, 1908, upon which the patent in suit was granted. We do not consider this ruling in conflict with our decision in Vacuum Co. v. Dunn, 209 Fed. 219, 126 C. C. A. 313. In that case the Schiedt patent which was held not to be a part of the prior art was not patented or published prior to the date of the Locke-Dunn application.

[2] We have selected the Lingley patent as showing perhaps more clearly than any other the mechanism for producing the opening through which the road may be seen when the glass is obscured by rain or mist. The same thing, substantially, is shown in the British patent to Bill which was applied for May 7, 1906, and accepted December 6, 1906. We do not see how the date of the Williams invention can be found to be February 11, 1908, because of a statement printed at the head of the specification: "Original application filed February 11, 1908." That application is not in evidence, we do not know what it contains and it would establish a new rule in patent litigation if the date of invention may be fixed by a mere statement printed at the top of the application but not a part thereof.

[3] It is not entirely clear what space is left in the Williams structure through which the driver may look when the upper and lower glasses are obscured by fog or rain. The court below finds that when

the upper glass is swung into position away from the lower glass, the horizontal distance between them cannot exceed three inches. What the perpendicular distance, through which the chauffeur must look in order to see the road, would be is not stated but, manifestly, it must be much less than three inches. To rely upon such a narrow opening through which to view the road ahead seems to us a highly dangerous expedient. When it is remembered that cars moving at the rate of 25 miles an hour which is not generally considered excessive, are approaching each other at the rate of 50 miles an hour, it seems plain that if the drivers relied upon these narrow perpendicular openings they would be in the jaws of collision before they knew of each other's approach. A shield which does not enable the driver, going at the ordinary rate of speed to detect obstacles, moving and stationary, in time to prevent collision may be new, but it can hardly be called useful. The proof on this branch of the case is not as clear and definite as it might be but we are convinced that the structure shown in the description and drawings might become a dangerous one when vision through the glass is totally obscured and the chauffeur must rely solely upon the narrow opening between the top of the lower glass and the bottom of the upper glass.

Judge Martin found that the Williams patent was not for a useful invention and that its claims must be narrowly construed in view of the prior art. As so construed he held that they were not infringed. As we agree with him in these conclusions, the decree is affirmed with costs.

McKEE GLASS CO. et al. v. LIBBEY GLASS CO.

(Circuit Court of Appeals, Third Circuit. February 9, 1915. Rehearing Denied March 2, 1915.)

No. 1893.

PATENTS ~~286~~—LICENSE—SUIT BY LICENSEE.

A license under a patent construed, and the right of the licensee to maintain a suit to protect its rights thereunder determined.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 453-456; Dec. Dig. ~~286~~.]

Appeal from the District Court of the United States for the Western District of Pennsylvania; Charles P. Orr, Judge.

Suit in equity by the Libbey Glass Company against the McKee Glass Company and the H. C. Fry Glass Company. Decree for complainant, and defendants appeal. Affirmed.

For opinion below, see 216 Fed. 172.

Geo. E. Reynolds and Robert D. Totten, both of Pittsburgh, Pa., for appellants.

Otto R. Barnett, of Chicago, Ill., and Thomas Patterson, of Pittsburgh, Pa., for appellee.

Before HUNT, McPHERSON, and WOOLLEY, Circuit Judges.

PER CURIAM. We have made a very careful examination of the record in this case, and believe that the opinion of the District Court sufficiently covers each and every phase presented for consideration. We therefore adopt the opinion of the District Court, and affirm the decree appealed from.

ENGINEER CO. v. BLAISDELL CANADY CO.

(Circuit Court of Appeals, Second Circuit. January 12, 1915.)

No. 175.

PATENTS ~~294~~—SUIT FOR INFRINGEMENT—PRELIMINARY INJUNCTION.

The granting of a preliminary injunction against infringement of a patent was within the discretion of the court, where the defendant, although denying present infringement, admitted the making and selling of articles which were adjudged to infringe in a suit against a user.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 473; Dec. Dig. ~~294~~.]

Appeal from the District Court of the United States for the Southern District of New York.

This cause comes here upon an appeal from an order of the District Court, Southern District of New York, granting a preliminary injunction. The suit is for alleged infringement of United States letters patent No. 817,438 and No. 826,349, for method of regulation of furnaces.

G. W. Case, Jr., of New York City, for appellant.

J. Edgar Bull, of New York City, for appellee.

Before LACOMBE, WARD, and ROGERS, Circuit Judges.

LACOMBE, Circuit Judge. Complainant brought suit for infringement of these same patents against the Hotel Astor, which was the user of a particular furnace regulator, which it was alleged infringed the patent. That suit was defended by the defendant in this suit, which makes devices which complainant contends infringe its patent. In the suit against the Hotel Astor infringement was found, and decree on final hearing was entered in favor of complainant.

Upon the hearing of motion for preliminary injunction in the suit at bar an affidavit filed in support asserts that defendant is offering for sale the same system and apparatus that was found to infringe in the Hotel Astor suit. An affidavit in answer to this charge made by defendant's president denies that it is offering to and installing for its customers the same system and apparatus, and alleges that defendant's present apparatus differs materially from the apparatus installed in the Hotel Astor. This affidavit, however, admits that it was this defendant which installed the apparatus in the Hotel Astor. That being so, an act of infringement stood conceded on the record, and it was not an abuse of discretion for the District Judge to grant preliminary injunction. The circumstance that defendant is now mak-

For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes.

ing and selling devices so different from the one which it admitted it installed that they do not infringe is immaterial. If they do not infringe, the injunction will not cover them.

The order is affirmed, with costs of appeal.

WOERHEIDE v. H. W. JOHNS-MANVILLE CO.

(Circuit Court of Appeals, Second Circuit. January 12, 1915.)

No. 107.

PATENTS @=328—VALIDITY AND INFRINGEMENT—CLEAT FOR SECURING PREPARED ROOFING.

The Woerheide patent, No. 973,902, for a cleat for securing prepared roofing, *held* valid and infringed.

Appeal from the District Court of the United States for the Southern District of New York.

On appeal from an interlocutory decree entered in the District Court for the Southern District of New York finding valid and infringed claims 2, 3, and 4 of letters patent No. 973,902, granted to the complainant, William H. Woerheide, for a cleat for securing prepared roofing. The decision of the District Court is reported in 215 Fed. 604.

Odin Roberts, of Boston, Mass., and A. Parker Smith, of New York City, for appellant.

Henry N. Paul, Jr., and Jos. C. Fraley, both of Philadelphia, Pa., and Charles S. Champion, of New York City, for appellee.

Before LACOMBE, COXE, and WARD, Circuit Judges.

PER CURIAM. Prior to the Woerheide invention the roofing material in question had been fastened to the roof with large-headed nails, or nails and cement, used in connection with round caps of metal through which the nails were driven, forcing the caps down upon the roofing sheets. These methods were not satisfactory; they did not bind the seam continuously; they produced buckling, tore the roofing fabric, and, in general, produced an unsatisfactory and leaky roof. All of these objections and defects were remedied in a simple, but complete, manner by the transversely arched cleat of the patent. As seen at the present time the introduction of this device seems an obvious thing to do; but the fact that roofs were made and fastened with the broad-headed nails and tin caps, and were continually leaking and getting out of order, shows quite conclusively that the remedy, though greatly needed, was not obvious. When the Woerheide cleat appeared, it was generally recognized as accomplishing the desired result. We think that the defendant's cleat is clearly an infringement, appropriating all the valuable features of the Woerheide invention. It is unnecessary to add further to the opinion of Judge Mayer, which covers all the points in controversy and disposes of them correctly.

The decree is affirmed.

**BISHOP-BABCOCK-BECKER CO. v. ARNHOLT & SCHAEFER
BREWING CO.**

(District Court, E. D. Pennsylvania. February 6, 1915.)

No. 543.

1. PATENTS ☞312—SUIT FOR INFRINGEMENT—EVIDENCE OF INVENTION.

Where the question of invention is in issue in an infringement suit, and was also in issue in interference proceedings in the Patent Office before the patent was granted, the record in such proceedings is admissible for the purpose of showing what the Patent Office had under consideration, and augmenting the presumption of invention arising from the allowance of the patent.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 544-549; Dec. Dig. ☞312.]

2. PATENTS ☞328—VALIDITY AND INFRINGEMENT—BOTTLE FILLING MACHINE.

The Champ patent, No. 956,285, for a bottle filling machine for filling beer bottles, commercially known as a rotary, automatic air lift, counter pressure, bottle filling machine, in which the bottles are automatically lifted to a connection with the filling tubes, held against a sealing head while being filled, and again lowered by a compressed air mechanism, was not anticipated, covers a true combination, and discloses patentable invention; also *held* infringed.

In Equity. Suit by the Bishop-Babcock-Becker Company against the Arnholt & Schaefer Brewing Company. On final hearing. Decree for complainant.

Jesse B. Fay and John F. Oberlin, both of Cleveland, Ohio, and Fenton & Blount, of Philadelphia, Pa. (Robert M. See, of Cleveland, Ohio, on the brief), for plaintiff.

Flanders, Bottum, Fawsett & Bottum, of Milwaukee, Wis., and Fraley & Paul, of Philadelphia, Pa., for defendant.

THOMPSON, District Judge. The bill charges infringement of letters patent No. 956,285, for a bottle filling machine, issued April 26, 1910, to the complainant, as assignee of Joseph H. Champ, and prays for an injunction and accounting. The defendant of record is using at its brewery in Philadelphia two bottle filling machines which are alleged to embody the mechanism set forth in the claims in issue of the Champ patent. The suit is defended by Henes & Keller Company, a copartnership, of Menominee, Mich., which manufactures and sells the machines which are alleged to infringe.

Claim 1 of the patent, which may be regarded as fairly illustrative of all the claims, reads:

"In a bottle filling machine, the combination of a rotatable upright shaft, a tank carried by said shaft, a series of bottle filling valves connected to said tank, a series of fluid pressure bottle lifts carried by said shaft, and means for automatically operating said bottle lifts by said fluid pressure during the rotation of the shaft."

The complainant's and the defendant's machines are both used and adapted for use in filling bottles with beer. Leaving out of consideration, as unessential to the consideration of the case, various me-

chanical appliances, which are described in detail and at great length by the experts, the machine of the complainant, as well as that of the defendant, consists of a rotatable upright shaft supporting a tank to which the beer, charged with carbonic acid gas, is conveyed, and above the level of the beer in the tank compressed air is conveyed to prevent the escape of the gas from the beer while in the tank. A series of bottle filling valves are connected to the tank and to tubes through which the beer flows when the bottles are in place for filling. The revolving shaft also carries a series of bottle lifts operated by air pressure for lifting the bottles, so that as the bottle is rising the filling tubes are inserted into the necks of the bottles and reach a point near the bottom of the bottles. The air lifts hold the mouth of the bottle against a sealing device, and by means of the valves the compressed air in the beer tank is introduced into the bottles before the flow of beer begins. When the pressure of the compressed air is the same in the bottle as in the beer tank, the beer is allowed to flow into the bottle. By this means the beer flows gently into the bottom of the bottle without the escape of the gas and consequent foaming of the beer, and by automatic action incident to the revolution of the shaft the valves are closed. When the bottle is filled, the flow of beer is shut off, and the bottle lowered from around the filling tube, making way for the next bottle on the next air lift.

The means for filling bottles from a tank containing beer and compressed air, mounted upon a rotatable shaft and the introduction of compressed air into the bottles from the tank prior to the introduction of the beer, in order to prevent escape of the gas and consequent foaming of the beer and flatness after bottling, are common to what is known as rotary, counter pressure, bottle filling machines, are not new, and are features of defendant's patent, No. 655,443, of August 7, 1900, to Keller. The claims in suit are for a combination of the actual filling mechanism with the automatic air lift operating during and by means of the rotation of the shaft. The machine claimed to be embodied in the Champ invention and in defendant's construction constitutes what is commercially known as a rotary, automatic air lift, counter pressure, bottle filling machine. The advantage of the air lift in this combination over the old means of raising the bottle and pressing it against the sealing head is claimed to result from the gentle action of compressed air as a means of operating the lifts. Shock or violence in the handling of beer causes the gas to be released from the liquid, causing foaming and flatness, and such action as will avoid turbulence is eminently desirable in filling and handling beer in bottles.

The invention is claimed to be an improvement over counter pressure filling machines, in which the bottles are lifted to, held in, and lowered from filling position by the mechanical action of a cam during the rotation of the machine, in the results accomplished by its gentle action during the process of filling, its capacity for accommodation to bottles of various sizes, economy of power, and the absence of the strain upon the shaft and wearing parts of the machine during rotation, which had been caused by the harsh action and heavy pressure of the previously used cam lift.

It is conceded that the defendant's machine was not manufactured and sold prior to the filing of the Champ application, but was manufactured and sold prior to the issue of the Champ patent.

The defenses set up are noninfringement, upon the ground that the defendant's machine is constructed upon the principle of the Keller patent, No. 655,443, patented August 7, 1900, prior to Champ's alleged invention of the machine of the patent in suit, and more than two years prior to Champ's application for the patent in suit, in combination with compressed air clamps, which are alleged to be clamps of general application, and to have no other function in the filling of bottles than the function of clamps either in the defendant's machine or in the machine of the Champ patent; and invalidity of the claims sued on, because the elements of the claims constitute mere aggregation, as distinguished from a patentable combination, and because they are completely anticipated by the prior art pleaded and proved by the defendant.

[1] Before considering the case upon the merits, disposition will be made of a preliminary motion of the defendant to strike out the exhibits offered in evidence by the complainant, consisting of Bastian patent, No. 1,000,971, and the Patent Office and the Court of Appeals record in interference No. 25,958, on the ground that they are incompetent, irrelevant, and immaterial items of evidence to either prove or disprove any issue in this cause. The defendant, during the taking of proofs, introduced in evidence the file wrapper and contents of the Champ patent, No. 956,285, which is the patent in suit. There is no dispute as to the materiality of the file wrapper to show the Patent Office history of the application, as bearing upon the validity and scope of the patent in suit.

During the pendency of the application for a patent, it was in interference with the Bastian patent above referred to, and the exhibits of the interference proceedings are offered in evidence for the purpose of showing what consideration the Patent Office gave to the questions of invention and patentability before the patent in suit was granted. Their admissibility for the purpose of augmenting the presumption of validity arising from the allowance by the Patent Office after a serious contest, which must have developed the characteristics of the patent and brought them pointedly into view, has been sustained in a number of cases. Milner Seating Co. v. Yesbera (C. C. A., 6th Cir.) 111 Fed. 386, 49 C. C. A. 397; Western Electric Co. v. Williams-Abbott Electric Co. (C. C.) 83 Fed. 842; Westinghouse Electric & Mfg. Co. v. Stanley Instrument Co. (C. C. A., 1st Cir.) 133 Fed. 167, 68 C. C. A. 523.

The defendant objects to the admissibility of this evidence, under the authority of the opinion of the Circuit Court of Appeals for this circuit in Elliott & Co. v. Youngstown Car Mfg. Co., 181 Fed. 345, 104 C. C. A. 175. The record of the interference proceedings, however, was not ruled out in that case as evidence to show what was under consideration by the Patent Office, but upon the ground that in the interference proceedings in that case the scope of the invention was not involved, and the only question there was one of priority between the two contestants. In the interference in the present case the issue of

invention of the patented machine was raised by motion upon the part of Bastian to dissolve the interference on the ground of lack of invention. In considering that motion, the Patent Office tribunals considered many prior patents which included two of those presented by the present defendant, and also other patents which the complainant claims are substantially similar to others which the defendant has here presented, which do not appear in the file wrapper.

For the purpose, therefore, of determining what the Patent Office had under consideration before the patent was granted, the interference proceedings are admissible under the authorities above cited, and the motion to strike out is denied.

[2] In support of the defense of noninfringement, it is urged that the defendant's machine is constructed in accordance with Keller patent, No. 655,443, with mechanical power substituted for manual power for revolving the machine, and with automatic compressed air clamps substituted for the manually operated spring and cam clamps of the machine of the Keller patent. It cannot be questioned that the defendant's machine, in its important functional parts and general principles of operation, corresponds closely with the machine of the Keller patent. It comprises a rotatable beer tank mounted upon an upright shaft. It is a counter pressure machine, and is provided with movable siphon tubes for transferring the beer from the tank to the bottles (in this immaterial respect differing from the complainant's machine in which the beer flows by gravity from the bottom of the tank into the bottle), filling heads, air and beer valves, mechanism for supplying the tank with beer and compressed air, for keeping the beer level in the tank at the right height and the compressed air pressure constant, all as in the Keller patent.

It differs from the machine of the Keller patent in the application of power for revolving the machine and the substitution of what is designated by the defendant as automatic compressed air clamps for the specific form of spring and cam clamps illustrated and described by that patent. These so-called automatic compressed air clamps consist of cylinders with pistons therein, and the compressed air is admitted below the pistons to clamp the bottles, and is exhausted from the cylinders to unclamp the bottles. The compressed air supply to the cylinders and the exhaust from the cylinders is automatically effected by and during the revolution of the machine. An examination of the construction and operation of these air operated pistons demonstrates that they are more than compressed air clamps, and more than mere substitutions for the clamps in the Keller machine. The clamp in the Keller machine is provided with jaws which firmly grasp the neck of the bottle, and a spring and cam mechanism pushes it tightly against the sealing head. Assuming that a compressed air clamp may be a mechanical substitute for the Keller spring and cam clamps, the compressed air mechanism of defendant's machine has other functions than those of a clamp. It automatically lifts the bottle to its filling position and lowers it when filled, in addition to its action in pushing and holding the bottle tightly against the filling head, accomplishing results which are not possible to nor present in the Keller clamp.

The defendant contends that the application of power to the machine of the Keller patent, No. 655,443, and the substitution of the so-called automatic compressed air clamps, is utterly without function, effect, or co-action with the bottle filling functions of the machine; that these changes have to do only with the bottle handling, and not with the bottle filling, and that this method of handling bottles and similar receptacles was old more than two years before Champ made his application for the patent in suit. If, in the defendant's machine, there is no union of function, effect, or action between the bottle filling and the bottle handling, the question arises, Where does one end and the other begin? The handling by means of the automatic air lifts is a useful and essential part of bottle filling. If the use of the automatic air lift device contributes to successful completion of the operation of filling, and its result is to render the bottled beer a better and more merchantable article, and this result is accomplished by a continuous operation in one machine in which the air lift acts before, at the time of, and after the flow of the beer filling the bottle, there must be a joinder of function, effect, and action between the parts of the combination, and the air lift is an essential feature of the filling machine. The defendant's machine substantially reproduces in its construction and operation the complainant's machine, and infringement follows if the complainant's claims cover a patentable combination, and not a mere aggregation of old mechanical elements known in the prior art.

The defendant offered in evidence the Christie patent, No. 603,874, as a complete anticipation of the claims sued upon, and as evidence that it, in connection with the German patent to Boldt and Vogel, No. 90,615, would suggest to a mechanic skilled in the art the complainant's device. These patents were considered by the Patent Office in the interference proceeding, and I can see no reason, giving due weight to defendant's evidence and contentions, to differ from the conclusions stated by the examiners in chief in that proceeding, as follows:

"Christie's device, in the first place, is from an entirely nonanalogous art. The device is an apparatus for testing tin cans to determine whether or not they are free from defects. It comprises a rotating table having thereon a series of devices onto which the cans are fed from a chute *K'* in a horizontal position onto four lugs *k* (Figure 3). Two of these lugs are carried on a part fixed to the table and the other two are carried on a movable clamping head *C⁴*; this clamping head being pushed up by a pneumatically actuated piston. When so clamped air under pressure is admitted, the device containing a sight apparatus shown in Figures 2 and 4 for determining whether or not the can is tight. The can is not filled with liquid of any kind, much less with a liquid charged with carbonic acid gas. The devices are not located in a position in which liquid could be inserted into the can, nor are the cans raised and lowered by pneumatic pressure. The only suggestion that we can find is of an arrangement of valve mechanism on a rotating table which will operate in succession a series of pneumatic cylinders. Placing the Colby and the Christie patents side by side, and assuming that one familiar with the bottling art knew of both, we fail to see how even the idea of using pneumatic cylinders for raising and lowering the bottling devices would be suggested. Nor would the addition to this group of patents of the German patent suggest the devices claimed. In the German patent the bottle carrying device is raised by a spring, and is held up, but not raised, by pneumatic pressure."

The United States Macdonnell patent, No. 211,413, and the Macdonnell British patent, No. 3,902, are also cited by the defendant. These patents are for substantially the same machine. This is not even a counter pressure machine, in which a heavy air pressure is maintained in the liquid tank and bottle to counteract the tendency of gas in the liquid to escape, and it has no bottle lift to raise the bottle into sealing contact with the collar above the filling tube. The positioning of the filling tube in the bottle is not accomplished by lifting the bottle, but by lowering the filling tube into the bottle, and the bottle is only slightly elevated in order to press its mouth against a sealing head. Both movements are accomplished by means of a cam, and not by air pressure.

Neither does Boldt & Vogel suggest the combination claims of the patent in suit, when associated with the above-named patents cited by the defendant. This machine is not a rotary machine, is not automatic, all of the operations being produced by hand, and the bottles are neither raised nor lowered by air pressure.

If we are to separate the filling mechanism from the lifting, clamping, and lowering mechanism, we have merely a crude and incomplete portion of the bottle filling operation. The result of the complainant's invention is that the bottles can be successively placed upon the pneumatic bottle lift as it arrives in its rotation at a point before the operator. The bottle is carried forward and upward on its axis, and, as it proceeds, is lifted into a position where it envelops the filling tube and is pressed against the filling head; the valves then permitting the compressed air to escape into the bottle. The beer flows gently into the bottom of the bottle, filling it gently, without any agitation and consequent loss of gas. The bottle is gradually and gently withdrawn as the lift proceeds upon its rotating course, and is delivered into a trough at the end of the journey, filled and sealed, without jar upon the machine and agitation causing turbulence in the beer. The combination of the filling device and its accompanying mechanisms and the air lift apparatus, which so effectively performs its work, produces a result which is not present in any example of the prior art. The invention, therefore, is something more than a mere aggregation of old elements, and must be regarded as a novelty in the art of bottle filling machines. That the complainant's invention was successful is evident from the large business which has been built up and in the very general use into which the machines manufactured under its patent have come.

The language of the Supreme Court in *Diamond Rubber Co. v. Consolidated Rubber Tire Co.*, 220 U. S. 428, 31 Sup. Ct. 444, 55 L. Ed. 527, is pertinent:

"Knowledge after the event is always easy, and problems once solved present no difficulties, indeed, may be represented as never having had any, and expert witnesses may be brought forward to show that the new thing which seemed to have eluded the search of the world was always ready at hand and easy to be seen by a merely skillful attention. But the law has other tests of the invention than subtle conjectures of what might have been seen, and yet was not. It regards a change as evidence of novelty, the acceptance and utility of change as a further evidence, even as demonstration."

So far as appears by the record, no other device or apparatus ever before operated upon the same principle in accomplishing the same or a similar result. The presumption in favor of the validity of the patent, augmented by the evidence of citation of the Christie and Boldt & Vogel patents in the interference proceedings, is not overcome by any of the citations of prior art by the defendant.

A decree will be entered in favor of the complainant for an injunction and accounting.

CHADELOID CHEMICAL CO. v. WILSON REMOVER CO. et al

(District Court, S. D. New York. January 6, 1915.)

1. PATENTS ~~49~~—SUIT FOR INFRINGEMENT—EVIDENCE OF UTILITY.

Ex parte experiments, conducted for the purpose of proving the inutility of a patented chemical composition for use in the arts, cannot overcome evidence that it has been substantially universally accepted by the trade and practical users.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 59-62; Dec. Dig. ~~49~~.]

2. PATENTS ~~328~~—VALIDITY AND INFRINGEMENT—PAINT REMOVER.

The Ellis patent, No. 714,880, for a paint remover and process of making the same, is valid, of a basic character, and entitled to a broad construction; also held infringed.

In Equity. Suit by the Chadeloid Chemical Company against the Wilson Remover Company and John MacNaul Wilson. On final hearing. Decree for complainant.

Duncan & Duncan, of New York City, for complainant.

Merwin & Swenarton, of New York City, for defendants.

LEARNED HAND, District Judge. It is established beyond question that the trade had no satisfactory paint remover before Ellis' discovery. I do not mean that there had been no others tried, or that they had had no sale whatever; but the overwhelming testimony is that their sales were small, and that they caused much dissatisfaction. The presence of at least 20 per cent. of phenol was alone enough to account for this in the phenol removers, while all concede that the caustic soda solutions were not feasible. Ball's remover contained no phenol, and relied for its solvent upon benzol; but it had no wax, and the solvent evaporated too quickly to be serviceable. It is true that the defendant sold substantial quantities of Amylene up to 1903, amounting to over 3,000 gallons; but there is real ground to question whether the sales of a large portion of this did not result from the inventor Forrest's connection with the Long Island Railroad, and from his pecuniary arrangements with the defendant after March 1, 1902; and, disregarding this, the sales were only a minute fraction of what successful removers at once reached upon their appearance. It is therefore quite within moderation to repeat that no successful paint remover had appeared when Ellis set to work.

Immediately his invention went into great use, and has substantially controlled the field. The business grew enormously, and now

~~49~~ For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

amounts to several hundreds of thousands of gallons per annum. Several persons attempted to disregard the patent; but they were unsuccessful, and much of the trade has taken out licenses. The patent at once filled the wants of the trade, and has held its ground for 11 or 12 years. There is surely some reason for this besides mere business exploitation. The need for a paint remover did not arise in 1902; it had always existed, as urgently before then as after; unsuccessful efforts had, indeed, been made to exploit several of the inventions containing phenol. All the elements, therefore, exist which justify one in calling Ellis' patent a pioneer.

[1] The defendant makes no effort to contradict this evidence, so I must suppose that it is not possible to do so. Its sole reliance is upon some experiments conducted *ex parte* by a young chemist of 28, whose qualifications consisted of a seven-year course in chemistry at Cooper Union, from which he graduated when he was 21, and during part of which he was employed elsewhere, and of subsequent work as a consulting chemist. Obviously such experiments count for nothing against the weight of the evidence which the trade here affords, and courts have always so understood. Ryneair Co. v. Evans (C. C.) 83 Fed. 696; Plunger Elevator Co. v. Standard Co., 165 Fed. 906, 911, 91 C. C. A. 584; Bethlehem Steel Co. v. Niles (C. C.) 166 Fed. 888. The value of an invention gets its safest test from what those think of it who are looking impartially for the best thing they can get for their purpose; when they have so decisively declared against the old forms and for the new, no trials on mice or selected panels count for anything whatever. If the Bennett remover, or the Arnestin, are as much better than Ellis' as the defendant asserts, it may use either, as it did before; but, rightly or wrongly, the trade thinks that they are not so good, and that is the best test we have.

It is said, however, based wholly upon the experiments, that the success was not made through the patent, but through an evolution from it; that the patent was for a solution of four parts of paraffine wax, four of Currier's hard grease, with eight parts of benzol; that this is not a useful solution; and that the commercial form is made of paraffine only. Bacon's experiments prove, so far as they prove anything, only that the "suitable solution" of the patent was inferior; perhaps, indeed, that it was so inferior as to be altogether invalid as a disclosure. On examination, however, they prove too much, because they include, not only the "suitable solution" of the patent, but a commercial solution going by the name of "Adelite." Now, in all cases the "suitable solution" does nearly as well as Adelite, and in one instance more than twice as well. Bacon has proved, therefore, that a commercial remover is of the same grade as the "suitable solution," and the commercial remover has the approval of the whole trade. Such is the value of these experiments. Again, Ball's remover with wax added, and Bennett's with phenol removed, rank high under Bacon's experiments, yet each would be covered by the patent.

The defendant's explanation of this result is not good, which is that amyl alcohol was used, and only about one-eighth of the wax stated in the "suitable" example. Amyl alcohol, not fusel oil—which is by no means its equivalent—was one of the alcohols of the patent, and

the amount of wax is not prescribed in the patent. In final answer to the whole contention that the "suitable solution" was not practicable, it is enough to say that a paste made exactly after the directions of that example was sold under the name of "Phenoid" and had a successful, though limited, market.

However, even if the "suitable solution" had been very inferior, it would have been immaterial, if the patent had shown the road to success, as it certainly did. The commercial composition was clearly disclosed, because the patentee gives a large range of equivalents, both in solvents, waxes, and alcohols. The most that can be urged is that it was necessary to show proportions, and that the trade has used a much thinner mixture. No doubt a patentee must disclose at least one operable form of his invention; he must add to the knowledge of the art enough to make further invention unnecessary, in order to give the full benefit of his discovery; but there is not the slightest reason to doubt that, when he spoke to the art, the art understood him, and knew very well that they might put as much or as little wax into the mixture as served their immediate purpose. Thickeners had been common enough before, and, once the theory of the patent was disclosed, the proportions were not important. At least I may insist upon the defendant's showing that the disclosure was not clear, and this they have not done, unless by the most ambiguous results of the experiments, which in any case I should not regard.

[2] Having, therefore, determined that the patent is broadly valid, because of its basic character, the question arises of infringement. It is quite true that, put in one form, it is accurate to say that Ellis merely omitted one element of the prior art, phenol; but that is a very meager measure for the real invention. The fact was that the art had relied upon phenol (which no one wanted), because it was at once a potent solvent and a nonevaporant. Ball's remover went upon the theory that benzol and fusel oil should act as the solvent; but he had no wax to hold them from evaporation. Now, it is true that Bennett and Arnstein too used wax; but the proof that they did not understand its operation is found in the presence of such high percentages of phenol as even the defendant asserts to have been undesirable and unnecessary. They relied upon the phenol as a necessary solvent, and, if they thought the benzol also operated, they did not suppose that it could be relied on alone. Ellis dared omit the phenol, because he had worked out a way of holding his evaporating solvent, and that he did by uniting a solution of wax and the solvent with a miscible precipitant. Then it was easy enough to omit phenol, or put in as much as one might need, either as a disinfectant, or to avoid infringement, or for any other reason. That discovery released the art from the supposed need of phenol, but it depended upon a bit of chemical imagination, which no one till then had been able to construct.

If, then, it be asked at what point the percentage of phenol avoids infringement, the answer is not hard: Substantially at that point where the prior art supposed it was necessary, as shown by the lowest percentage it had reached. Since Ellis emancipated the art from the necessity, his monopoly should extend to the degree of that emancipation.

While, therefore, it is not necessary to show that the defendant added the proportion of phenol which it uses with the purpose of evading the patent, still such a fact, if proved, would throw some light upon the genuineness of its position that it took nothing from Ellis' disclosures. Up to 1903 it apparently continued the use of the old removers, containing percentages of phenol as high as 33 per cent. In 1903 the defendant changed its formula somewhat, particularly in reducing the phenol to 16 per cent., as appears by Forrest's formula. This was after the patent had appeared, and the change was probably made in view of the patent. Courts have always regarded the suppression of documents as a legitimate basis for inference, and the suppression of the letter here in question falls within that rule. Parties must understand that they adopt such methods at their peril. In 1906, and perhaps before, though I have not found the exact date, the defendant put out a neutral waxy remover, called "Liquinoid," which followed the patent, except that it contains hardly more than 2 per cent. of wax. It is but fair to say that this was not, strictly speaking, a remover proper. Rather it was a dip; but, as I have said, the proportion of wax was, under the prior art, clearly a variable matter, and nothing turns on the amount, provided its function existed. In the summer of 1906 Judge Hazel's decision in Chadeloid Chemical Co. v. Frank S. De Ronde Co., 146 Fed. 988, appeared, and the defendant interpreted it at once as possibly interfering with their sales, presumably of the Liquinoid, though it is true that they continued selling it into 1907. After advising with counsel how best to avoid the difficulties so arising, they put out Paintwood, Cleanwood, and a new Amylene, each containing about 14 per cent. phenol. Some controversy arose, and the defendant agreed to go to the old removers of 25 per cent., which apparently they did, at least so far as the plaintiff could learn. These proved unsatisfactory, and the present infringement was put out in 1910. This course of conduct hardly shows a very lively interest in the presence of phenol.

Moreover, there is good reason to believe that not all the phenol actually put into the defendant's Lingerwett and Wonderpaste remains uncombined with the waxes and therefore effective for any purpose. I am impressed with the low percentages which analysis disclosed in some of the defendant's products actually bought on the market. Whether or not this be true, there is no doubt that the alcohols neutralize the phenol, and make its effect upon the skin and tissues much less serious when used in the small quantities of the present removers. The defendant, whatever the scientific fact, is in no position to dispute that in practice the unneutralized phenol is reduced to much smaller proportions than the actual combination formula, for the record contains declarations from it of the small proportion of phenol which its removers contain. Thus it says, answering an assertion that the removers contained from 10 per cent. to 50 per cent. of phenol:

"The proportion of carbolic acid in the Wilson removers is not much greater than in carbolic vaseline"

—a proportion not over 3 per cent. They probably found this necessary because of the complaints and troubles generally arising from the

use of Paintlift, which appear at length in the record; but in any case the statement cannot be true, unless much of the phenol is combined with the wax, or at least rendered neutral. In any case I may take them at their word in corroboration of the plaintiff's proof upon the issue. Again, their frequent protestations in advertisements of the harmless character of their compound must, I think, be understood as referring to the absence of what had formerly been regarded as the most common harmful element. I cannot believe that any other element was in mind but phenol.

The usual decree will pass upon claims 6, 7, and 8, with costs.

CHADELOID CHEMICAL CO. v. F. W. THURSTON CO. et al.

(District Court, N. D. Illinois, E. D. January 26, 1915.)

No. 29423.

1. PATENTS ☞229—INFRINGEMENT—PATENT FOR PROCESS.

Infringement of a patent for a process of mixing substances is not avoided, because the order described is not followed, unless such order is essential to produce the product sought.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 366, 368; Dec. Dig. ☞229.]

2. PATENTS ☞328—VALIDITY AND INFRINGEMENT—PAINT AND VARNISH REMOVER.

The Ellis patent, No. 714,880, for a paint and varnish remover and process of making the same, held not anticipated nor invalid because of prior use. Claims 6, 7, and 8 for the product also held infringed.

In Equity. Suit by the Chadeloid Chemical Company against the F. W. Thurston Company, Frank W. Thurston, and John C. Thurston. On final hearing. Decree for complainant against defendant corporation.

Victor Elting, of Chicago, Ill., and Frederick S. Duncan, of New York, for complainant.

Taylor E. Brown and Clarence E. Mehlhope, both of Chicago, Ill., for defendants.

SANBORN, District Judge. Infringement suit on claims 1 to 8 of patent No. 714,880, issued to Charleton Ellis December 2, 1902, but dating from February, 1901, for improvements in paint and varnish removers, and the process of making them. The patent has been sustained by Judge Hazel in the Western District of New York (Chadeloid Chemical Co. v. Frank S. De Ronde Co. [C. C.] 146 Fed. 988), and in other districts, but is again attacked as void for anticipation by prior patents, for noninvention, and seven prior uses are set up in the answer. Testimony as to these was taken, and defendants' brief discusses all of them. The briefs submitted cover 593 pages. Defendants' brief of 368 pages has no index, but I have supplied one for convenience in examination of the many questions discussed. Eighteen defenses are

fully discussed by defendants' counsel, with ability, and the greatest care and thoroughness.

The following statement from complainant's brief shows the general features of the Ellis invention:

"The patent is for a chemical composition for the removal of old coats of paint and varnish preparatory to repainting and refinishing furniture, household and office trim, railroad cars, steamboats, yachts, etc. The remover is composed of two classes of liquid solvents: First, benzol or its homologues; and, second, grain or wood alcohol, or their equivalents—and of a waxy body, such as paraffin or ceresin wax. Both of the liquids are good solvents of paint and varnish, the benzol or similar hydrocarbons having an energetic penetrating action, while the alcohol is an efficient softener and loosener of the old finish. Both of these liquids are highly volatile—so volatile that, if applied alone, they would evaporate before having any appreciable effect on the paint and varnish. The use, however, by Ellis of a waxy body in the combination of the benzol and alcohol renders it highly effective as a practical paint and varnish remover. Benzol is a good solvent of wax, whereas alcohol is a very poor solvent of wax and precipitates it from solution in benzol. The result of the combination of these three ingredients is that the wax is partly in solution and partly precipitated throughout the remover in a cloudy condition. When such a remover is spread upon the wood from which the finish is to be taken, the wax quickly forms a film over the surface of the remover, effectively preventing the evaporation of the liquid solvents and keeping them wet and active in their solvent work for a long period of time. The formation of this waxy film has been likened to placing a watch crystal over the volatile liquids. It keeps them moist for hours when otherwise they would evaporate in a minute or two.

"The presence of the two classes of liquid solvents (benzol and its equivalents and alcohol and its equivalents) is necessary for two reasons: First, neither benzol and wax nor alcohol and wax would leave the wax in an effective film-forming evaporation-preventing condition. In the second place, the two solvents are needed effectively to loosen and to dissolve the paint and varnish; the combination of the two classes being far more effective and capable of wider use on all kinds of paint and varnish than either solvent alone.

"It is also necessary that the two classes of solvents should be miscible with each other. If they were immiscible they would exist in the remover in separate layers, neither of which would have the desired qualities of the three ingredients combined in the Ellis remover. The wax would be wholly dissolved in one layer and not precipitated by the other, and neither layer would effectively attack the paint or varnish. As has already been pointed out, neither one solvent alone nor the two solvents together would have any practical value without this waxy ingredient that prevents the evaporation of the liquids, and neither solvent alone with wax would be effective. The remover is spread over the painted or varnished surface and left for a few minutes or a couple of hours, according to the thickness and toughness of the finish to be removed. Evaporation is substantially prevented by the wax film, and the benzol penetrates and the alcohol loosens and softens the old finish so that it can easily be brushed or scraped off with a soft rag or a dull tool."

The first five claims are for the process of mixing the materials, and six, seven, and eight for the product. Some of these follow:

"(3) A process of thickening or gelatinizing a composition which softens dried paint or varnish by the precipitation of a dissolved wax by means of an aliphatic alcohol substantially as described."

"(6) A composition for removing paint and varnish consisting of a wax, a solvent for the wax, and an alcohol combined, substantially as described."

"(8) A composition for removing paint and varnish consisting of a wax dissolved in benzol or its immediate homologues and gelatinized by the addition of an alcohol, substantially as described."

Judge Hazel sustained the patent in 1906, in the Southern District of New York. This decision was followed by Judge Dodge in the First Circuit in 1907 on a motion for temporary injunction. In 1910 a like ruling was made by Judge Chatfield in the Eastern District of New York, and on final hearing in 1912 by Judge Veeder. Finally Judge Lacombe granted a temporary injunction in the Southern District of New York in 1913, and Judge Learned Hand has just sustained the patent on final hearing in the same case. Chadeloid Chemical Co. v. Wilson Remover Co. (D. C. S. D. N. Y.) 220 Fed. 681, January 6, 1915.

Defendants have attacked the binding effect of the De Ronde decision, on the theory that the later rulings are all virtually based upon it. The De Ronde record is in evidence for a particular purpose, in order to see just what was before the court in that case. Defendants' counsel state the grounds of attack as follows:

"It has been pleaded in the answer in this case that the proceedings in the De Ronde Case 'were collusive and not a precedent for this court to follow or notice.' Part of the basis for this charge is in the defendants' proofs and part in the record of the De Ronde Case. We are permitted to examine that record only to show what was or was not before Judge Hazel. In other words, the De Ronde record is merely presented as a reference and not as evidence herein. Almost immediately upon the entry of the decree in the De Ronde suit, the defendant therein negotiated for and obtained a free license under the Ellis patent in suit. No appeal was taken from that decision. Moreover, it is a fact that the complainant corporation promptly organized, with the aid of De Ronde himself, an association of paint and varnish manufacturers, all of whom were licensed under the Ellis patent in suit. Prompt advantage was taken of Judge Hazel's decision and of the decree in the De Ronde suit, so that no opportunity was afforded for a proper review of that decision and decree by the Circuit Court of Appeals of the Second Circuit.

"The fact that no appeal was taken, the fact that the licensees were gathered together so expeditiously, and that such arrangements were largely promoted by De Ronde and another officer of the De Ronde Company, created much comment and caused a suspicion to be entertained in the trade that the De Ronde defense was not bona fide, and that it was to the defendant's interest to have the Ellis patent sustained rather than defeated. That suspicion finds some justification in the record of the De Ronde suit, which, as before stated, we are at liberty to examine for that purpose. We find that at a crucial point in the examination of defendant's principal chemist and expert witness, Dr. McKenna, and after he had been interrogated with reference to the prior art removers, anticipating or approximating the exact and precise formula of the Ellis patent in suit, he was asked whether or not, in view of the prior art, it required invention for Mr. Ellis to bring together a mixture or prepare a mixture combining a hydrocarbon, such as benzol, an alcohol, and a wax or waxy body, such as paraffin, and he declined to answer.

"The prior art in the De Ronde Case showed that the combination of a solvent and an alcohol and fusel oil have the effect of retarding, to some extent, the evaporation of the other volatile elements. The question was asked Dr. McKenna whether or not in such event, and in view of other facts of the prior art, and the prior use of wax in this art, it would require invention to substitute the well-known paraffin wax for the fusel oil for the purpose of increasing the retarding of the evaporation of the volatile elements. Dr. McKenna, who was the defendant's chief witness, begged the question and stated that he could not answer, because 'the distinction is a delicate one which requires consideration,' for which he was not prepared. It is patent that defendant thereby, though quite unnecessarily, admitted the patentability, or rather the inventive ingenuity necessary to sustain letters-patent. The brief filed by counsel for complainant in the De Ronde Case cited and harped upon and made great use of this admission and this failure to cast doubt

upon the inventive act. Such admission would not have been made, except the defendant desired to gain thereby, and the record herein shows that he did gain in that De Ronde had his expenses repaid him by the association and gained a free license. However, we shall show, by reference to the opinion of Judge Hazel in the De Ronde suit, and by the evidence introduced in the case at bar, that under no possible exercise of the principle of comity (a rule no longer enforceable after the decision of the Supreme Court in Mast-Foos & Co. v. Stover, 177 U. S. 485 [20 Sup. Ct. 708, 44 L. Ed. 856]) is this court bound to follow the reasoning or the conclusions announced by Judge Hazel. Upon the contrary, we shall show by the evidence adduced by the case at bar that this court must of necessity come to a different conclusion."

Surely counsel cannot be serious in asserting that these matters afford even the slightest ground for collateral attack. The answer does not show wherein the suit was collusive; there is not a hint that Judge Hazel was deceived. It seems that Dr. McKenna was asked an incompetent question, and answered that the matter required consideration, and that after the decision the parties, and others interested, got together and compromised the suit. A more frivolous attack can hardly be conceived. In view of Judge Hand's decision, it is unnecessary to follow defendants' brief through its 18-page analysis of the De Ronde decision, by which it is sought to show that the case should not be followed because of Judge Hazel's mistakes of fact, and the new evidence in the case at bar.

[1] Is the process of the patent one contemplated by the statute? One of the process counts (4) claims:

"The process for producing a composition for removing paint and varnish by the dissolution of a wax or mixtures of waxes in benzol and the subsequent precipitation by an alcohol, substantially as set forth."

The position of defendants is that, if these five process claims are invalid, the product claims fall with them; also that, even though the remover used by defendants contains the same materials as that of the patent, there is no infringement, unless the process is the same, which is not shown by the evidence. They further claim that the words "substantially as set forth," occurring in four of the process claims, import the particulars of the specification into them, and confine the claims to that particular method; and that the patent requires that the wax must first be dissolved in the hydrocarbon solvent and then the alcohol be added thereto.

"A process is a mode of treatment of certain materials to produce a given result. It is an act, or a series of acts, performed upon the subject-matter to be transformed and reduced to a different state or thing. If new and useful, it is just as patentable as is a piece of machinery. In the language of the patent law, it is an art. The machinery pointed out as suitable to perform the process may or may not be new or patentable, whilst the process itself may be altogether new, and produce an entirely new result. The process requires that certain things should be done with certain substances, and in a certain order; but the tools to be used in doing this may be of secondary consequence." *Cochrane v. Deener*, 94 U. S. 780, 24 L. Ed. 139.

In *Corning v. Burden*, 15 How. 252, 14 L. Ed. 683, the Supreme Court said that a new process is usually the result of a discovery, while a new machine is the result of invention, and then went on to state that:

"Where the effect or result is produced by chemical action, by the operation or application of some element or power of nature, or of one substance to another, such modes, methods, or operations are called processes."

It is no doubt true that, if a certain order of mixing materials is essential to the useful result to be secured by the process, that order must be followed, otherwise not. In some processes order is of little consequence, as in smelting, setting up an induced current in a motor or dynamo, or purifying a medicine. The coke and the ore need not be put into the furnace in any particular order. Either the field or the armature may be revolved. In aspirin the chloroform may be first put on the acetyl salicylic acid, or vice versa. In these cases there is no question of order, only of a new and useful way of getting results. The aspirin patent was for a product, not a process. *Kuehmsted v. Farbenfabriken*, 179 Fed. 701, 103 C. C. A. 243.

[2] The process and product of Ellis undoubtedly constitute a single invention, as in the Tucker Bronze Case (*Plummer v. Sargent*, 120 U. S. 442, 7 Sup. Ct. 640, 30 L. Ed. 737), where a patent for the process and another for the product were taken out. It was held that the product patent only covered articles made by the described process. On the other hand, it would seem that, in a process for mixing substances, the order described in the specifications need only be followed, where it is essential to produce the particular product sought. Ellis does say that the wax is to be dissolved in a hydrocarbon oil, and *subsequently* precipitated by the addition of an alcoholic body miscible with the solvent, and only slightly dissolve the wax, and all the claims require either precipitation or subsequent precipitation (which is the same thing) of dissolved wax in alcohol. It appears from the testimony that there is an equivalent method of obtaining the same result, by mixing hot benzol and alcohol, adding finely divided wax, and stirring until cool. It is the process *substantially* as described, not literally, which is covered by the claims. The patent is a meritorious one, and should not be defeated on a purely technical objection. I think the process claims are valid, following the *De Ronde* and *Wilson* Cases and others referred to, unless there has been established a prior use by the evidence for the first time appearing here.

The Cleveland and Chicago Wood-Finishing Prior Uses. These cover a great part of the testimony and briefs, and are the chief attempts to show the Ellis patent invalid. It seems unnecessary to consider the other alleged uses, since the testimony to support them falls far short of the essential legal tests. The two now considered were not before Judge Hand in the *Wilson* Case, although the *Chicago* use was available. The reason for not relying on it may be more apparent further on.

The Ellis patent covers benzol or its equivalent, alcohol (or equivalent), and wax. The alleged *Cleveland* prior use is shown to have been benzol, fusel oil, wood alcohol, and paraffin wax dissolved in turpentine. It was used on the *Rockefeller* house in *Cleveland* in the fall of 1898, more than two years before the Ellis patent, and is called the *Weber-Wright* formula in the testimony. I find that the evidence is sufficient to establish an experimental use of this formula some time

before February, 1901 (from which time the Ellis patent has its inception), but not in public use or on sale for more than two years before. So the supposed anticipation depends on the fact that the Weber-Wright formula was "known or used by others in this country" (R. S. § 4886 [Comp. St. 1913, § 9430]) before Ellis' discovery. Unless, therefore, such prior use was abandoned, or the presence of the fusel oil made it a different product, it seems an anticipation is shown. If the use of this remover was abandoned because unsatisfactory by reason of its offensive smell or effect on the workman, or for any other reason, it was an abandoned experiment, and could not be a valid anticipation. It was used on the Rockefeller job, then on the Swetland job at first, but the work finished with lye. It is also claimed to have been used on the Masonic Temple job, but from charges in the Weber account book it would seem to appear that the work was done with acid, lye, and sandpaper. Mr. George S. Wright testifies positively that he did not use beeswax on any but the Rockefeller job, and between the time of that use and 1899 he did not make any mixture of paraffin, fusel oil, benzol, and alcohol. On the question being repeated to him, he says they might have left out the fusel oil and used only benzol and alcohol, but he cannot recall positively. It is obvious that this kind of testimony falls far short of the standard required to establish a prior use. It is true that the Weber-Wright formula appears in written form on December 30, 1899, and that Weber asserts that its use was not abandoned.

"Q. 136. And since the date of the Rockefeller job, what is the fact with respect to the use of the paint and varnish remover, referred to, whenever jobs presented themselves on which such a remover was desirable to be used? A. When occasion required since that time we have used the varnish remover, but not to the exclusion of other methods, where it seemed in our judgment more expedient to use other materials. If it became necessary to remove the varnish from the top of a table, or flat surface, it sometimes was removed with scrapers, afterward cleaning it up with wood alcohol. On exterior work, where we were working on old hard paint, we have found it much cheaper and more expeditious to use the torch. Where we had large surfaces to remove, we were not compelled to use great care to prevent material getting on the floors. We have used lye and afterward bleached the work with oxalic acid; the latter process being much cheaper and frequently more rapid than had we used the varnish remover.

"Q. 137. State whether or not, since the date of the Rockefeller job, you or your firm have abandoned the use of that same paint and varnish remover? A. We have not; on the contrary, we have used it continuously ever since that date."

These answers make no discrimination between the time before the Ellis patent date and the period since, and, being general in their character, are not of sufficient weight, unless fully corroborated. Counsel for defendants argue that a single prior use is sufficient to avoid the patent, but this claim must be taken with much allowance in view of the rule as to abandoned experimental uses. John A. Smith was employed by Weber part of 1898, all of 1899, and part of 1900, and does not remember the formula being used, except on the Rockefeller and Swetland jobs. M. E. Cox was likewise employed from 1897 to 1910, and says the remover was used on the Rockefeller, Austin, the boat City of Erie, and the Swetland, work. J. J. Rush worked for Weber

from 1898 to 1905, and he did not use a wax remover for a number of years after the Austin job, which was in 1900 or 1901. John A. Wright, brother of George S. Wright, used a sample can of the Weber-Wright remover. He does not mention any further use of it. Out of some 28 cases shown by the Weber shop book in which paint or varnish was taken off, only 7 show the use of the Weber-Wright remover, and some of these are not clear.

George S. Wright left the Weber shop December 30, 1899, and in 1903 worked for the Cleveland Varnish Company. In 1903 he obtained from Weber a sample of the "Adelite" remover, put out by the Adams & Elting Company, and made under the Ellis patent. It was called "Perfecto," and contained benzol, paraffin wax, bisulphide of carbon, amylacetate, acetone, and wood alcohol. Fusel oil was left out because of its stifling odor.

I have read the testimony of all the witnesses for defendants on the Weber-Wright formula, and, on the whole, I think the evidence shows that its use was experimental only, and was abandoned because of the long-continuing stifling odor of the fusel oil, possibly also because the benzol was not a pure product. Assuming that fusel oil is a form of alcohol (Judge Hand found it to be different), I still think the Cleveland prior use amounted only to an abandoned experiment.

The Chicago Wood-Finishing Company's Prior Use. It is unnecessary to consider the evidence relied on in support of this defense in detail, because of some very remarkable circumstances connected with it. It is claimed that a remover was discovered by the witness Matthes many years before Ellis' invention, composed of substantially the same ingredients, being benzol, methyl alcohol, and paraffin wax, and that it was made and sold by the Chicago Company from 1890 to a recent date. The two main witnesses for this prior use are Matthes, and the secretary of the Chicago Company, Mr. Hulin. Further it is claimed this anticipation is corroborated by certain papers and books of the same company.

As early as 1905 it was reported that the Chicago Company had a prior use defense which would defeat the Ellis patent, and from that time to 1913 the precise nature of this supposed anticipation remained a profound mystery, whereby its value was no doubt greatly enhanced. *All this time the evidence of priority was for sale.* In 1907 there was a conference between Hulin and representatives of the complainant, at which an offer to destroy the proofs was made. Later, and on May 2, 1907, Mr. Charles C. Linthicum had a conference with Mr. Duncan, attorney for complainant, Mr. Hulin and Mr. Hulin's attorney, and the following recital is taken from Linthicum's testimony:

The whole talk was about this prior use. Linthicum requested to see the documents, but was told by Hulin that he would not submit them to him or any one else, except on condition that the Chicago Company was given a release for the past, a license for the future, and a sum of money. "I was unable to understand the sum of money, and discussed it with Mr. Hulin and his attorney, trying to get at the foundation for the demand. I cannot, of course, give the conversation, but the substance of it was that this defense was supposed to be sufficient to break down the patent; that if an arrangement was made the defense would not be available to other infringers; that, if the arrangement was not made, the defense might or might not be made

available to other infringers, but that the Chicago Wood-Finishing Company proposed to conduct its business and rely upon this defense to maintain its position. I raised the ethical question as to whether proofs could be properly withheld and also the practical question, stating that I knew that other people had information that such a defense was claimed to exist. During the course of the conversation the amount of money demanded was mentioned. As I recollect it, it was \$25,000. Either before or after this interview I discussed the ethics of the proposition with Mr. Duncan, also the probability or improbability of the defense being presented by other alleged infringers. There was no difference of opinion between Mr. Duncan and me on the proposition that no sum of money could or should be paid to the Chicago Wood-Finishing Company as a condition for suppressing this information or turning it over to Mr. Duncan, which was the method proposed. Whether Mr. Hulin or Mr. Parker stated that the books and data would be turned over to Mr. Duncan I cannot now state, but I got this information from some one at the time."

The next attempt to market these proofs was in 1911 and 1912, when a written proposal to sell the assets and good will of the Chicago Company to the Bridgeport Wood-Finishing Company of Connecticut was made. As a part of this offer the Chicago Company, by Hulin as its secretary and general manager, proposed to make a contract that there should be transferred to a person connected with the Bridgeport Company all processes, formulas, labels, and good will now or heretofore used by it as a going concern and relating to the making, using, and marketing of paint and varnish remover, and all evidence whatsoever relating to the manufacture, use, and sale of such removers prior to the year 1901, which is now in the possession of said company, but said company hereby reserves the right to use said evidence in its defense of the infringement cases now pending against it and its customers. These offers were not accepted.

Finally, and on June 5, 1912, the Chicago Company, by Hulin and Thomas R. Smith, vice president, gave to a person acting for the Wilson Remover Company, defendant in the suit decided by Judge Hand, an option to purchase its paint and varnish remover business, formulas, good will, etc., including evidence now held by said Chicago Wood-Finishing Company of its continuous use and sale of neutral removers of substantially the present formula continuously since a date several years prior to the year 1899, which remover consists essentially of alcohol, benzol, and wax in suspension therein, as covered by the Ellis patent, No. 714880, dated December 2, 1902. The option was carried out by written contract of December 7, 1912, by which the remover business and the following were sold for \$15,000: All of the documentary evidence now held by the party of the first part of its use and sale of neutral and non-neutral removers of substantially the present formulas since a date several years prior to the year 1899, said evidence to be held in the custody of Parker & King for the mutual use and benefit of the parties hereto, the party of the first part reserving the right to use said evidence in the defense of the patent infringement litigation hereinafter enumerated; and otherwise the said documentary evidence shall be under the direction and control of the party of the second part and shall be delivered to the party of the second part by Parker & King, free from any claims of any kind of the party of the first part, upon the termination of all of said patent infringement litiga-

tion. The party of the second part shall have the right to examine said evidence from time to time and to take such copies of same or inventories of same as may suit its convenience.

Promissory notes were given for the contract price, and \$5,000 paid. The purchaser later returned the documentary proofs and has refused to pay the other \$10,000, being dissatisfied with his purchase. It is obvious that the Wilson Company did not put in the proofs of the Chicago use either because they were in its opinion insufficient, or because they feared the \$15,000 purchase would be disclosed and they be accused of purchasing evidence, as well as consenting to its possible suppression. A later contract, of January 30, 1913, again emphasizes the latter feature, that no third person should be permitted to see these supposed proofs.

While Matthes does not appear in this series of offers and contracts, there is other evidence to show clearly his willingness to co-operate with Hulin.

The proofs having finally been returned to Hulin's attorney, the Chicago Company sold its business to the defendants in this case (without the proofs, which still belong to the agent of the Wilson company), and the evidence was put in as a defense.

The facts recited are so flagrant (to say the least) that no court would be justified in paying the slightest attention to this prior use evidence, since the testimony of Hulin and Matthes is vital.

Infringement. The manager of the Thurston Company testified that defendants had not practiced the methods or processes of the Ellis patent, "but have sold a paint or varnish remover which I believe is similar to that described in the Ellis patent." This witness refused to answer whether defendants' remover contained benzol, wood alcohol, an alcoholic body, paraffin wax, any wax soluble in benzol and relatively insoluble in alcohol. He also refused to state how their product was made. Although these questions were perfectly proper ones, the witness took it upon himself, without advice by the attorney for defendants, to decline to answer.

Much is made by the defense of the fact that carbolic acid removers are much better than the Ellis product, and that the Wilson Remover Company's product belongs to that class. If defendants desire to return to the carbolic acid removers of the prior art, they are at perfect liberty to do so, at their peril of infringing the Ellis patent by putting in an amount not greater than that which was held to infringe by Judge Hand.

Defendants' remover is the same as that of the patent, except that it contains 26 per centum of acetone, which is a volatile liquid solvent of paint and varnish, and acts much like wood alcohol. It is made from the same sources. In the patent product it is an equivalent for alcohol. The product claims are infringed.

As to the process claims, there is no express evidence of the way in which defendants produce their product, while their manager, by a sort of negative pregnant, testifies they do not use the exact process described in the first five claims. This might suggest that they use something like it. Infringement, however, must be clearly shown, and the record is silent as to just how defendants make their remover.

It may be that in the 1,800 printed pages of evidence there is something showing that the individual defendants should be held personally liable for infringement. If so I have not found it.

There should be a decree against the corporation defendant declaring infringement of claims 6, 7, and 8, and for an injunction, accounting, and costs.

VERNON v. SAM S. & LEE SHUBERT, Inc., et al.

(District Court, S. D. New York. February 8, 1915.)

1. **COPYRIGHTS** ~~65~~—**INFRINGEMENT OF COPYRIGHT OF PLAY—SIMILARITY IN CHARACTERS AND PHRASEOLOGY.**

Where defendants' play was the result of the independent efforts of its authors, who had never heard of plaintiff, or heard of or seen his copyrighted play, and though there were characters in both plays having a similarity, and some instances of similar phraseology, the theory of the two plays and the method of execution were entirely different, there was no infringement of plaintiff's copyright.

[Ed. Note.—For other cases, see Copyrights, Cent. Dig. § 62; Dec. Dig. ~~65~~.]

2. **COPYRIGHTS** ~~90~~—**BILL FOR INFRINGEMENT—COSTS.**

Where, though defendants did not infringe plaintiff's copyright on a play by the production of a play having some similar characters and phraseology, plaintiff by a combination of circumstances was led to the belief that his work had been appropriated by defendants, and his suit for infringement was brought in good faith, costs would not be awarded against him.

[Ed. Note.—For other cases, see Copyrights, Cent. Dig. § 85; Dec. Dig. ~~90~~.]

In Equity. Suit by John H. Vernon against Sam S. & Lee Shubert, Incorporated, and others. Bill dismissed.

Benjamin, Shepard, Houghton & Taylor, of New York City (Harry W. Mack, of New York City, of counsel), for complainant.

Max D. Steuer and William Klein, both of New York City, for defendants.

MAYER, District Judge. [1] Plaintiff, who is engaged in a mercantile business, wrote a play called "Threads of Destiny." His first version was copyrighted on September 9, 1911. On March 22, 1912, a second version was copyrighted, which did not differ from the first in any substantial respects, but which contained some additions and rephrasing.

Plaintiff claims that his copyright has been infringed by a play called "At Bay," which was not copyrighted until May 12, 1913. The latter play was the result of the joint labor of Mr. Scarborough and Mr. Augustus Thomas. Mr. Scarborough had been in the employ of the Department of Justice and was familiar with the so-called secret service of the United States. It was quite natural, therefore, that if he tried his hand at playwriting his efforts would be along the line of his own information or experience. This was practically Mr. Scarborough's first play, but nevertheless he hit upon an ingenious

situation, which to the experienced playwright would suggest valuable dramatic possibilities. That situation was the touching off of a flashlight by a dying man in order to obtain the photograph of the woman who had killed him and in the surroundings where the act had been done. There is no doubt whatever that Mr. Scarborough did his original work independently, and never at any time had read nor heard of the "Threads of Destiny." Mr. Scarborough's early draft was called "The City of Indiscretion," and was copyrighted on February 8, 1912.

Through Mr. Andrew Mack, an actor who was a friend of Mr. Scarborough, Mr. Augustus Thomas was prevailed upon to read Scarborough's play. Mr. Thomas is a playwright of ripe experience, who has written fully half a hundred plays to which he has signed his name, and, in addition, has collaborated with others from time to time; his practice in collaborations being not to attach his name to the play. By virtue of his skill and training, Mr. Thomas, of course, would be likely to see in what directions an idea or a situation basically clever or useful could be practically worked out for the ultimate result of a stage production. Mr. Thomas has testified that he never knew nor heard of Mr. Vernon, nor the "Threads of Destiny," prior to the time that "At Bay" was completed.

As the result of conferences and discussions between Mr. Scarborough and Mr. Thomas, Mr. Scarborough's first act was retained and was made the second act of "At Bay." Mr. Scarborough wrote Act I, and Mr. Thomas wrote Acts III and IV; all of the new or revised work being done in accordance with a plan agreed on after joint consideration. Much of the "City of Indiscretion" was abandoned, and it is urged that there are striking similarities between "Threads of Destiny" and "At Bay." I have no doubt that "At Bay" was the result of the independent effort of Mr. Scarborough and Mr. Thomas, precisely as they have testified.

What has aroused the suspicions of Mr. Vernon is an incident or series of incidents now quite familiar to me in this class of litigation. The defendant Mr. Huffman acts, at times, as stage director for the Messrs. Shubert. Mr. Huffman is *sui generis*, and cannot be appreciated unless seen and heard. He works when he feels like it, does or does not do what his employers desire as his fancy may suggest, answers or does not answer telephones as he may be inclined, and tells budding authors anything pleasant or unpleasant which for the moment will relieve him of further conversation or of the necessity of reading a play. In fact, he so completely separates business from recreation that the one thing which evidently he dislikes to do is to witness a play. At times he is compelled to do this in those productions where he is acting as stage director, but once this task is performed Mr. Huffman goes his way, dismissing from his mind the stage, the play, the managers, and the actors.

In some casual way Mr. Vernon met Mr. Huffman, and that meeting, together with the unsolicited sending of the manuscript to Huffman, unanswered telephone calls, and one telephone conversation, would naturally arouse suspicion in the mind of a layman; but it is quite apparent that Huffman never read the play "Threads of Des-

tiny," and certainly never communicated its contents nor its substance to any of the other defendants, and had no part whatever in or relation to its production. Of course, as so often happens, there are some characters in both plays having a similarity, and there are here and there some instances of similar phraseology. But that is a very old story in playwriting, because, after all, there are not so many themes around which a play may be plotted. Secret marriages, district attorneys, murders, office boys, blackmailers, good people, and bad people have walked about behind the footlights for many a day; but the only way to arrive at a conclusion on the merits in a case like this is to endeavor to discover the theory of the play and, generally speaking, the method of its execution.

Concededly the "Threads of Destiny" is crude in workmanship, but that would not necessarily defeat the plaintiff. But the theory of the two plays is different. In the "Threads of Destiny" the author attempts to enforce the theory that destiny is all-controlling. The central figure is the district attorney, the woman is placed in most unenviable environment, and at the end of the play the father gives a demonstration of how the love of a child is greater than ambition or desire for worldly progress.

In "At Bay" the authors had no mission. Their purpose was to provide an evening's entertainment, which would bring customers to the box office, and thereby royalties to the authors. In "At Bay" the district attorney is an incidental figure, and the hero is a courageous, manly, refreshing young gentleman, who, to protect his fiancée, is engaged in a battle of wits with the supposedly shrewd officers of the law. Broadly speaking, the method of execution is entirely different, and the play, as Mr. Thomas said, is built around the flashlight incident, because from that time on the whole effort is to destroy the units which, if combined, would make the evidence of the supposed crime.

The case possibly might go off on technical grounds suggested by defendant Shubert Corporation, but these need not be considered because, on the merits, there is no infringement. Mr. Thomas, like other well-known men who are writers or producers of plays, receives many communications. His only protection is to pursue the course which he testified was pursued in this case, namely, not to read unsolicited manuscripts. It is not at all clear that the manuscript of plaintiff ever reached the now deceased secretary of Mr. Thomas; but, assuming that it did, it is entirely clear that Mr. Thomas never saw this manuscript.

[2] Yet I can see how the plaintiff, by a combination of circumstances, was led to the belief that his work had been appropriated, and how, therefore, the suit was earnestly brought and in good faith, and under all these circumstances costs will not be awarded against him.

The bill will be dismissed, without costs.

FARGO v. POWERS et al.

(District Court, E. D. Michigan. September 23, 1914.)

No. 3844.

1. CONSTITUTIONAL LAW ~~12~~—CONSTRUCTION OF CONSTITUTIONAL PROVISIONS—EXTRINSIC MATTERS—HISTORY OF THE TIMES.

The interpretation of constitutional provisions is to be made in view of the history of the times, the evil to be remedied, and the purpose to be accomplished.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 9; Dec. Dig. ~~12~~.]

2. TAXATION ~~142~~—CONSTRUCTION OF CONSTITUTIONAL PROVISIONS—"CORPORATIONS."

The word "corporation," as used in Const. Mich. art. 14, § 10 (amendment of 1900), which authorizes the Legislature to "provide for the assessment of the property of corporations at its true cash value by a state board of assessors," in view of the previous legislation of the state in which express companies were classed for purposes of taxation with railroad, telegraph, and similar companies, of the course of judicial decision and the agitation and other facts disclosed by the history of the times, which resulted in the adoption of the amendment, the purpose of which was to place the taxation of such companies on an ad valorem instead of a specific basis, includes an express company which, although not strictly a corporation but a joint-stock association, has many of the attributes and powers of a corporation under the laws of the state of its organization.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 270; Dec. Dig. ~~142~~.]

For other definitions, see Words and Phrases, First and Second Series, Corporation.]

3. CONSTITUTIONAL LAW ~~20~~—CONSTRUCTION OF CONSTITUTIONAL PROVISIONS—LEGISLATIVE CONSTRUCTION.

If a state constitutional provision is susceptible of two constructions, the action of the Legislature in adopting one of those constructions and enacting a statute to carry it into effect as thus construed is conclusive in favor of such construction.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 14, 15; Dec. Dig. ~~20~~.]

4. TAXATION ~~388~~—MODE OF ASSESSMENT—PROPERTY OF EXPRESS COMPANY.

That a state board in the assessment of the property of an express company included its tangible personal property in other states used in conducting its business in making up the entire value of its property as a unit, the portion assessable in the state then being determined on a mileage basis, does not invalidate the assessment; nor does the fact that the board refused to include in the aggregate mileage of the company its claimed foreign and ocean mileage, where the record indicated that the character of such mileage was at least equivocal and that the company did not have the ocean routes claimed under contracts, but in some cases merely contracts for rates with no exclusive rights, and in others not even those.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 667, 668; Dec. Dig. ~~388~~.]

In Equity. Suit by James C. Fargo, president of the American Express Company, against Perry F. Powers (Bradley substituted), Auditor General of the State of Michigan, and others. Decree for defendants.

Campbell, Bulkley & Ledyard, of Detroit, Mich., for complainant.
Roger I. Wykes, of Grand Rapids, Mich., for defendants.

TUTTLE, District Judge. This case involves the authority of the State Board of Assessors, and the method of its exercise, in assessing the property of express companies in Michigan.

The American Express Company, in 1903 and previously, did business and operated routes and possessed property in Michigan, which was in 1903 subject to taxation in this state; the State Board of Assessors imposed a tax for 1903 upon its Michigan property.

The statute under which taxation of the express company's property took place was Act 173 of 1901, as amended by Act 45 of 1903.

The bill is filed by James C. Fargo, on behalf of the said express company, to question the validity of the statute and tax and to restrain the collection of this tax.

These acts were based upon, and purposed to carry into effect, the constitutional amendments of 1900 embraced in sections 10 and 11 of article 14 of the Constitution, which reads as follows:

"Sec. 10. The state may continue to collect all specific taxes accruing to the treasury under existing laws. The Legislature may provide for the collection of specific taxes from corporations. The Legislature may provide for the assessment of the property of corporations, at its true cash value, by a State Board of Assessors and for the levying and collection of taxes thereon. All taxes hereafter levied on the property of such classes of corporations as are paying specific taxes under laws in force on November 6th, A. D. nineteen hundred, shall be applied as provided for specific state taxes in section one of this article.

"Sec. 11. The Legislature shall provide a uniform rule of taxation except on property paying specific taxes, and taxes shall be levied on such property as shall be prescribed by law: Provided, that the Legislature shall provide an uniform rule of taxation for such property as shall be assessed by a State Board of Assessors, and the rate of taxation on such property shall be the rate which the State Board of Assessors shall ascertain and determine is the average rate levied upon other property upon which ad valorem taxes are assessed for state, county, township, school and municipal purposes."

This system of taxation required detailed reports from all express companies, owning property and doing business in Michigan. The required report was made by the American Express Company for 1903.

After the coming in of the report, the board assessed the property of the company in Michigan, and extended the taxes against the assessment at the average rate as fixed by law.

Under the statute (section 8, Act 45 of 1903) the method of fixing the value of the Michigan property of express companies was as follows:

"In determining the cash value of the property of express companies, they shall ascertain and determine the actual value in money of the entire amount of the capital stock and bonded indebtedness of such express company. From the amount so obtained and determined, said board shall deduct the actual value of all real estate owned by it as ascertained by said board, and the actual value of all its personal property which is not used in the express business of such express company. And the remainder thus obtained shall be used in determining the assessment of such express company in the following manner: The said board shall then divide the amount obtained above by

the total number of miles of railroad, stage, water and other routes over which the company did business, to obtain the value per mile, and shall then multiply the value per mile thus obtained by the total number of miles of such routes within this state, exclusive, however, of the number of miles of water routes over the navigable waters of the United States within this state, to which results shall be added the value of all real estate owned by such express company in this state, as determined by said board, and the sum so obtained shall be taken and considered as the actual value of the property of such express company subject to assessment and taxation in this state."

In its report for the year 1903, the express company stated, as the value of its several items of property and its mileage, the following:

Number of shares, 180,000; par value \$100; actual value \$153; personal property, not used in the express business, \$20,939,694.22; real estate in Michigan \$43,945.74; real estate outside of Michigan, \$4,897,922; mileage, railroad, stage and water in the United States and Canada \$42,807.50; Michigan mileage, \$5,144.38; ocean and European mileage, \$125,673.

With this report before it, the board proceeded in the following manner in making its assessment:

Taking the June average of the stock sales would make the value of the single shares \$193,456, and the value of 180,000 shares.....	\$34,822,080.00
From this to be deducted: Personal property not used in the business	\$20,939,694.22
Real estate in Michigan.....	43,945.74
Real estate outside of Michigan.....	4,897,922.00
Total deductions.....	<u>25,881,561.96</u>
Leaving a balance of.....	<u>\$ 8,940,518.04</u>

This to be apportioned under mileage as follows:

Railroad and stage in the United States.....	\$38,828.31
Water (inland).....	2,549.00
Railroad in Canada.....	1,430.19
Total	<u>\$42,807.50</u>

And taking the Michigan mileage as follows:

Railroad	\$4,899.38
Water (inland).....	245.00
Total	<u>\$5,144.38</u>

The proportion of the property to be attributed to Michigan is found by dividing 5,144.38 by 42,807.50—1201747.

And this, applied to the value above found of \$8,940,518.04, would equal.....	\$1,074,424.07
Adding the real estate in Michigan.....	43,945.74

Brings a total value of.....	\$1,118,369.81
While the assessment was.....	<u>\$1,120,000.00</u>

The American Express Company is not, strictly speaking, a corporation, but is a joint-stock association, organized under voluntary agreement of the parties pursuant to the common law of the state of New York. The Legislatures of that state have, from time to time, passed laws which confer upon joint-stock associations powers of a

more or less corporate nature, but not destroying their real character of voluntary joint-stock associations.

While the bill raised numerous objections to the validity of the statute, Act 173 of 1901, and to the method of assessment followed and the tax imposed, but three of those objections were presented and insisted upon by the complainant's solicitor in argument:

(a) That, as the American Express Company is a partnership and not a corporation, it is not within the terms of the Michigan constitutional amendment of 1900 or of the taxing statute.

(b) That the act under which the assessment is made and the method and principle of the assessment of complainant's property as made are unconstitutional and void, because said act requires the taxation of, and said assessment actually did tax in Michigan, the tangible personal property of the American Express Company used in its business and permanently located outside of the state of Michigan.

(c) That the refusal of the State Board of Assessors to use the ocean mileage or routes as a part of complainant's aggregate mileage was a violation both of the taxing statute and of the federal Constitution.

While only the more important facts are stated in this opinion, all of the facts and proof in the case have been given due and full consideration.

Upon those facts the court is constrained to, and does, hold both the taxing statute and the action of the State Board thereunder, in assessing and taxing the property of the American Express Company, to be valid and constitutional.

[2] The first objection to the tax and statute made by the complainants involves the construction to be placed upon the constitutional amendment of 1900, and the determination of whether the term "corporations" as used in that amendment extends to, and includes, the property of joint-stock associations, such as the American Express Company, in such a manner as to permit the Legislature to apply to the property of those institutions the rule of assessment and taxation provided for in Act 173 of the Public Acts of 1901.

Upon its face the constitutional amendment is limited to corporations. If the amendment is to be construed literally and to include nothing but those institutions possessing every attribute of, and which are strictly, corporations, possibly the property of the complainant could not be included in the plan of taxation enacted thereunder, as it is a joint-stock association organized under the New York laws, and is not, strictly speaking, a corporation.

The representative of the state claims that the intent of the framers of this constitutional amendment and of the people in adopting it was to include and to permit the taxation through a State Board of Assessors of the property of joint-stock associations, and particularly the property of those which, like the American Express Company, had theretofore been specifically taxed.

One of the primary rules in the construction of both constitutional and statutory provisions is that the intent, when ascertained, must govern. However, that rule does not permit the courts to make in-

vestigations for the purpose of applying constructions which will do violence to the language which has been used. If the term of language used be clear, there is, of course, no room for construction; but where the question is whether a particular word, such as the word "corporations" in this instance, shall be construed to extend to and include other institutions of a very similar nature, which possess so many of the attributes of corporations, and which have been almost uniformly, in the history of the legislation of the state, treated as corporations, and subjected to the same rules, and often included within the term "corporations," it becomes the duty of the court to have recourse to the history, purpose, and reason for the provision and the mischief to be remedied thereby, and to apply such construction as the history and purpose and intent of the provision will indicate to be proper.

An ambiguity or doubt as to the meaning of the term arises from the fact that it is not expressly stated whether these joint-stock companies are to be excluded from, or included within, the term, and that ambiguity or doubt permits recourse to the history of the times, the purpose of the enactment, and the mischief to be remedied.

Upon this point the Michigan Supreme Court, in *Bay City v. State Treasurer*, 23 Mich. 506, said:

"So the people supposed when the Constitution was adopted. Constitutions do not change with the varying tides of public opinion and desire: the will of the people therein recorded is the same inflexible law until changed by their own deliberative action; and it cannot be permissible to the courts that, in order to aid evasions and circumventions, they shall subject these instruments, which in the main only undertake to lay down broad general principles, to a literal and technical construction, as if they were great public enemies standing in the way of progress, and the duty of every good citizen was to get around their provisions whenever practicable, and give them a damaging thrust whenever convenient. They must construe them as the people did in their adoption, if the means of arriving at that construction are within their power. In these cases we thought we could arrive at it from the public history of the times."

In *People v. Harding*, 53 Mich. 485, 19 N. W. 156, the rule for the construction of constitutional provisions was stated in the following language:

"But it is urged that the clause is meaningless unless the effect is given to it for which the prosecution contends. In this we do not agree. It may have meaning and effect, though different to that the prosecution contends for. And in seeking for its real meaning we must take into consideration the times and circumstances under which the state Constitution was formed—the general spirit of the times and the prevailing sentiments among the people. Every Constitution has a history of its own which is likely to be more or less peculiar, and, unless interpreted in the light of this history, is liable to be made to express purposes which were never within the minds of the people in agreeing to it. This the court must keep in mind when called upon to interpret it; for their duty is to enforce the law which the people have made, and not some other law which the words of the Constitution may possibly be made to express."

In Endlich on Interpretation of Statutes, § 29, it is said:

"The interpreter, in order to understand the subject-matter and the scope and object of the enactment, must * * * refer to the history of the times to ascertain the reason for, and the meaning of the provisions of a

statute, and to the general state of opinion, public, judicial, and legislative, at the time of the enactment. And the unmistakable evidence of such contemporaneous circumstances of the intention of the Legislature should govern the construction of a statute whose terms are left doubtful by its language, and whose object is the correction of an abuse. For these purposes the court, in interpreting a statute, will take judicial notice of contemporaneous history, or it may consult contemporary or other authentic works or writings." Rhode Island v. Massachusetts, 12 Pet. 657, 9 L. Ed. 1233.

[1] Many other decisions of the state of Michigan and other states establish the same rule, namely, that the interpretation of constitutional provisions is to be made in view of the history of the times, the evil to be remedied, and the purpose to be accomplished.

The history and purpose of the constitutional amendment in question is clear. The amendment resulted from agitation for so-called equal taxation which had existed for a number of years. The purpose was to bring the property of corporations and other institutions, previously in part escaping its just share of taxation, within the rules permitting taxation of property upon its value by a state board; it being intended to include all property previously subjected to specific taxation. This brought within the scope of the agitation express, car-loaning, telegraph, telephone, railroad, and union station and depot companies; all having been taxed specifically.

Many things showing the purpose and intent of this constitutional amendment will be found in the Legislative Journals. In the course of the agitation resulting in the passage of the amendments the executives of the state sent to the Legislature numerous messages and proclamations, some of them convening it in session for the express purpose of considering the question of equal taxation and no other. These proclamations and messages throw a very clear light upon the designs of the amendment as applied to the property of express companies.

Not only were express companies taxed specifically previous to 1901, but the system of their taxation in Michigan from 1867 applied the same to joint-stock express companies, and to incorporated express companies. Act of 1867, C. L. 1871, p. 535, § 1619; Act of 1867, How. Stat. p. 952, § 3718; Act of 1867, C. L. 1897, p. 1656, § 5258.

In addition, the law for the enforcement of specific taxes contained from 1872 the following section, or its equivalent:

"The term 'corporation,' as used in this act shall be construed to include all associations and joint stock companies having any of the powers or privileges of corporations not possessed by individuals or partnerships." How. Stat. § 1255.

After 1896 and before the passage of the Atkinson Bill (Act 19) in 1899, at least six messages or proclamations upon the subject of the revision of the laws of the state so as to permit the taxation of property theretofore escaping taxation, through the payment of specific taxes, upon an ad valorem basis, were sent by the Executive to the Legislature. Typical passages from one of these messages are as follows:

"In my message of May 6, 1897, I called your attention to the operation of the present laws with reference to express companies, and pointed out to you that under the laws as they then existed we collected from express companies in the state, as one per cent. on gross earnings in 1895, \$2,742.34,

and in 1896, \$2,563.36. In the neighboring state of Indiana the property of these companies was assessed in 1895 for \$1,330,676.00. Indiana had at that time, 1,336 less miles of railroad than Michigan. The business of express companies is largely dependent upon the railroads, so that it is safe to say that without excessive mileage and excessive commerce the business done in this state must be at least equal to the business done in the state of Indiana.

"If the express companies of this state had been assessed at the same amount as in Indiana, their taxes would have been in 1895, \$37,258.93 instead of \$2,742.34. This is computed at the average rate of taxation as fixed by the board of review for that year.

"In the neighboring state of Ohio express companies are made to yield even a larger revenue than in Indiana. The system under which they are taxed in Indiana and Ohio has been pronounced fair and just by the Supreme Court of the United States, and I earnestly recommend the adoption of the same system in this state.

* * * * *

"Values, not earnings, should be assessed.

"There is but one rule consistent with honesty, and that is to place all the property of the state upon the same footing, and to make every one pay his share and to ask no one to pay more than his share. No one should ask the railroads, express companies, telegraph and telephone companies to do more than they insist upon others doing. We should not be satisfied with less. We should bear in mind that we are only representatives, in passing laws that affect the interests of our constituents and the interests of unborn men and women who are to come after us. Our constituents have a right to demand a substantial and bona fide effort to equalize taxes and to make every one pay his just share.

"Distribution of Taxes.

"The taxes paid by railroad companies, express companies, telegraph and telephone companies under the present system are devoted to the primary school fund. I respectfully recommend to you that the taxes to be collected under any act which you may pass be devoted to the same purpose, and be paid direct to the school districts of the state in proportion to the number of school children. (H. J. Extra Session 1898, pp. 24, 25, 26.)

"I recommend that you authorize the appointment of a state board of five, to be nonpartisan if the Constitution permits, which shall be empowered to make a just and equitable valuation of the franchises and other property of railroad companies, express companies, telegraph and telephone companies, at their true cash value, and to ascertain the average rate of taxes paid by the other people of the state for state, county and municipal purposes, and to assess the property of these companies at that rate, the moneys collected to be paid directly to the state treasurer and by him distributed in the same manner as the moneys now collected from specific taxes. (H. J. Extra Session 1898, p. 26.)"

The Legislature of 1899 passed Act No. 19 of that session, commonly known as the "Atkinson Bill," being entitled:

"An act to provide for the assessment and levy of taxes upon the property of railroad companies, express companies, telegraph companies and telephone companies and the collection thereof, and the designation and election of a state board of assessors to make such assessment and levy."

This act, in section 9, provided:

"Any person or persons, joint-stock association or corporation, wherever organized or incorporated or wherever residing, engaged in the business of conveying to, from or through this state, or any part thereof, money, packages, gold, silver, plate, or other articles by express, not including the ordinary lines of transportation of merchandise and property in this state, shall

be deemed an express company within the meaning of this act." Art. 9. Act 19, 1899.

This act was held unconstitutional in *Pingree v. Auditor General*, 120 Mich. 95, 78 N. W. 1025, 44 L. R. A. 679, as violating the provision of the state Constitution requiring taxes upon property to be levied according to a uniform rule, and the constitutional amendments of 1900 were the outgrowth of this decision.

Following the decision in *Pingree v. Auditor General*, and before the passage of Act 173 of 1901, at least eight messages or proclamations bearing upon the subject of equal taxation were sent by the executives of the state to the Legislature, all of which set forth clearly that the purpose of the constitutional amendments was to reach the property theretofore taxed specifically and to permit the passage of a law along the lines of the Atkinson Bill, which had included the property of express companies whether joint-stock associations or corporations.

In his message to the special session of December, 1899, the Governor said:

"The platform of the Republican party of 1898, to which nearly all of you owe allegiance, declared as follows: 'We commend the present administration for its earnest efforts in favor of the equal and just taxation of the property of railroad, telegraph, telephone and express companies. We favor the immediate repeal of the tax upon the gross earnings of railroad companies and favor a tax to be levied upon the true value of railroad, telegraph, telephone and express companies' property, this value to be determined by a state board. The taxes collected therefrom shall be paid into the primary school fund. We indorse the principles of the Atkinson Bill and pledge the support of the Republican party thereto.'" (H. J. Special Session 1899, p. 12.)

In his proclamation convening the Legislature in special session in October 1900, he said:

"An extraordinary condition, and one which requires the immediate application of a remedy by the Legislature, exists in this state, relative to the subject of taxation. Executive messages, commencing with Governor Bagley's in 1877, have voiced the complaints of the people concerning inequality, irregularity and injustice in taxation. They have arisen largely from the unjust discrimination in favor of certain corporate property and its owners. * * *

"The decision of the Supreme Court of this state upon the principle involved in the Atkinson Bill makes it necessary to amend the Constitution before all property can be taxed at its true value. It is therefore necessary to adopt an amendment to the Constitution so that property now paying specific taxes upon earnings can be taxed at its true cash value. This should be done not only in interest of uniformity, but of justice. It is not longer seriously denied that corporations paying specific taxes on earnings are not now and have not heretofore borne their just share of the public burdens. * * *

"I hereby call the Legislature of the state of Michigan to meet in extraordinary session on Wednesday, the tenth day of October, A. D. 1900, at 12 o'clock noon, of that day to consider the question of the submission of an amendment or amendments to the Constitution which will permit the enactment of laws that will provide for the equal taxation of all property, by an assessment of the same at its cash value and for the purpose of repealing or amending the special charters of railroads and other companies." (H. J. Oct. Special Session 1900, pp. 4, 5.)

In his message to the same session he said:

"Under our Constitution as construed by the Supreme Court of Michigan, it is practically impossible to frame a law by which property of railroad,

telegraph, telephone and express companies can be taxed upon its true value, unless we resort to local taxation." (H. J. Oct. Special Session 1900, p. 10.)

He also said:

"Some of the principal arguments against specific taxation upon earnings and in support of taxation upon actual cash value are as follows:

"(1) That the policy of taxing railroads and similar corporations by a specific tax originated when the state was new, when it was thought necessary to favor the promotion of improved methods for transportation and communication. This reason no longer exists. Specific taxation was regarded at that time as a partial exemption from taxation. It can no longer be seriously contended, however, that the richest corporation in the state should be any longer favored with these special privileges. * * *

"It has been assigned as a reason for voting against measures providing for taxation upon cash value, the fact that no valuation has been made of railroads, telegraph, telephone and express companies' property, and that therefore it could not be said with any degree of certainty that these corporations are not under the present system paying their share of taxes. * * *

"Many of the statements herein made with reference to railroads, apply with equal force to telegraph, telephone and express companies, which pay taxes upon their earnings. In the case of the latter corporations it will be found that the properties of greatest value which they possess are their franchises." (H. J. Oct. Special Session 1900, pp. 10, 13, 15.)

This October special session of 1900 framed and proposed for adoption the constitutional amendment which was subsequently adopted at the November election.

These extracts from the messages of the executives of the state are typical of passages contained in all of the messages, and indicate clearly the spirit of the times, the history of the legislation and constitutional amendment, and the purpose in view.

The Legislature of 1901 passed the law under which, as amended, the assessment involved in this case took place, which was entitled:

"An act to provide for the assessment of the property of railroad companies, union station and depot companies, express companies, * * * refrigerator car companies and fast freight line companies; and for the levy of taxes thereon by a State Board of Assessors, and for the collection of such taxes."

This act (section 5) contained the provision:

"The term company, corporation or association, wherever used in this act shall apply to and be construed as referring respectively to any railroad company, union station and depot company, express company, car-loaning company or refrigerator, or fast freight line company, and any and all other corporations subject to taxation under this act."

By section 6 of the act, express companies were required to report "the nature of the company, and under the laws of what state or country organized."

It cannot be successfully contended that the provision of the statute, which included express companies in the system of assessment by a State Board of Assessors, was intended to be limited to those express companies which were in fact corporations, because the effect of such a construction would be to include but a small part of the property of express companies under that system, inasmuch as, in volume of property and business, but about one-seventh of the total

express property in the state belonged to corporations, while six-sevenths of that property belonged to joint stock associations.

The character and names of the express companies doing business in Michigan in 1901 with the volume of their business as reported by them are as follows:

Company	Character	Miles	Gross Receipts Michigan
Adams	Joint-Stock Co.	459.72	\$ 33,347.18
American	" " "	4,191.00	\$370,825.81
National	" " "	780.00	\$ 76,672.63
Canadian	Corporation	57.00	\$ 14,774.16
Pacific	"	79.00	\$ 4,343.73
United States	Joint-Stock Co.	697.58	\$ 33,133.31
Western	Corporation	686.58	\$ 25,482.16
Dominion	"	2.00	\$ 699.65

In making the first assessment under Act 173 in 1902, and each year since, the state board has construed the statute to include, and has assessed, the property of the joint-stock express companies as well as that of the corporation express companies.

In view of the facts that the agitation for increased taxation extended to all specific paying institutions, including express companies; that the purpose of the Legislature since 1897 has been to provide a system for their taxation; that the Atkinson Bill as passed included express companies; that the purpose of the constitutional amendment of 1900 was to permit legislation along the lines of the Atkinson Bill; that immediately upon the passage of that amendment the Legislature passed a law including express companies; that all the important express companies doing business in Michigan are joint-stock associations; that any system which does not include the joint-stock associations taxes but a small portion of the express property, splitting it up between two methods of taxation, and leaving the system open to the objection, upon the validity of which I do not pass; that it is not uniform as to the class of property to which it applies; that the state board has uniformly construed the act as including the joint-stock associations, and has uniformly assessed them under it; and that those associations have for the most part paid their taxes under the act—I have reached the conclusion that the purpose and effect of the constitutional amendment was to include joint-stock associations.

The American Express Company is shown by the proof to be a voluntary joint-stock association, organized under the common law of New York, and being the successor of the Merchants' Union Express Company. Its articles and the testimony show that it possesses practically all of the attributes of a corporation. Its status under the New York law is not, strictly speaking, that of a simple partnership.

In the case of *Waterbury v. Merchants' Union Express Co.*, 50 Barb. (N. Y.) 158, 159-161, the attributes of a joint-stock association organized under the New York laws were set forth in the following language:

"Before proceeding to more particular questions, it will be useful to consider briefly the nature and legal character of these joint-stock associations. They are organized, not as simple partnerships, but with written articles of association framed under and with reference to the statute laws on the subject. The first act was passed in the year 1849. It was amended in the year 1851, and again in 1854. A further act, passed at the session of 1867, authorized these companies to hold real estate in perpetual succession. By an examination of all these statutes it will be found that joint-stock companies possess the following qualities or attributes of corporation: (1) They can, like corporations, sue or be sued in a single or collective name, to wit, the name of their president or treasurer. (2) Their property or capital is represented in shares and certificates of stock differing in no respect from the shares and stock certificates in corporations. (3) The death of a member, his insolvency, or the sale or transfer of his interest, is not a dissolution of the company. (4) They have perpetual succession, or what is sometimes called the immortality of corporations. (5) They can take and hold real and personal estate in a collective capacity and in perpetual succession. These are all attributes of a corporation, and, if we look into the books for elementary definitions, we shall find that corporations have no other attributes except the technical one of a common seal to distinguish them from common-law partnerships. On the other hand, simple partnerships have none of the attributes or qualities here mentioned. Mere names are but of little importance. Looking at the substance and nature of things, it is plain that, in respect to the absence of a common seal merely, these joint-stock associations are like partnerships. In the other and vastly more material respects mentioned, they are like corporations, although they are not declared to be such by the legislative acts referred to. And so it was in the case of the general banking act of 1838. The word 'corporation' is not used in that act, yet the institutions or associations organized under it have been uniformly held to be corporations in the fullest and most exact sense. As to personal and individual liability, I may add that this is an incident both of partnerships and corporations, uniform and invariable in the one case, subject entirely to the legislative will in the other.

"What, then, are the true relations of a shareholder in one of these associations, and by what rules and analogies are his rights to be determined where he seeks a controversy with the body to which he belongs. These institutions are of such recent origin among us, and have arisen under laws of such recent enactment, that we are without judicial precedents in this country. It seems to me, however, plain that in controversies like the present one we must follow mainly the analogies afforded by laws and jurisprudence in the case of corporations, instead of those derived from the law of simple partnership." *People v. Wemple*, 117 N. Y. 136, 22 N. E. 1046, 6 L. R. A. 303; *Fargo v. McVicker*, 55 Barb. (N. Y.) 437-440; *People v. Coleman*, 133 N. Y. 279, 31 N. E. 96, 16 L. R. A. 183.

In numerous cases joint-stock companies and voluntary associations have been held to be corporations, and in numerous cases laws, which in terms only included corporations, have been held to apply to joint-stock companies and to voluntary associations and to these express companies as such institutions. *People v. Wemple*, 117 N. Y. 136, 22 N. E. 1046, 6 L. R. A. 303; *Fargo v. McVicker*, 55 Barb. (N. Y.) 437, 440; *Fargo v. Louisville, N. A. & Chicago Ry. Co.* (C. C.) 6 Fed. 787, 790; *Westcott v. Wm. G. Fargo*, 61 N. Y. 542, 548, 19 Am. Rep. 300; *Id.*, 6 Lans. 319, 329; *Liverpool Ins. Co. v. Massachusetts*, 10 Wall. 566, 574, 19 L. Ed. 1029; *Youngstown Coke Co. v. Andrews Bros. Co.* (C. C.) 79 Fed. 669; *Attorney General v. Mercantile Marine Ins. Co.*, 121 Mass. 524; *Tidewater Pipe Co. v. Assessors*, 57 N. J. Law, 516, 31 Atl. 220, 27 L. R. A. 684; *Pipe Line Co. v. Berry*, 52 N. J. Law, 308, 19 Atl. 665; *Edgeworth v. Wood*, 58 N. J. Law.

463, 33 Atl. 940; Maltz et al. v. American Ex. Co., 1 Flip. 611, Fed. Cas. No. 9,002; Bushnell v. Park Bros. & Co., Ltd. (C. C.) 46 Fed. 209; Park Bros. & Co. v. Bushnell, 60 Fed. 583, 9 C. C. A. 138.

The case of Liverpool Insurance Co. v. Massachusetts, 10 Wall. 566, 19 L. Ed. 1029, indicates the reasonableness of classifying joint-stock companies with corporations for taxation purposes. This case involved an English joint-stock company. The Massachusetts court held it to be within the intent of its statute for the taxation of corporations, and that decision was sustained by the federal Supreme Court on the ground that it possessed practically all of the attributes of a corporation.

In Michigan these joint-stock associations have in numerous instances been recognized by the Constitution, the statutes, and the courts, as being properly included within the term "corporation" and as possessing practically all of the attributes of corporations, and they are subjected by express provision to all of the requirements and restrictions of the Michigan Constitution contained in the article relating to corporations. Section 11, art. 15, Michigan Constitution 1850; Act 53 of 1871 (section 5262, C. L. 1897); Act 57 of 1852 (section 1255, How. Stat.); Attorney General v. American Express Co., 118 Mich. 682, 77 N. W. 317.

In Attorney General v. American Express Company, 118 Mich. 682, 77 N. W. 317, the American Express Company was held to come within the terms of a court rule applying to corporations; the court saying:

"But counsel contend, further, that the power given to the circuit courts to issue mandamus rests upon Cir. Ct. Rule No. 46, which provides: 'Circuit courts shall have jurisdiction within their respective counties in all mandamus proceedings involving the action of any officer or board of any county, township, city, or * * * village, and the action of any private corporation or officer or board thereof,' and that, this rule not having included joint stock associations, the circuit courts are not vested with power to issue the writ. 'Corporations' and 'Associations' are convertible, and often used as synonymous, terms. There is no reason for any * * * discrimination between corporations and joint stock associations, in applying this rule. It is the intent of the rule to place all mandamus proceedings of this character primarily in the circuit courts. In reference to the assessment and collection of specific taxes, the Legislature of this state has recognized the terms as convertible. (Art. 1255, 1 How. Stat.) provides:

"The term corporation, as used in this act shall be construed to include all associations and joint stock companies having any of the powers or privileges of corporations not possessed by individuals or partnerships."

"In Maltz v. American Express Co., 1 Flip. 611 [Fed. Cas. No. 9,002] it was held that, whether a corporation or not, a joint-stock association is a distinct legal entity, and that so long as that fact exists, and it possesses the attributes of perpetual succession, and the capacity of suing and being sued, it is a juridical person, and must be regarded as a citizen of the state which creates it; and it is wholly immaterial whether it be termed an 'association,' 'joint-stock association' or 'guild.'"

The foreign joint-stock association such as the American Express Company is included within the term "corporations" and subjected to the requirements applied to corporations before it is permitted to do business in Michigan by section 9 of Act 206 of 1901 as amended, and in 1907 the American Express Co. filed its articles in the office of

the Secretary of State, and paid the franchise fee in the manner required of foreign corporations.

[3] If the constitutional provisions in question are susceptible of two constructions—one being that contended for by complainants, the other that taken by the Legislature—the action of the Legislature in adopting one of those constructions and enacting a statute carrying it into effect, as thus construed, must be deemed conclusive. That rule is:

"That the acts of a state Legislature are to be presumed constitutional until the contrary is shown; and it is only when they manifestly infringe some provision of the Constitution that they can be declared void for that reason. In case of doubt, every presumption, not clearly inconsistent with the language or subject-matter, is to be made in favor of the constitutionality of the act. The power of declaring laws unconstitutional should be exercised with extreme caution and never where serious doubt exists as to the conflict."

Where a statute has been adopted in carrying into effect a constitutional provision, the constitutional provision and statute must both be so construed as to permit the act to stand. This question was passed on in *People v. Blodgett*, 13 Mich. 151, 161, 162, where Judge Christianity says:

"But it has been strenuously insisted here that these principles can only properly apply when the doubt exists as to the construction of the act, and not where it arises upon the meaning of a constitutional provision; that it is in all cases the duty of the court first to fix and settle the meaning, definitely, of the Constitution, whatever may be their doubts upon it, and then to examine the act and apply it to the Constitution.

"Now, it strikes me, as a self-evident proposition, that the question whether a legislative act conflicts with the Constitution must, of necessity, equally involve the examination of both. And that, while it can make but little practical difference which is first examined and construed, the more logical order, when it is claimed that an act is unconstitutional, would be first to determine what the act is. Nor can I perceive any good ground for holding that the doubt which is to restrain us from pronouncing the act unconstitutional must be confined to the meaning of the act; nor why courts can be bound to settle, fix, and declare the meaning of the one, in spite of their doubts, more than of the other. The doubt which is to save the act is the doubt of the conflict: and this may arise alike from the construction of the one or the other, or both. In fact, it will be found that, in much the greater number of cases where the rules above cited have been laid down, the doubts arise upon the construction of the Constitution, and not upon that of the act which was claimed to conflict with it."

In *Board of Education v. State Board of Assessors*, 133 Mich. 120, 94 N. W. 669, the question of the construction of this constitutional provision was before the court which gave effect to the legislative construction, saying:

"But it is urged in behalf of the power exercised by the board in this case that, if the act is subject to this construction, it is in conflict with the constitutional amendment itself. In determining this question, under well-settled rules, we are not to ignore the contemporaneous construction placed upon the amendment by the Legislature itself." *Kennedy v. Gies*, 25 Mich. 92; *Pfeiffer v. Board of Education*, 118 Mich. 564, 77 N. W. 250, 42 L. R. A. 536.

[4] The second objection to be considered is that the tangible personal property of the American Express Company, located outside

of Michigan and used in the express business, was taxed in Michigan, thus exceeding constitutional limitations. The Michigan statute imposes a tax only upon the property of the company located in Michigan. In ascertaining the value of that property in Michigan and subject to taxation there, it treats the entire property of the company as a unit, deducts the real estate and the personal property not used in the business, from the total value of the unit, divides the remainder between Michigan and the other states upon the mileage of routes over which the company operates, and, to the Michigan proportion thus obtained, adds the real estate. This is but the giving of expression to the unit rule, for the assessment and taxation of the property of institutions doing business in a number of states, which has been repeatedly applied, and whose application has been repeatedly upheld. *Western Union Tel. Co. v. Mass.*, 125 U. S. 530, 8 Sup. Ct. 961, 31 L. Ed. 790; *Pullman's Palace Car Co. v. Pennsylvania*, 141 U. S. 18, 11 Sup. Ct. 876, 35 L. Ed. 613; *Maine v. Grand Trunk*, 142 U. S. 217, 12 Sup. Ct. 121, 163, 35 L. Ed. 994; *Pittsburg, C. & St. L. v. Backus*, 154 U. S. 431, 14 Sup. Ct. 1114, 38 L. Ed. 1031; *Western Union Tel. Co. v. Taggart*, 163 U. S. 1, 16 Sup. Ct. 1054, 41 L. Ed. 49; *Postal Tel. Co. v. Adams*, 155 U. S. 688, 15 Sup. Ct. 268, 360, 39 L. Ed. 311; *American Refrigerator Co. v. Hall*, 174 U. S. 78, 19 Sup. Ct. 599, 43 L. Ed. 899; *Marye v. Baltimore & Ohio*, 127 U. S. 117, 8 Sup. Ct. 1037, 32 L. Ed. 94; *Delaware Railroad Tax*, 18 Wall. 206, 21 L. Ed. 888; *Charlotte Columbus R. R. v. Gibbes*, 142 U. S. 386, 12 Sup. Ct. 255, 35 L. Ed. 1051; *Columbus So. Ry. v. Wright*, 151 U. S. 470, 14 Sup. Ct. 396, 38 L. Ed. 238; *State Railroad Tax Cases*, 92 U. S. 608, 23 L. Ed. 663; *New York Central v. Miller*, 202 U. S. 584, 26 Sup. Ct. 714, 50 L. Ed. 1155; *Wis. & Mich. v. Powers*, 191 U. S. 379, 24 Sup. Ct. 107, 48 L. Ed. 229; *Galveston, Harrisburg & San Antonio v. Texas*, 210 U. S. 217, 28 Sup. Ct. 638, 52 L. Ed. 1031.

The complainant's counsel, as he must of necessity do, admits the propriety of the unit rule in general, but seeks to distinguish this case because of the fact that the property of express companies differs from that of railroad or telegraph companies and similar properties, in that, in those cases there is a physical unity or connection which does not exist with regard to the property of express companies, as the tangible property of express companies is made up of items such as horses, wagons, safes, etc., which, taken separately and by themselves, are of no greater value, and should be treated no differently, than the same items of property belonging to other persons. I find myself unable to accede to the merits of the distinction claimed. While a unity through physical connection does not exist in the property of express companies, there does exist a unity of use, and a unity through the joining together of the several items of property by means of the contracts for routes.

This unit system of valuation has been sustained, as applied to express property, and the point upon which it is here attacked falls directly within the previously decided cases. *Adams Express Co. v. Ohio*, 165 U. S. 194, 220, 17 Sup. Ct. 305, 41 L. Ed. 683; *American Express Co. v. Indiana*, 165 U. S. 255, 17 Sup. Ct. 991, 41 L. Ed.

707; Adams Express Co. v. Ohio, 166 U. S. 185, 17 Sup. Ct. 604, 41 L. Ed. 965; Adams Express Co. v. Kentucky, 166 U. S. 171, 17 Sup. Ct. 527, 41 L. Ed. 960; Fargo v. Hart, 193 U. S. 490, 24 Sup. Ct. 498, 48 L. Ed. 761; Sanford v. Poe, 69 Fed. 546, 16 C. C. A. 305, 60 L. R. A. 641; Coulter v. Weir, 127 Fed. 897, 62 C. C. A. 429.

In Adams Express Co. v. Ohio, 165 U. S. 219, 17 Sup. Ct. 309, 41 L. Ed. 683, in passing upon the two objections, that the effect of such a system is to subject to taxation property located outside the jurisdiction of the taxing state, and to impose a tax upon interstate commerce, the court said:

"As to railroad, telegraph, and sleeping car companies, engaged in interstate commerce, it has often been held by this court that their property, in the several states through which their lines or business extended, might be valued as a unit for the purpose of taxation, taking into consideration the uses to which it was put and all the elements making up aggregate value, and that a proportion of the whole fairly and properly ascertained might be taxed by the particular state without violating any federal restriction. Western Union Telegraph Co. v. Massachusetts, 125 U. S. 530 [8 Sup. Ct. 961, 31 L. Ed. 790]; Massachusetts v. Western Union Telegraph Co., 141 U. S. 40 [11 Sup. Ct. 889, 35 L. Ed. 628]; Maine v. Grand Trunk Ry., 142 U. S. 217 [12 Sup. Ct. 121, 163, 35 L. Ed. 994]; Pittsburgh, Cincinnati, etc., Railway v. Backus, 154 U. S. 421 [14 Sup. Ct. 1114, 38 L. Ed. 1031]; Cleveland, Cincinnati, etc., Railway v. Backus, 154 U. S. 439 [14 Sup. Ct. 1122, 38 L. Ed. 1041]; Western Union Telegraph Co. v. Taggart, 163 U. S. 1 [16 Sup. Ct. 1054, 41 L. Ed. 49]; Pullman's Palace Car Co. v. Pennsylvania, 141 U. S. 18 [11 Sup. Ct. 876, 35 L. Ed. 613]. The valuation was, thus, not confined to the wires, poles, and instruments of the telegraph company; or the roadbed, ties, rails, and spikes of the railroad company; * * * but included the proportionate part of the value resulting from the combination of the means by which the business was carried on, a value existing to an appreciable extent throughout the entire domain of operation. And it has been decided that a proper mode of ascertaining the assessable value of so much of the whole property as is situated in a particular state is, in the case of railroads, to take that part of the value of the entire road which is measured by the proportion of its length therein to the length of the whole (Pittsburgh, etc., Railway v. Backus, 154 U. S. 421 [14 Sup. Ct. 1114, 38 L. Ed. 1031]); or taking as the basis of assessment such proportion of the capital stock of a sleeping car company as the number of miles of railroad over which its cars are run in a particular state bears to the whole number of miles traversed by them in that and other states (Pullman's Palace Car Co. v. Pennsylvania, 141 U. S. 18 [11 Sup. Ct. 876, 35 L. Ed. 613]); or such a proportion of the whole value of the capital stock of a telegraph company as the length of its lines within a state bears to the length of all its lines everywhere, deducting a sum equal to the value of its real estate and machinery subject to local taxation within the state (Western Union Tel. Co. v. Taggart, 163 U. S. 1 [16 Sup. Ct. 1054, 41 L. Ed. 49]).

"Doubtless there is a distinction between the property of railroad and telegraph companies and that of express companies. The physical unity existing in the former is lacking in the latter; but there is the same unity in the use of the entire property for the specific purpose, and there are the same elements of value arising from such use. The cars of the Pullman Company did not constitute a physical unity, and their value as separate cars did not bear a direct relation to the valuation which was sustained in that case. The cars were moved by railway carriers under contract, and the taxation of the corporation in Pennsylvania was sustained on the theory that the whole property of the company might be regarded as a unit plant, with a unit value, a proportionate part of which value might be reached by the state authorities on the basis indicated.

"No more reason is perceived for limiting the valuation of the property of express companies to horses, wagons, and furniture, than that of railroad,

telegraph, and sleeping car companies, to roadbed, rails and ties, poles and wires, or cars. The unit is a unit of use and management, and the horses, wagons, safes, pouches, and furniture, the contracts for transportation facilities, the capital necessary to carry on the business, whether represented in tangible or intangible property, in Ohio, possessed a value in combination and from use in connection with the property and capital elsewhere, which could as rightfully be recognized in the assessment for taxation in the instance of these companies as the others.

"We repeat that, while the unity which exists may not be a physical unity, it is something more than a mere unity of ownership. It is a unity of use, not simply for the convenience or pecuniary profit of the owner, but existing in the very necessities of the case—resulting from the very nature of the business.

"The same party may own a manufacturing establishment in one state and a store in another, and may make profit by operating the two; but the work of each is separate. The value of the factory in itself is not conditional on that of the store, or vice versa; nor is the value of the goods manufactured and sold affected thereby. The connection between the two is merely accidental and growing out of the unity of ownership. But the property of an express company distributed through different states is as an essential condition of the business united in a single specific use. It constitutes but a single plant, made so by the very character and necessities of the business. * * * That an express company owns no line of railway and operates no railroad does not prevent the value of its property from being affected by the relation of each part to every other part, and the use to which a part is put as a factor in a unit business." * * *

"There is here no attempt to tax property having a situs outside of the state, but only to place a just value on that within. Presumptively all the property of the corporation or company is held and used for the purposes of its business, and the value of its capital stock and bonds is the value of only that property so held and used. * * *

The complainant's counsel seeks to distinguish the Ohio and Indiana express cases upon the theory that those cases refer to and permit the application of the unit rule to the intangible property of express companies only. A careful examination of those cases, and particularly the Ohio cases, indicates that the entire property, both tangible and intangible, are constituted the unit for the purpose of fixing the value, and that the language of the opinions which is claimed to support the position taken was due to the claim of counsel in those cases that the intangible property could not be taxed according to the unit rule.

I do not find, in the fact that the State Board of Assessors refused to include, in the aggregate mileage of the American Express Company, the claimed foreign and ocean mileage, any reason for setting aside the tax. Without going into the nature of this ocean mileage in detail, it may be stated that the record indicates that the character of this ocean mileage was equivocal, to say the least; that the express company did not have the ocean routes claimed, under contract as routes, but simply had arrangements for rates; that in many instances there were no arrangements for rates over the mileage claimed, but, when the express company had a shipment to be sent over the route, an arrangement was made for the carriage of that specific shipment; that no exclusive routes upon the ocean exist, and that all of the routes claimed as ocean routes were open to the business of all express companies, and that they can be claimed by the other express companies sending express matter over them as their ocean routes in the

same manner and with the same effect as they can be claimed by the American Express Company; that, during the shipment over the ocean, the express company has no protection of or control over the shipment, or over any space upon the boat, greater or different than an individual shipper; that the connection of the American Express Company with the shipments which it sends over the claimed ocean routes is more in the nature of its being a forwarder over the route, than of its being an operator of the route.

In view of these things, it is very doubtful whether any of the claimed ocean mileage should have been allowed by the state board. If any of such mileage or routes were properly allowable, it is clear that the mileage of those routes upon which there was no general contract and over which shipments were carried only upon specific arrangement from time to time, as shipments were originated and desired to be sent by the express company, could not, under any circumstances, be properly included or claimed as mileage of routes. The testimony does not sufficiently separate between the routes claimed to be covered by general contract for rates, and those claimed to be subject to specific arrangement, to enable the court to say what mileage was in the one class or the other.

This, however, becomes immaterial in view of the facts that whether this mileage could or could not be claimed and allowed as routes of the express company was at best an open question; that question was submitted to the discretion of the board, investigated by it, and determined adversely to the claim of the complainant. The court is not in a position to say that that discretion was not wisely exercised, but is, on the contrary, inclined to the view that the state board was correct in excluding such mileage.

The question of the refusal of the state board to allow for ocean mileage was presented in *Fargo v. Hart*, 193 U. S. 497, 24 Sup. Ct. 499, 48 L. Ed. 761, and in sustaining the board, acting under a statute like that of Michigan, in excluding that mileage the court said:

"We lay on one side, also, the question of ocean mileage. Without dwelling on the sudden change in the returns which added nearly 130,000 miles in 1898, with comparatively slight explanation, of the admitted differences between the ocean and land carriage, we cannot say that the tribunal having the duty and sole jurisdiction to find the facts exceeded its powers in not allowing the item."

In conclusion, I would say that in my judgment the Michigan statute and the assessment thereunder in question was valid and constitutional. A decree may be entered dismissing the bill of complaint, with costs.

EQUITABLE TRUST CO. OF NEW YORK v. UNITED BOX BOARD & PAPER CO. et al.

(District Court, D. New Jersey. February 19, 1915.)

1. CORPORATIONS ~~579~~—REORGANIZATION—LIABILITY FOR DEBTS—MORTGAGES.

A corporation conveyed its property to a trustee to secure an issue of general mortgage bonds, of which a part were to be held by the trustee and authenticated and delivered when sold by the mortgagor, the proceeds to be used to pay off prior liens. The mortgage provided for the release of parts of the mortgaged premises under certain circumstances, and provided that all covenants therein should bind the corporation's successors and assigns. The corporation became insolvent, and its property was sold, subject to outstanding mortgages, at receiver's sales, to a reorganized corporation with the same stockholders, on the terms and conditions contained in a bid, which described the property for which the bid was made as including all bonds of the old corporation in the hands of creditors as collateral or in its treasury, or in the hands of the trustee under its general mortgage or a collateral trust mortgage, with all rights with respect thereto or with respect to any property of the corporation. It assumed the old corporation's outstanding debts and liabilities, not including bonds, debts, or obligations secured by real estate mortgages or the collateral trust mortgage. It subsequently obtained from the trustee a release of certain parts of the mortgaged premises pursuant to the provisions of the mortgage, and obtained from the trustee general mortgage bonds retained by it to pay off prior liens, and applied the proceeds to such liens. The trustee authenticated and delivered such bonds only after the court, on application of the new corporation, had authorized it to do so. Held that, though the new corporation became the mortgagor's successor in title to the mortgaged premises, it did not become liable for any deficiency in the mortgage debt upon a foreclosure sale, since it became the mortgagor's successor by virtue of a judicial sale, and not by virtue of the mortgage, or in pursuance of any rights thereunder, and, though it took title subject to the mortgage, it was bound only by such covenants therein as ran with the land, while the obligation to pay the debt was a covenant in personam, and not one running with the land.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2307, 2309, 2313-2318; Dec. Dig. ~~579~~.]

2. CORPORATIONS ~~579~~—REORGANIZATION—LIABILITY FOR DEBTS—MORTGAGES.

The new corporation, by exercising the right under the mortgage to have the bonds in the hands of the trustee authenticated and delivered, did not become liable for a deficiency upon a foreclosure of the mortgage, either to the holders of bonds previously issued or to the holders of those which it procured to be issued, as, though the methods employed in executing and authenticating the bonds were steps conforming to the mortgage, they did not amount to an assumption of the bonds, and were but steps to secure to the new corporation a part of what it had purchased, and, moreover, the holders of the bonds previously issued had an opportunity in the receivership action to express their views on the advisability of a sale on the terms of the bid, while those purchasing the bonds subsequently issued presumably purchased with full knowledge of the terms and conditions of the mortgage; the bonds not being issued in the name of the new corporation, but in that of the old corporation.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2307, 2309, 2313-2318; Dec. Dig. ~~579~~.]

In Equity. Suit by the Equitable Trust Company of New York, trustee, against the United Box Board & Paper Company and another,

to foreclose a mortgage, with a prayer for a decree for deficiency against the present owner of the mortgaged premises, as well as against the mortgagor. Prayer denied.

Murray, Prentice & Howland, of New York City (George Welwood Murray and Vance Hewitt, both of New York City, of counsel), for complainant.

Riker & Riker, of Newark, N. J. (James Todd, of Chicago, Ill., of counsel), for defendant United Boxboard Co.

RELLSTAB, District Judge. The question to be decided is whether the United Boxboard Company (not the mortgagor), who was the owner of the mortgaged premises at the filing of the bill of complaint, is liable for the deficiency, or any part of it, which resulted on the foreclosure sale of such premises.

The defendant United Box Board & Paper Company (hereafter called the mortgagor), on the 22d day of December, 1905, conveyed its property to a trustee as security for an authorized issue of general mortgage bonds, not to exceed \$2,750,000 face value,

"for the purpose of raising money to purchase and pay for its mortgage bonds theretofore outstanding, and to provide for and pay off liens then upon the property of the said company, and for its other corporate purposes."

By the terms of the mortgage all of these bonds were to be executed and delivered by the mortgagor to such trustee. \$1,750,000 thereof were to be authenticated and delivered by the trustee to the mortgagor without further direction. The remainder were to be held by the trustee, to be authenticated and delivered by it when sold by the mortgagor, in which event the trustee was to use the proceeds thereof, on the order of the mortgagor, to pay off liens upon the mortgaged property prior to the lien of such general mortgage. Only \$1,750,000 of such bonds were executed by the mortgagor and authenticated and issued by the trustee while the mortgagor was the owner of the mortgaged premises. The mortgagor covenanted to pay the principal and interest to become due upon the bonds when so issued. The mortgage provided for the release of parts of the mortgaged premises under certain circumstances and on compliance with certain conditions therein stated, and also that all the covenants and promises contained therein—"by or on behalf of the company [mortgagor] shall bind its successors and assigns, whether so expressed or not."

The mortgagor became insolvent, and on application of a creditor a receiver was appointed by the Court of Chancery of New Jersey, and ancillary receivers by federal and state courts of the several jurisdictions where the mortgaged properties of the mortgagor were located. Such properties were subsequently sold by such receivers to the defendant the United Boxboard Company, pursuant to a decree made by said New Jersey Court of Chancery, upon the terms and conditions contained in the bid made by a reorganization committee of the stockholders of said mortgagor; said last-named company (hereafter called the purchaser) having been incorporated for the purpose of taking over and operating said mortgaged premises. The property thus bid for by such committee, and which was conveyed to such purchaser, included—

"all bonds of the United Box Board & Paper Company in the hands of creditors as collateral, or in its treasury, or in the hands of trustee under its general mortgage subject to the provisions thereof, or in the hands of the trustee under its collateral trust mortgage, subject to the provisions thereof, with all the rights, powers, and privileges with respect to said bonds, and the certification, disposition, or use thereof, which said United Box Board & Paper Company was given or had, and also all and every the rights, powers, and privileges with respect or belonging to said assets and property, real and personal, respectively, and every or any part or portion thereof, of which said United Box Board & Paper Company had, held, or possessed, or to which it was entitled."

As a part of the consideration for such conveyance the purchaser assumed and agreed to pay the outstanding debts and liabilities of the mortgagor,

"not including bonds, debts, or obligations of said United Box Board & Paper Company, or of its grantors or of prior owners, which are secured by mortgage or mortgages upon real estate, and not including bonds or obligations secured by the collateral trust mortgage or deed of said United Box Board & Paper Company to the Trust Company of America, bearing date December 22, 1905, or the liability or obligations of said United Box Board & Paper Company upon any said bonds or mortgages."

The said bid also set forth:

"That with respect to such parts, parcels, and portions of said assets and property as at the time of the appointment of the said receivers as aforesaid were and at the time such sale shall be subject to valid mortgage or pledge, securing indebtedness not so included as aforesaid, such sale and purchase shall be subject to such valid mortgage or pledge."

This bid also provided:

"It is also a condition of this offer that the United Box Board & Paper Company shall, under the proper authority, direction, order, and decree of the court, make, execute, and deliver to us or to our appointee good and sufficient conveyances, deeds, and instruments of transfer of the assets and property comprised in this offer as we may require."

After appropriate proceedings, this bid was, on February 19, 1909, approved by the New Jersey Court of Chancery (the court of primary jurisdiction), and the property thus bid for, with some exceptions, which, however, in no way affect the question here presented, was shortly thereafter conveyed to the said purchaser. Subsequently said purchaser exercised certain of the rights secured to such mortgagor in said general mortgage, in the following particulars: It obtained a release from the trustee of certain parts of the mortgaged premises. It obtained from the trustee \$120,000, face value, of such general mortgage bonds retained by the trustee to pay off liens which were prior in date to said general mortgage, which bonds were sold and the proceeds thereof applied to pay off and reduce liens of such character. By a mortgage covering other properties, it gave additional security for the payment of the bonds then outstanding or that might thereafter be issued under said general mortgage, and also by it secured "the performance of all of the obligations of the United Box Board & Paper Company and its successors in said mortgage contained, upon all of the terms, conditions, and trusts in said mortgage contained, as fully to all intents and purposes as if said property had been in the ownership of the said United Box Board & Paper Company at the time of

the delivery of said mortgage and had been therein described, subject, however, to the lien of a certain mortgage" therein specifically mentioned.

On these facts the complainant contends, first, that the purchaser is a "successor or assign within the meaning of the mortgage, and is therefore liable for the obligations of the mortgagor company"; and, if that be untenable, second, that the purchaser became such a successor or assign by the order of the state Court of Chancery, empowering it to avail itself of the terms of the mortgage in relation to said issue of \$120,000 of bonds, and became, by its "exercise of other privileges and rights which were peculiarly within the power of the mortgagor, its 'successor and assign.'"

The purchaser's contention is that it made such purchase on the express condition that it should not be liable for the mortgagor's bonded indebtedness secured by such general mortgage, whether the bonds had then actually been issued or were thereafter to be issued according to the terms of such mortgage.

[1] As to the first contention: The purchaser undoubtedly became the successor in title to the mortgaged premises; but it became so not by virtue of the mortgage or in pursuance of any rights created thereby or preserved therein. It became such through a judicial sale ordered by a competent court in a cause wherein the mortgagee was not an actual or necessary party. Such mortgagee was a stranger to such contract of purchase and the consideration which supported it. The purchaser bid for and obtained all the mortgagor owned in such property. It took title subject to such mortgage, but it was bound only by such covenants therein which ran with the land. The mortgagor by such sale obtained no indemnity against the mortgage debt. It continued, as it began, the primary and sole debtor on said bonds. The bid for such property expressly excepted and disavowed any liability on account of the bonds issued or to be issued, for the payment of which such mortgage was given as security, and the judicial order authorizing the acceptance of such bid expressly countenanced such disclaimer. The obligation of the mortgagor to pay said bonds, principal and interest, was not a covenant running with the land, but one in personam. *Glenn v. Canby*, 24 Md. 127. See, also, *Farmers' Loan & Trust Co. v. Penn Plate-Glass Co. et al.*, 103 Fed. 132, 43 C. C. A. 114, 56 L. R. A. 710, affirmed 186 U. S. 434, 22 Sup. Ct. 842, 46 L. Ed. 1234. And the parties to such mortgage could not, by its terms, impose such an obligation on a purchaser who subsequently obtained the title to the mortgaged premises, not through a contract made with the mortgagor, but through a judicial sale as stated.

The purchaser, though its stockholders were the same as those of the mortgagor, was entirely new and distinct. The property taken over was not obtained as the result of a consolidation or merger of other companies, but was property purchased at a judicial sale; and the purchaser became a successor of the mortgagor, not by reason of any right derived from it or said mortgage, but as any stranger would under a judicial sale. In such circumstances, no privity exists between the purchaser and the mortgagor or mortgagee as concerns mere personal covenants contained in such mortgage. The right of the mort-

gagee to enforce payment of the mortgage debt against such premises and to enforce the personal covenants of the mortgagor was unaffected by such sale. Its rights were only those that could be found in such mortgage, and as the purchaser derived its estate through other means, not in any way dependent upon such mortgage or the volition of the mortgagor, it cannot by reason of anything in said mortgage be bound to pay any deficit on said bonds arising after sale of the mortgaged premises. The complainant's first contention in this respect is untenable.

[2] As to the second contention: The asserted liability under this contention, as already noted, depends upon the conduct of the purchaser subsequently to its purchase of the mortgaged premises. Of such conduct, that relating to the issue of \$120,000, face value, of the general mortgage bonds is deemed by the complainant the most significant and controlling as to such contention. As to such issue of bonds, the purchaser applied to the trustee to authenticate and deliver the same to it, asserting its right thereto under the terms of its purchase of said property. The trustee refused to do this, because they had not been executed by the mortgagor as the mortgage required, and because it would not take the risk of determining the status of the purchaser with respect to such unexecuted bonds. After some negotiations, the purchaser petitioned the Court of Chancery of New Jersey for an order requiring their execution, authentication, and delivery. In its petition in that behalf it recited that both it and the said reorganization committee supposed that all the general mortgage bonds had been executed and delivered by the mortgagor to the trustee, but that it had recently learned that \$1,000,000, face value, of such bonds had not been so executed and delivered; that under the terms of its bid and the order of its acceptance by the court it had—

"acquired the right to have said bonds, and each of them, executed by the said defendant United Box Board & Paper Company, and delivered to the said trustee pursuant to the terms of the said respective mortgages."

Subsequently said court ordered that the proper officers of the mortgagor execute such bonds and deliver the same to said trustee—

"subject to certification upon the demand of the said petitioner, the United Boxboard Company, in accordance with the terms of the said respective mortgages and deeds of trust, and that for this purpose the injunction heretofore ordered in the above-stated cause is modified."

Certainly there is nothing in the original bid, pursuant to which the purchaser became the owner of the mortgaged premises, nor in the order of the court authorizing the acceptance of such bid, nor in the deed evidencing such purchase, nor in the application to such court seeking its aid to secure the execution of the unexecuted bonds, nor in the order by the court directing that such bonds be executed and authenticated as aforesaid, which made the purchaser liable for the bonds secured by such general mortgage. The negotiations leading to the purchase of the mortgaged premises and the order authorizing it expressly exclude any such liability, and the subsequent application and order of court founded thereon to obtain the execution and delivery of the bonds that had not then been issued were but steps to secure to the

purchaser a part of what it had purchased; and while the methods employed in executing and authenticating such bonds for future delivery were steps conforming to the mortgage requirements to achieve that result, these steps, although a recognition of such mortgage and its terms in that regard, were not intended and cannot be construed to create an assumption on the part of the purchaser to pay either the bonds then outstanding or yet to be issued. The holders of the bonds outstanding at the time the court authorized the sale to the purchaser, as well as the unsecured creditors of the mortgagor, had notice of such offer for the property, and that the court on a day named would determine whether it should be accepted, and they are therefore presumed to have had knowledge that the would-be purchaser had expressly stipulated that it would assume no personal liability for the payment of such bonds. Whether it was to the interest of such bondholders that the sale should be made upon the terms proposed in such bid is not now an open question. They had their opportunity to express their views upon that subject, and they are bound by the terms of such purchase. The subsequent issuing of \$120,000 worth of bonds and the releasing of parts of such mortgaged premises were acts contemplated by such mortgage; and that such rights or privileges were enforced at the instance of the purchaser creates no assumption on its part of personal liability for the indebtedness secured by such mortgage. So far as the old bondholders are concerned, they have neither a contractual nor an equitable right to the decree for deficiency prayed.

The holders of the \$120,000 worth of bonds, so far as this proceeding is concerned, stand in no better position. In the absence of anything to the contrary, the presumption is that the holders of such bonds purchased them with full knowledge of the terms and conditions of the mortgage given to secure them. These bonds were not issued in the name of the purchaser, but in the name of the mortgagor, and were a part of the obligations contemplated and secured by the general mortgage, and whatever benefits the purchaser may have derived from the exercise of the privileges contained in such mortgage were only such as it bargained for and obtained in its said purchase. So far as the present proceedings are concerned, no decree for deficiency can be made for the benefit of one set of bondholders, and not for the other. The counsel for the complainant concedes this, stating in that regard that:

"A partial right or partial liability is not within the contemplation of the mortgage."

If there is any liability on the part of the purchaser for the payment of any or all of this \$120,000 issue of bonds, it is a liability that does not grow out of any of the steps alleged and relied upon in this proceeding.

Northern Pacific Railway Co. v. Boyd, 228 U. S. 482, 33 Sup. Ct. 554, 57 L. Ed. 931, mainly relied upon by the complainant, is not opposed to the view herein expressed. In that case the suit was to make the property taken over pursuant to a reorganization scheme subject to a judgment obtained against a former owner of a part of such property, and, so far as pertinent to the present inquiry, it was held that a sale of the properties of an insolvent railway company,

made to another company organized by the shareholders and bondholders of the insolvent company, in pursuance of a reorganization scheme entered into between such share and bondholders, and which made no provision for creditors other than such bondholders, was not binding upon a nonassenting creditor of such insolvent company not a bondholder, and that the property thus conveyed was subject to a judgment obtained by such nonassenting creditor. In the instant case, however, the reorganization plan included all the unsecured creditors and took over the property of the insolvent corporation subject to the mortgage thereon, upon the express condition that no personal liability for the debt secured by such mortgage was assumed by the purchaser.

The prayer for a decree that the defendant the United Boxboard Company pay the deficiency resulting from the foreclosure sale of the mortgaged premises in question is denied, with costs.

UNITED STATES v. LENGYEL. SAME v. MORRIS. SAME v. GLANTZ.

(District Court, W. D. Pennsylvania. February 10, 1915.)

Nos. 13-15.

ALIENS ~~68~~—NATURALIZATION—DECLARATION OF INTENTION—DELAY IN APPLYING FOR CITIZENSHIP.

Naturalization Act June 29, 1906, c. 3592, 34 Stat. 596, § 4 (Comp. St. 1913, § 4352), requiring applicants for citizenship to declare their intention of becoming citizens, provided that no alien who, in conformity with the law in force at the date of his declaration, had declared his intention to become a citizen prior to that act, should be required to renew such declaration, and not less than two years nor more than seven years after the making of the declaration of intention, to make and file a petition for citizenship in writing signed by the applicant in his own handwriting, when construed in connection with the further provisions of that section that if he has filed his declaration before the passage of that act he shall not be required to sign his petition in his own handwriting, and that when an alien, who has declared his intention to become a citizen, dies before he is actually naturalized, his widow and minor children may be naturalized without any declaration of intention, section 8 (section 4364), providing that the requirement of that section that applicants for citizenship shall be able to speak the English language shall not apply to any alien who prior thereto declared his intention to become a citizen in conformity with the law in force at the date of the declaration, section 27 (section 4382), prescribing a form of declaration of intention, and Rev. St. § 2174 (Comp. St. 1913, § 4357), relative to the naturalization of alien seamen serving on merchant vessels of the United States, does not invalidate declarations of intention filed prior to the enactment of that act, though not made the basis of a petition for citizenship within seven years after the adoption thereof, especially in view of the property and other legal rights granted by the United States or by the several states to aliens who have declared their intention of becoming citizens.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. §§ 138-145; Dec. Dig. ~~68~~.]

Separate suits by the United States against Stefan Lengyel, Joshua Morris, and August Glantz. Bill in each case dismissed.

E. Lowry Humes, U. S. Atty., of Pittsburgh, Pa., for complainant.

ORR, District Judge. In each of the above cases the United States has invoked the remedy provided in the fifteenth section of the act of June 29, 1906 (34 Stat. pt. 1, p. 596), entitled "An act * * * to provide for a uniform rule for the naturalization of aliens throughout the United States," and establishing the Bureau of Naturalization. That section makes it the duty of United States district attorneys, upon affidavits showing good cause, to institute proceedings in any court having jurisdiction to naturalize aliens in their respective judicial districts in which the naturalized citizens may reside at the time of bringing the suit, for the purpose of setting aside and canceling the certificate of citizenship, on the ground of fraud, or on the ground that such certificate of citizenship was illegally procured. There is no allegation of fraud in either of the bills in the above cases, and there is no intimation that any fraud was intended. The ground relied upon, therefore, in each case, is that the certificate was illegally procured.

Each of the defendants has answered, admitting the averments of fact contained in the bill to which the respective answer is made, except the averment (if averment it be, and not a conclusion of the pleader) that the certificate of citizenship held by the defendant was illegally procured. The cases were all presented to the court at the same time and each was heard upon bill and answer. The position of the government in each case is supported by the contention that the naturalization law, by its terms, renders invalid declarations of intention filed by aliens prior to the passage of the act, and which were not made the basis of petitions for citizenship within seven years from the date of the passage of the act. In other words, that the court was without power to issue a certificate of naturalization upon a petition based upon an original declaration of intention, and presented to the court more than seven years after the passage of the act, when the declaration of intention had been made prior to such act.

Each case is somewhat different. In the Lengyel case, the declaration of intention was dated March 13, 1905, and the petition for naturalization was filed on the 8th of May, 1914. In this case, also, the petition for citizenship was not signed by the applicant in his own handwriting, but by his mark, duly attested.

In the Morris case, the declaration of intention was made on the 11th day of September, 1906, and his petition for citizenship was filed on the 23d day of December, 1913.

In the Glantz case, the defendant relied upon the declaration of his father, which was made on January 9, 1886, when defendant was a minor, in which condition he was also at the date of his father's death on the 19th of September, 1889. The defendant's petition for naturalization was filed on the 30th of September, 1914.

The Naturalization Act of 1906 has been amended from time to time. Therefore, in considering the questions involved in this case, they will be dealt with having due regard to the act as amended. Turning to section 4 of the act, we find the following provisions in which, for purposes of emphasis, certain portions are italicized:

"First. He shall declare on oath before the clerk of any court authorized by this act to naturalize aliens, or his authorized deputy, in the district in

which such alien resides, two years at least prior to his admission, and after he has reached the age of eighteen years, that it is bona fide his intention to become a citizen of the United States, and to renounce forever all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty, and particularly, by name, to the prince, potentate, state, or sovereignty of which the alien may be at the time a citizen or subject. And such declaration shall set forth the name, age, occupation, personal description, place of birth, last foreign residence and allegiance, the date of arrival, the name of the vessel, if any, in which he came to the United States, and the present place of residence in the United States of said alien: *Provided, however, that no alien who, in conformity with the law in force at the date of his declaration, has declared his intention to become a citizen of the United States shall be required to renew such declaration.*

"Second. *Not less than two years nor more than seven years after he has made such declaration of intention he shall make and file, in duplicate, a petition in writing, signed by the applicant in his own handwriting, and duly verified, in which petition such applicant shall state his full name, his place of residence (by street and number, if possible), his occupation, and, if possible, the date and place of his birth; the place from which he emigrated, and the date and place of his arrival in the United States, and, if he entered through a port, the name of the vessel on which he arrived; the time when and the place and name of the court where he declared his intention to become a citizen of the United States; if he is married, he shall state the name of his wife and, if possible, the country of her nativity and her place of residence at the time of filing his petition; and if he has children, the name, date, and place of birth and place of residence of each child living at the time of the filing of his petition: Provided, that if he has filed his declaration before the passage of this act he shall not be required to sign the petition in his own handwriting.* * * *

"Sixth. *When any alien who has declared his intention to become a citizen of the United States dies before he is actually naturalized the widow and minor children of such alien may, by complying with the other provisions of this act, be naturalized without making any declaration of intention."*

Section 8 of the act (section 4364) provides:

"That no alien shall hereafter be naturalized or admitted as a citizen of the United States who cannot speak the English language: *Provided, that this requirement shall not apply to aliens who are physically unable to comply therewith, if they are otherwise qualified to become citizens of the United States: And provided further, that the requirements of this section shall not apply to any alien who has prior to the passage of this act declared his intention to become a citizen of the United States in conformity with the law in force at the date of making such declaration: Provided further, that the requirements of section eight shall not apply to aliens who shall hereafter declare their intention to become citizens and who shall make homestead entries upon the public lands of the United States and comply in all respects with the laws providing for homestead entries on such lands.*"

Section 26 (section 4381) provides:

"That sections twenty-one hundred and sixty-five, twenty-one hundred and sixty-seven, twenty-one hundred and sixty-eight, twenty-one hundred and seventy-three, of the Revised Statutes of the United States of America, and section thirty-nine of chapter one thousand and twelve of the Statutes at Large of the United States of America for the year nineteen hundred and three, and all acts or parts of acts inconsistent with or repugnant to the provisions of this act are hereby repealed."

Section 27 (section 4382) provides:

"That substantially the following forms shall be used in the proceedings to which they relate:

"Declaration of Intention.

"(Invalid for all purposes seven years after the date hereof).

"_____, ss.

"I, _____, aged _____ years, occupation _____, do declare on oath (affirm) that my personal description is: Color _____, complexion _____, height _____, weight _____, color of hair _____, color of eyes _____, other visible distinctive marks _____. I was born in _____ on the _____ day of _____, Anno Domini _____. I now reside at _____. I emigrated to the United States of America from _____ on the vessel _____. My last foreign residence was _____. It is my bona fide intention to renounce forever all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty, and particularly to _____, of which I am now a citizen (subject). I arrived at the (port) of _____ in the state (territory or district) of _____ on or about the _____ day of _____, Anno Domini _____. I am not an anarchist; I am not a polygamist nor a believer in the practice of polygamy; and it is my intention in good faith to become a citizen of the United States of America and to permanently reside therein. So help me God.

"(Original signature of declarant) _____.

"Subscribed and sworn to (affirmed) before me this _____ day of _____, Anno Domini _____.

"[L. S.]

(Official Character of Attestor.)"

The repealing clause of the Naturalization Act leaves untouched section 2174 of the Revised Statutes, which is as follows:

"Every seaman, being a foreigner, who declares his intention of becoming a citizen of the United States in any competent court, and shall have served three years on board of a merchant vessel of the United States subsequent to the date of such declaration, may, on his application to any competent court, and the production of his certificate of discharge and good conduct during that time, together with the certificate of his declaration of intention to become a citizen, be admitted a citizen of the United States; and every seaman, being a foreigner, shall, after his declaration of intention to become a citizen of the United States, and after he shall have served such three years, be deemed a citizen of the United States for the purpose of manning and serving on board any merchant vessel of the United States, anything to the contrary in any act of Congress notwithstanding; but such seaman shall, for all purposes of protection as an American citizen, be deemed such, after the filing of his declaration of intention to become such citizen."

It is vain to search for anything in the Naturalization Law which *expressly* invalidates a declaration of intention made prior to the act at any future time. It seems unfortunate that the courts are not uniform in holding that there is nothing in the act which *impliedly* invalidates such certificates. The best expression of the alignment of the decisions in this regard is to be found in the brief opinion of the Circuit Court of Appeals of the Second Circuit in *Yunghauss v. United States*, 218 Fed. 168. That decision is an affirmation of the decision of the District Court for the Southern District of New York in *Re Yunghauss*, 210 Fed. 545. Those cases adopt the construction that the act shows by implication "that the Congress did not intend that old applicants could wait for a longer period than new applicants within which to file the petition." The lower court recognized that a decision invalidating old declarations "will involve the status of a considerable number of aliens." The Court of Appeals holds:

"In effect the act says to the alien who has made his declaration prior to 1906: 'Your declaration is in all respects valid, but if you wish to become a citizen you cannot delay your application for a period of over seven years from the passage of the act.'"

This court has already expressed its views against such a construction of the act in the case of *Eichhorst v. Lindsey*, 209 Fed. 708, resting more particularly upon the fundamental principle that an act of a legislative body should not be construed as retroactive, unless the language employed expresses a contrary intention in unequivocal terms. The words of Mr. Justice Paterson in *United States v. Heth*, 3 Cranch, 413, 2 L. Ed. 479, have often been quoted with approval:

"Words in a statute ought not to have a retrospective operation, unless they are so clear, strong, and imperative, that no other meaning can be annexed to them, or unless the intention of the Legislature cannot be otherwise satisfied."

That language seems specially applicable in the consideration of the present question. It is unnecessary to again make reference to the language italicized by the court at the end of the first and the beginning of the second paragraphs of section 4 of the act, because that language has been under consideration in the Eichhorst Case, and in the case of *In re Anderson* (decided by the District Court for the Western District of Texas) 214 Fed. 662. The language at the close of the second paragraph of section 4, relieving the alien from signing the petition in his own handwriting, if he shall have filed his declaration before the passage of the act, seems to this court to be an important feature in the act, as showing the intention not to interfere with existing declarations in any respect, and not to interfere with any status acquired by an alien by reason of a former declaration. Additional force to that position is found in the language at the beginning of the sixth paragraph of section 4, which permits the widow and minor children of an alien, who has declared his intention to become a citizen, of becoming naturalized without making any declaration of intention. Can it be supposed that Congress intended a seven-year limitation as against the widow and minor children who rely upon the declaration of the husband and father? Is it to be deemed, from that language, that Congress intended that the declaration by the husband would become invalid after seven years, and that the widow and minor children, perhaps after reaching majority, should make a new declaration of intention and use the same within seven years? One construction seems to be as reasonable with respect to the widow and minors as with respect to others who rely upon their own declarations.

Again, the act in section 3 prohibits the courts from admitting to citizenship thereafter any alien who cannot speak the English language, with the proviso, however, that such requirement should not apply to an alien who prior to the passage of the act had declared his intention to become a citizen of the United States in conformity with the law in force at the date of making such declaration. That proviso contains no limitation as to time. On the contrary, it expressly refers to the law in force at the date of making such declaration. The use of the word "date" in the proviso has reference, not to the existing law, or to any particular act of Congress. It seems from its very language to mean that irrespective of lapse of time, and irrespective of the age of the applicant, he shall be admitted, although he cannot sign his petition in his own handwriting, if he should have conformed, at any previous period, with the act of Congress in force relating to declarations of

intention. The man who cannot write, and yet had made his declaration under existing law, had a status given him by the United States. It was the right to become a citizen upon his compliance with the laws in force at the time, upon making his application to the court at some indefinite time, when he deemed himself to have sufficient knowledge of the Constitution and government to satisfy the court as to his attachment thereto. That status has been removed by the act of 1906, if the conclusions reached in the Yunghauss Case are sound. In vain would such a one search for notice to him of such a change in his status.

Referring now to section 27, wherein is set forth the form of the declaration of intention, so far as this court is informed the present Naturalization Law is the first to set forth a form of the declaration of intention, and a statement of the matters which should be set forth therein. There seems to have been no provision in previous laws for indicating the color, complexion, height, weight, color of hair, color of eyes, or other visible marks which will identify the alien. Under the title "Declaration of Intention" appear the words, "Invalid for all purposes seven years after the date hereof." There does not seem to be anything in that language which can relate to any other declaration of intention than the one prescribed in the act itself. That very language, when read in connection with the proviso in the first paragraph of section 4, "that no alien who, in conformity with the law in force at the date of his declaration, has declared his intention to become a citizen of the United States shall be required to renew such declaration," seems to indicate that the seven-year limitation is applicable only under the new act and not to declarations made prior thereto.

Referring now to section 2174 of the Revised Statutes, which, as we have seen, is not repealed, we find it gives a status to foreign seamen, who have declared their intention to become citizens, provided they shall have served three years on board of a merchant vessel of the United States subsequent to the date of such declaration. By that act, after such declaration and such service, a seaman may be admitted to citizenship; and also, after such declaration and during such service, he shall, for all purposes of protection as an American citizen, be deemed such. There is no limitation in said section of the Revised Statutes after which such declaration shall cease to avail the seaman of the privileges therein given him. That section must be deemed to have been intended by Congress, when it passed the Naturalization Act, to be and remain in full force, because Congress repealed by express words many other sections, among them 2173.

In every aspect, the Naturalization Act seems to have been intended to preserve existing conditions, except where by express words they were changed. By so much the less, therefore, did Congress intend to change the status of aliens who had declared their intention, by mere inference. This view seems strengthened when we turn from the consideration of the status of the alien who had made his declaration previous to the act of 1906, viewing him in the light of one to whom a revocable privilege had been granted by the sovereign, to a considera-

tion of the status of such alien to whom a property or other legal right had been granted by the United States, or by the several states. Congress by section 2319 of the Revised Statutes (Comp. St. 1913, § 4614) declared all valuable mineral deposits in lands belonging to the United States to be open to occupation and purchase, not only by citizens of the United States, but by "those who have declared their intention to become such." In the second edition of the American & English Ency. of Law, in the article upon "Elections," we find this:

"In some of the states, however, an alien having the other qualifications may be an elector, if he shall have resided in the state for a certain specified period immediately preceding the election, and shall have declared his intention to become a citizen of the United States, conformably to the laws of the United States on the subject of naturalization."

The footnote refers to the Constitutions of the states of Alabama, Arkansas, Arizona, Colorado, Dakota, Florida, Indiana, Kansas, Louisiana, Minnesota, Missouri, Montana, Nebraska, Oregon, Texas, Wisconsin, and Wyoming. Doubtless that list of states is not correct today, in view of constitutional changes in many of them; but it was admitted by the representative of the government in this case that at the time of the passage of the Naturalization Law there were at least nine states in which aliens, who had declared their intention to become citizens of the United States and possessing other qualifications, were deemed qualified electors in such states. Congress must have known at the time of the passage of the Naturalization Law of these rights possessed by aliens who before that time had made their declaration of intention to become citizens. Had the purpose been to invalidate existing certificates after a lapse of seven years from the passage of the act, Congress would have felt impelled to have so enacted in plain terms.

It is proper also to consider that the act itself contained the provision that it should not take effect or be in force for 90 days after its passage, except with respect to certain sections not material to the present discussion. This court cannot consider the Naturalization Act as in the nature of a statute of limitations, and therefore cannot apply the principles of *Sohn v. Waterson*, 84 U. S. (17 Wall.) 596, 21 L. Ed. 737, other than as an additional emphasis of the words of Mr. Justice Patterson hereinabove quoted. The proceeding ending in an adjudication that the applicant is qualified for citizenship is begun by a declaration of intention, and therefore the construction fixing a limitation upon a right of action would not apply.

In view of the foregoing considerations, the following conclusions must be reached:

In the case of Stefan Lengyel, who was unable to sign his declaration in his own handwriting, there was no illegality in admitting him to citizenship.

In the case of Joshua Morris, who filed his declaration on the 11th day of September, 1906, before the Naturalization Act became in force, and who filed his petition for citizenship on the 23d of December, 1913, there was no illegality in admitting him to citizenship.

In the case of August Glantz, who relied upon the declaration of his deceased father, there was no illegality in admitting him to citizenship.

For the reasons hereinbefore given, the bill in each case must be dismissed.

In re VYSE et al.

(District Court, E. D. New York. February 20, 1915.)

1. BANKRUPTCY \Leftrightarrow 136—ORDERING PAYMENT OF MONEY TO TRUSTEE—PERSONS LIABLE.

Where one of the bankrupt members of a bankrupt firm was a mere clerk, received what was equivalent to wages, had nothing to do with the real conduct of the business, and kept in his possession none of the proceeds of a sale shortly before bankruptcy, but actually turned over all of the money received from such sale to his partner, and never knew what became of it thereafter, he could not be required to pay such money to the trustee, on the theory that it was still within the control of the bankrupts.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 233, 235; Dec. Dig. \Leftrightarrow 136.]

2. BANKRUPTCY \Leftrightarrow 136—ORDERING PAYMENT OF MONEY TO TRUSTEE—MONEY DELIVERED TO THIRD PERSON.

Where a bankrupt had actually delivered money to his sister, the trustee could not proceed directly against him to require such money to be turned over to the trustee, even though the claim that the money was so delivered in payment of a debt was preposterous and unworthy of belief, as the sister had a right to be heard in defense of her own possession.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 233, 235; Dec. Dig. \Leftrightarrow 136.]

3. BANKRUPTCY \Leftrightarrow 136—ORDERING PAYMENT OF MONEY TO TRUSTEE—MONEY DELIVERED TO THIRD PERSON.

Where, though a bankrupt did not account satisfactorily for money which he claimed to have delivered to K., the evidence indicated that the money was either turned over to K. for some purpose or squandered in connection with K., he accounted sufficiently therefor so far as a proceeding against him to require the money to be turned over to the trustee was concerned; and though K.'s assumption of responsibility for taking the money did not prevent a finding that the bankrupt gave it to him for some fraudulent purpose and was liable for his acts, it was necessary to proceed against him and the bankrupt at the same time.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 233, 235; Dec. Dig. \Leftrightarrow 136.]

4. BANKRUPTCY \Leftrightarrow 136—ORDERING PAYMENT OF MONEY TO TRUSTEE—ACCOUNTING BY BANKRUPT.

A bankrupt did not sufficiently account for several thousand dollars in his possession prior to bankruptcy, so as to prevent an order requiring him to pay it to the trustee, by admitting that he gambled with everything upon which he could lay his hands.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 233, 235; Dec. Dig. \Leftrightarrow 136.]

5. BANKRUPTCY \Leftrightarrow 136—ORDERING PAYMENT OF MONEY—ORDER—CONFORMITY TO ISSUES.

Where, in a proceeding by a trustee to require a bankrupt to pay over to him certain sums of money which were found to be no longer under his control, the evidence disclosed a failure to account for a larger amount,

and all the proceedings were thereafter conducted as if the bankrupt was charged with the secretion of the entire amount, and the issues were contested with reference to the entire balance unaccounted for, rather than any particular items, an order requiring the bankrupt to pay to the trustee money unaccounted for, other than the items sought to be recovered when the proceeding was instituted, was not unauthorized.

[Ed. Note.—For other cases, see *Bankruptcy*, Cent. Dig. §§ 233, 235; Dec. Dig. 136.]

In *Bankruptcy*. In the matter of Henry F. Vyse and another, individually and as members of Henry F. Vyse & Co., and the copartnership of Henry F. Vyse & Co., bankrupts. On motion to confirm a report of the special commissioner on an application to require the bankrupt to turn over funds to the trustee. Ordered in accordance with the opinion.

Wing & Wing, of New York City, for trustee.

Smith, Doughty & Weynberg, of Brooklyn, N. Y., for bankrupts.

CHATFIELD, District Judge. The trustee has moved to confirm the report of the special commissioner, who has found that the bankrupts should pay over to the trustee the sum of \$12,940.62, which he has found was unaccounted for by the bankrupts from the funds in their possession before the filing of the petition in bankruptcy, and in his opinion is still within their control, or has been disposed of by them in a way which they have not explained.

This conclusion was reported by the referee upon the 31st of August, 1914, and, because of the situation presented, was referred back to the special commissioner upon a memorandum filed upon the 14th day of October, 1914, by Judge Veeder. By this memorandum the special commissioner was directed to prepare another and complete report, in which the conclusions of law and fact were to be clearly defined with reference to the evidence upon which they are based.

In accordance with this memorandum the special commissioner has now reported to the court separate findings of fact and conclusions of law, as a statement of the matters and opinions which he attempted in his previous report to include in a general decision. These reports are based upon considerable testimony taken before the commissioner, and also upon an examination under section 21a, and the situation is not substantially changed by the detailed findings of fact and of law, for the same questions now arise as were originally presented upon the pleadings, testimony, and report which was returned for further findings.

It appears that the bankrupts are two men who were in partnership and who conducted ostensibly a produce business, in the course of which they received, a short time before bankruptcy, and when plainly insolvent, certain car loads of grapes, for which they have not paid, and the proceeds of which, some \$9,000, were immediately used as so much ready cash.

[1] One of the partners, Edward A. Fallon, was a mere clerk, and the record from the outset shows that he received what was equivalent to wages, had nothing to do with the real conduct of the business, kept in his possession none of the proceeds, and actually turned all

of the moneys in question, which were received from the sale of produce, over to his partner, and never knew what became of them thereafter. There is no basis in the papers for accusing him of wrongful possession of the assets, or failure to account for the same (*Boyd v. Glucklich*, 116 Fed. 131, 53 C. C. A. 451), unless in the criminal court or as to a discharge.

His partner, on the other hand, was admittedly gambling on an extensive scale, particularly in that form of this mania which is called in the public press "playing the races." Such form of gambling was throughout part of the period illegal, and he operated through commissioners, who took his money and apparently usually reported it as lost.

[2] The various items of expenditure which have been traced—that is, as to which some reference has been ascertained from the books—reduce the amount unaccounted for to the sum which has been found by the commissioner, viz., \$12,940.62, and as to this the bankrupt Vyse's sole explanation is that he must have spent it—that is, squandered it or lost it—by gambling, with the exception of two distinct items. The sum of \$2,875 he testifies he paid to his sister in return for some money previously advanced by her out of a considerable sum which she had received from the estate of a relative. She has testified in corroboration, and there is nothing to indicate whether the money could be recovered from her, or that she is not good therefor, if her claim that this was paid to her as a debt does not prevent its recovery by the estate.

The trustee urges that the bankrupt should account for this fund, upon the theory that the testimony of the bankrupt and of his sister that he paid this money to her as a debt is unbelievable, and the commissioner has found that he does not believe in the existence of the debt and the payment of the money therefor. He has, on the contrary, found that the bankrupt did pay this money for some purpose to his sister, and she therefore is in the position of either having it in her possession, or having received and held it, under a claim of title; and even if the trustee seeks to show that her claim is preposterous, and so plainly colorable as not to be worthy of belief, he cannot, under the cases, proceed directly against the bankrupt, for the party admitting the possession of the money has a right to be heard in defense of her own possession.

In the case of *In re Friedman et al.*, 161 Fed. 260, 88 C. C. A. 306, which is relied upon by the trustee, all the parties were before the court, and the finding was against the contention of them all. *In re Siegel* (D. C.) 164 Fed. 559. If a claim of title is fairly interposed, then a plenary suit is necessary (even if that claim of title be ever so poorly founded). *In re Bacon*, 210 Fed. 129, at page 134, 126 C. C. A. 643. Certainly, if the bankrupt shows that he has turned over property to some one who makes a claim of title, this must be held as an accounting by him, unless it can be made to appear upon the entire record that the bankrupt is merely concealing the property, that no claim of title is even fairly presented, and that no transfer ever occurred. In the present case the trustee has not proceeded against the sister, either

summarily or by plenary action, and she may be entirely good for the money.

[3] As to the \$3,000, it seems that the bankrupt Vyse, during the days in which he was gambling extensively, says that he turned over to one Kirby, of Sheepshead Bay, \$1,700, and then \$1,300, within a few days of each other, only a short time before bankruptcy, and only a week before he consulted a lawyer with reference thereto. The ostensible reason for turning the money over was that this man Kirby might invest in some motor boats which were to be sold at a bargain. But there is no satisfactory evidence upon the part of either the bankrupt or Kirby that this reason was then advanced seriously by Kirby, or taken seriously by the bankrupt. In fact, all the indications are that the money was given to Kirby for some kind of gambling outlay, or else to conceal it for the bankrupt, and some of it was used by him in gambling upon horse racing and promptly lost.

The bankrupt and Kirby now wish the court to believe that the bankrupt placed credence in Kirby's proposition that he could make a valuable investment in motor boats, and then within a few days thereafter made another loan for the same purpose, without inquiring as to the result of the first loan. For these amounts, however, Kirby actually gave the bankrupt a promissory note, and the trustee actually started suit in the state court upon this promissory note, but immediately withdrew the action and changed to this proceeding, in which it is alleged that this promissory note is but a cover to protect the bankrupt in securing for his own purposes the \$3,000 which he says he loaned to Kirby.

Some elements of the story are inherently preposterous. But, again, Kirby tried to support the preposterous and ridiculous story, and the trustee seeks (by indicating the apparent falsehood on the part of both men as to the purpose for which the money was to be used) to obtain a finding that all statements with respect to the money should therefore be taken as false, and that the bankrupt has failed to explain what became of this sum.

If the conclusion were merely that the bankrupt had not given a satisfactory account of how the money was used, and if it were any indication that either he or any one else had the money, an order to turn it over would be proper; but the presumption and evidence is much stronger that the money was either turned over to Kirby and improperly used, or that in some way, in connection with Kirby, it was squandered, than that the bankrupt has failed to account therefor to the extent that he should be presumed to be still able to restore it to his estate. The fact that Kirby assumes the responsibility for actually taking the money, and is in a position to be sued therefor, does not prevent the finding that the bankrupt gave it to him for some fraudulent purpose, and is liable for his acts. But in order to find that Kirby is carefully safeguarding it for the bankrupt, when the situation under which both were throwing away money is taken into account, it is necessary to proceed against him and the bankrupt at the same time, as Kirby's possession thereof and claim of title thereto is an accounting by the bankrupt so far as the present motion to turn over is concerned. *Boyd v. Glucklich, supra.*

[4] With reference to the balance of the fund, however, viz., the sum of \$7,065.62, there is no evidence at all to explain what has become of the money, except the bankrupt's willingness to admit that he gambled with everything upon which he could lay his hands. Such explanations have never found favor as a complete accounting for the money involved. It is evident that a person spending money in this way would lose track of some part, but he should not be excused from being held to account at all. In re De Gottardi (D. C.) 114 Fed. 328; In re Frankfort (D. C.) 144 Fed. 721; In re Weinreb, 146 Fed. 243, 76 C. C. A. 609; In re Schulman (D. C.) 167 Fed. 237, affirmed 177 Fed. 191, 101 C. C. A. 361; In re Nisenson (D. C.) 182 Fed. 912.

[5] The trustee instituted this proceeding to recover an amount of \$5,875, which indicates the sum of the items of \$2,875 paid to the sister and the \$3,000 loaned to Kirby. In attempting to prove the charge a larger amount was shown. Since that balance appeared upon the record, all the proceedings have been conducted as if the bankrupt were charged with the secretion of the entire amount, and, as the matter has finally been reported by the special commissioner, the issues have been contested with reference to the balance unaccounted for in the firm's transactions, rather than any particular items making up the total set forth in the petition. The bankrupts now object to a determination that they should be held to account for anything other than the moneys paid to the sister and loaned to Kirby, but such a contention is not supported by authority or law.

The bankrupt Vyse should be ordered to pay over to the trustee the sum of \$7,065.62, which he has disposed of in fraud of his creditors, and which he does not show is out of his control. He should also be held for full responsibility for the fraudulent loan to Kirby, unless Kirby can meet the responsibility for its disposition, and Vyse should be committed unless and until he can show some proper reason for release from such commitment, by compliance with the order to turn over or by a proper accounting.

STROTHER v. UNION PAC. R. CO.

(District Court, W. D. Missouri, W. D. March 1, 1915.)

No. 4222.

1. REMOVAL OF CAUSES ——STATUTORY PROVISIONS—ACTIONS UNDER EMPLOYERS' LIABILITY ACT—"CASE."

Within Employers' Liability Act April 22, 1908, c. 149, § 6, 35 Stat. 66, as amended by Act April 5, 1910, c. 143, § 1, 36 Stat. 291 (Comp. St. 1913, § 8662), providing that no case arising under that act and brought in any state court shall be removed to any court of the United States, "case" means cause of action; and this is true, though the petition in the same count states facts disclosing a good cause of action under a state statute or at common law.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. §§ 4, 5; Dec. Dig. ——3.

For other definitions, see Words and Phrases, First and Second Series, Case.]

2. REMOVAL OF CAUSES ~~50~~—JOINDER OF CAUSES OF ACTION—TIME FOR REMOVAL.

Under Employers' Liability Act, § 6, where a petition contained two counts stating causes of action under that act and under the state law for the death of an employé, and the necessary diversity of citizenship existed to make the cause of action under the state law removable, defendant could remove such cause of action, without waiting until plaintiff elected at the trial to rely on the cause of action under the state law, and such removal carried the entire case with it, as the provision against removal of causes under the Employers' Liability Act is a privilege which plaintiff may waive, and defendant could not be deprived of its right to remove the cause of action under the state law by the joinder of the irremovable cause of action.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. § 100; Dec. Dig. ~~50~~.]

3. REMOVAL OF CAUSES ~~102~~—REMANDING—DOUBTFUL CASES.

Where the right to remove a case which has been removed to the federal court is doubtful, the federal court will retain jurisdiction.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. §§ 218-220, 223, 224; Dec. Dig. ~~102~~.]

At Law. Action by Samuel B. Strother, administrator of Matt Klobetitsch, deceased, against the Union Pacific Railroad Company. On motion to remand to the state court. Motion denied.

C. W. Prince, of Kansas City, Mo., for plaintiff.

Watson, Watson & Alford, of Kansas City, Mo., for defendant.

VAN VALKENBURGH, District Judge. The above-entitled action was commenced in the circuit court of Jackson county, Mo., at Kansas City. On petition of defendant it was removed to this court. Plaintiff now moves to remand the case, on the ground that under section 6 of the Employers' Liability Act (36 Stat. 291, c. 143), the removal is not permitted. Said section 6 is as follows:

"Under this act an action may be brought in a Circuit Court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action. The jurisdiction of the courts of the United States under this act shall be concurrent with that of the courts of the several states, and no case arising under this act and brought in any state court of competent jurisdiction shall be removed to any court of the United States."

The complainant in the first count states a cause of action arising under the federal Employers' Liability Act, and in the second count one arising under the statutory law of the state of Kansas. Each count declares upon the same physical injury, which resulted in death. This suit was instituted by complainant as administrator of the estate of the deceased. Said administrator is a citizen and resident of the Western division of the Western district of Missouri. Defendant is a corporation duly organized and existing under the laws of the state of Utah.

[1] The statute above quoted provides that no case arising under the Employers' Liability Act and brought in any state court of competent jurisdiction shall be removed. By "case" is, of course, meant cause of action; and this is true, although the petition in the same count may state facts disclosing a good cause of action under a state statute or

at common law. Missouri, Kansas & Texas Railroad Company v. Wulf, 226 U. S. 570, 33 Sup. Ct. 135, 57 L. Ed. 355, Ann. Cas. 1914B, 134; Wabash Railroad Company v. Hayes, 234 U. S. 86, 34 Sup. Ct. 729, 58 L. Ed. 1226; Ullrich v. New York, New Haven & Hartford Railroad Company (D. C.) 193 Fed. 768. If at the trial the proofs demonstrate that the injury arose outside of interstate commerce, and, therefore, that no recovery could be had under the federal act, the declaration may be amended, or regarded as amended, to conform to the proofs, and a recovery permitted under the statutory or common law, if the petition contains the necessary allegations. In such case, it is intimated that the plaintiff may not deprive the defendant of a right of removal otherwise existing, although whether that relief should be granted in the court below, if seasonably urged, or in the appellate court, if the point be preserved, or in both such courts, is left undecided. Wabash Railroad Company v. Hayes, *supra*. Enough is said, however, to indicate the recognition of a right to such relief.

[2] If a cause of action arising under the federal act is coupled with one arising under a state statute or at common law, stated in the alternative in separate counts, the plaintiff preserving the right, under recognized rules of local procedure, to make his election and avail himself of either at the close of the evidence, the right of removal is presented more baldly at the threshold of the case. There is present at the same time a case arising under the federal act, and therefore, standing alone, not removable, and one not arising under that act, and therefore, the citizenship being diverse, admittedly susceptible of being removed. Must the defendant await the action of the plaintiff at the close of the evidence before claiming the right, and, if so, is his relief then clear and complete? The Supreme Court has thus far refrained from settling such procedure, although it has intimated that the defendant should not necessarily be deprived of relief.

It rests with the plaintiff to determine whether he shall state a cause of action solely under the Employers' Liability Act, and therefore incapable of being removed, or whether he may unite with it, in the alternative, a cause of action that may be removed. If he adopts the latter course, does he not subject himself to the exercise of all the rights which a defendant may legitimately claim? Beyond question both causes of action are cognizable in the federal court, whether originally brought there or removed by consent. The provision against removal is a privilege granted to the plaintiff, which he may waive. If a cause of action containing all the elements of removability be joined with a count stating a cause of action not originally cognizable in the federal court, nevertheless the defendant may remove the former cause of action, and this will carry the entire case with it. Sharkey v. Port Blakely Mill Co. (C. C.) 92 Fed. 425. The defendant cannot be shorn of his right to remove the former action because of such a joinder, and inasmuch as the plaintiff should and has joined in one petition all causes of action arising out of the same transaction, the removal should not, and does not, have the effect of splitting such causes, retaining one in the federal court, and remitting the other to the state court. I do not think the prohibition against removal contained in the federal act is

of greater force than the denial in the Judiciary Act of the right to bring a suit, otherwise cognizable in a federal court, in a specific jurisdiction. It is conceded that the latter inhibition may be waived, and so equally may the former.

[3] I am of opinion that this entire cause of action, as presented by the pleadings, is removable; but if the question be regarded as doubtful in the present condition of the decided cases, nevertheless under the rule prevailing in this circuit the jurisdiction should be retained. *Boatmen's Bank v. Fritzlen*, 135 Fed. 650, 68 C. C. A. 288.

UNITED STATES v. RIGNEY & CO.

(District Court, E. D. New York. February 20, 1915.)

1. Food \Leftrightarrow 15—Food and Drugs Act—Violations—“Misbranded.”

That there was a custom in the trade to label packages so as to state approximately the quantity in liquid or solid measure nearest the general size of the package, such packages being known as commercial quarts, half gallons, etc., or that a seller's circulars and price lists, with reference to which sales were made to retailers, stated that the quantities specified were “commercial measure,” did not excuse violations of Food and Drugs Act June 30, 1906, c. 3915, 34 Stat. 771, which provides, in section 8, as amended by Act March 3, 1913, c. 117, 37 Stat. 732 (Comp. St. 1913, § 8724), that drugs or food are “misbranded,” within the meaning of that act, if the package or label bears any false or misleading statements, or if, in case of food in package form, the quantity of the contents be not plainly and conspicuously marked on the outside of the package in terms of weight, measure, or numerical count.

[Ed. Note.—For other cases, see Food, Cent. Dig. § 14; Dec. Dig. \Leftrightarrow 15.]

For other definitions, see Words and Phrases, First and Second Series, Misbrand.]

2. Food \Leftrightarrow 15—Food and Drugs Act—Violations—Defenses.

That a defendant ceased the use of labels on packages containing food which were misleading as to quantity went only to the question of mitigation for a violation of the Food and Drugs Act.

[Ed. Note.—For other cases, see Food, Cent. Dig. § 14; Dec. Dig. \Leftrightarrow 15.]

An information was filed against Rigney & Co. for a violation of the Food and Drugs Act. On motion to quash or dismiss the information. Motion denied.

William J. Youngs, U. S. Atty., of Brooklyn, N. Y., and Samuel J. Reid, Jr., of New York City, Asst. U. S. Atty.

Henry W. Baird, of New York City, for defendant.

CHATFIELD, District Judge. [1] This information was filed against the defendant corporation for shipping by interstate commerce a quantity of syrup in a package labeled “24 quarts com.,” and also another quantity of syrup in a package bearing a label “12 half gallons com.”

The shipments were alleged to have been an offense against the provisions of the Food and Drugs Act of June 30, 1906 (34 Stat. 771), as contained in section 8, which prohibits a false or mislead-

\Leftrightarrow For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

ing statement upon a package or label regarding the article contained therein, and under subdivision 3 of the portion of that section relating particularly to food, which provides (as amended March 3, 1913):

"Third. If in package form, the quantity of the contents be not plainly and conspicuously marked on the outside of the package in terms of weight, measure, or numerical count," etc.

The defendants subsequently withdrew their plea and sought to raise a question of fact as to the meaning of their label, and to contend that, under the law, this meaning was neither misleading to the public or their customers, nor false in statement when considered from the point of view of those who should be held responsible for knowledge as to ordinary trade practices.

The defendants therefore interposed a motion to dismiss or quash the indictment, based upon affidavits showing that the packages in question contained, in the one case bottles, substantially of the size in exterior dimensions of the ordinary quart bottle, and in the other case cans, again in general external size and appearance of a half-gallon or two-quart size, but the *labels* upon the bottles and cans themselves contained no statement of quantity. The price for which the articles were sold depended (of course) upon the wholesale price charged therefor, as the ordinary downward limit under competition.

These bottles and cans were, as shown by the affidavits, packed in wooden boxes, upon which a stencil was used to mark in black letters the syrup label and also the words complained of in the information, in one case "24 quarts 17 com.," and in the other case "12 half gallons 19 com." The affidavits also show, and these matters are not disputed by the government, that the shipments were to wholesalers, and not to retail customers, and were all made upon prices quoted for the quantity shown in the circulars, and were billed to the wholesalers by the same description, as, for instance:

"No. 1 com'l half pts. (7 oz.)

"No. 4 square qts. (5 to gal.)

"No. 19 half gallons commercial measure 1 dozen to case gross wt. 70 lbs.

"No. 21 gallons, commercial measure, 1/2 dozen to case 63 lbs.

"No. 23 5 gallons, cased full measure gross weight 60 lbs."

The only points contested by the government upon this motion are the meaning of the words and the allegation that the trade understood the meaning of the words "quarts," "1/2 gallon," etc., when used under what is alleged by the defendants to be a well-known practice of selling packages containing smaller quantities, but labeled in a so-called descriptive way to state approximately the quantity in liquid or solid measure nearest the general size of the package. The government produced certain affidavits in which wholesalers deny that such meaning of the words, "commercial quart," or "commercial half gallon," was well known and commonly used in this descriptive sense in the trade.

It is unnecessary to consider whether the practice of attracting trade by apparent intimation of cheap prices, but in reality by a saving of the actual quantity sold, and by holding out to the public or advertising misleading statements, by which the customer may be de-

ceived, but which the wholesaler and retailer, or those initiated into the trade secrets, understand are false, should be treated as reprehensible, nor need we consider whether Congress has the power to pass a statute prohibiting such practices, in interstate commerce, when the injury to the public demands. The mere queries answer themselves.

In the present case we have only to do with the question whether the labels (interpreted from the price lists or from custom, by the persons to whom the goods were shipped) were false and misleading in their statements of the quantity contained in the package, and whether the contents were plainly and correctly stated on the outside thereof.

If the label used would allow the deception of the public and unfair methods of advertising, through the complicity of the retail dealer, it becomes evident that this is one of the evils which the statute was intended to prevent, and that Congress did not pass this law for the protection of the retailer alone.

There is nothing before the court, and no authority in dictionary, text-book, or statute, to vindicate or uphold the establishment of a different system of liquid and weight measures than those sanctioned by law and general use, even though a lax and vicious reduction in quantity, as a matter of trade practice, is frequently found when no legal prohibition exists.

[2] It has appeared upon the argument of the motion that the defendant ceased the use of these labels and has made its measures and literature correspond to the requirements of the department, under the Pure Food Law, since its attention has been called thereto, and now disclaims any desire to be a party to violations of the statute or acts tending to deceive the public. This is what would be expected from any person or house in reputable business, and goes only to the question of mitigation, for an act which at the time, even though not appreciated, was a violation of the Pure Food Law.

The motion to dismiss or quash will be denied, and the defendants will be directed to plead over.

SAN PEDRO, L. A. & S. L. R. CO. v. UNITED STATES.

(Circuit Court of Appeals, Ninth Circuit. February 1, 1915. Rehearing Denied March 8, 1915.)

No. 2412.

1. MASTER AND SERVANT ☞13—HOURS OF SERVICE ACT—VIOLATION.

Hours of Service Act March 4, 1907, c. 2939, § 2, 34 Stat. 1416 (Comp. St. 1913, § 8678), provides that telegraph operators in day and night offices on interstate railroads, who have to do with the movement of trains shall be permitted to remain on duty not exceeding 9 hours in any 24-hour period, "except in case of emergency," when they may be kept on duty for 4 additional hours each day for not exceeding 3 days in any week. Section 3 provides that the act shall not apply "in case of casualty or unavoidable accident." Defendant railroad company had on duty at a day and night office on its line three operators, each of whom worked 8 hours per day. One was taken suddenly ill, and no other operator could be obtained in the place. As soon as possible, which was the next day, the chief dispatcher sent a relief man; but the train was wrecked and he was ordered to establish an office at the wreck, causing further delay, in consequence of which the two remaining operators each worked 12 hours a day for 4 or 5 successive days. *Held*, that such extended time during the first 3 days was permissible under section 2, and the further delay was due to a casualty which, under section 3, rendered the act inapplicable, and that defendant was not chargeable with its violation.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 14; Dec. Dig. ☞13.]

Hours of service of employés, see note to United States v. Houston Belt & T. Ry. Co., 125 C. C. A. 485.]

2. MASTER AND SERVANT ☞13—HOURS OF SERVICE ACT—VIOLATION.

Defendant railroad company *held* not exempted from liability under Hours of Service Act, for keeping the conductor and brakemen in charge of a train on duty for 27 consecutive hours and until they reached the end of their run, by the fact of a landslide which made it necessary to run the train around over other lines, where, notwithstanding the detour, they could have been relieved several hours earlier.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 14; Dec. Dig. ☞13.]

3. MASTER AND SERVANT ☞13—HOURS OF SERVICE ACT—CONSTRUCTION.

In order to justify a carrier in keeping employés on duty beyond the time fixed by Hours of Service Act under the proviso of section 3, it must show that the same was not in any respect occasioned by the lack of that high degree of care and foresight properly required of a carrier.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 14; Dec. Dig. ☞13.]

In error to the District Court of the United States for the Southern Division of the Southern District of California; Olin Wellborn, Judge.

Action by the United States against the San Pedro, Los Angeles & Salt Lake Railroad Company to recover penalties. Judgment for plaintiff, and defendant brings error. Reversed in part.

☞For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

A. S. Halsted and James E. Kelby, both of Los Angeles, Cal., for plaintiff in error.

Albert Schoonover, U. S. Atty., and Harry R. Archbald, Asst. U. S. Atty., both of Los Angeles, Cal., and Monroe C. List and Philip J. Doherty, Sp. Asst. U. S. Atty., both of Washington, D. C., for the United States.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

ROSS, Circuit Judge. Two actions brought in the court below by the government against the San Pedro, Los Angeles & Salt Lake Railroad Company—one there numbered 106 and the other 243—were consolidated for trial before the court with a jury, and were submitted upon an agreed statement of facts and upon the uncontradicted testimony of one witness, sworn on behalf of the plaintiff in the action. The cases have also been submitted together here. Both actions were based upon the act of Congress known as the "Hours of Service Act," approved March 4, 1907, entitled "An act to promote the safety of employés and travelers upon railroads by limiting the hours of service of employés thereon" (34 Stat. 1415). The complaint in case numbered 106 contained five counts, one of which was withdrawn by the plaintiff, and in respect to one of which a verdict for the defendant company was returned under instructions of the court, leaving the first three counts of that complaint for consideration here.

The second section of the act of Congress provides:

"That it shall be unlawful for any common carrier, its officers or agents, subject to this act, to require or permit any employé subject to this act, to be or remain on duty for a longer period than sixteen consecutive hours, and whenever any such employé of such common carrier shall have been continuously on duty for sixteen hours he shall be relieved and not required or permitted again to go on duty until he has had at least ten consecutive hours off duty; and no such employé who has been on duty sixteen hours in the aggregate in any twenty-four hour period shall be required or permitted to continue or go again on duty without having had at least eight consecutive hours off duty: Provided, that no operator, train dispatcher, or other employé who by the use of the telegraph or telephone dispatches, reports, transmits, receives, or delivers orders pertaining to or affecting train movements shall be required or permitted to be or remain on duty for a longer period than nine hours in any twenty-four hour period in all towers, offices, places and stations continuously operated night and day, nor for a longer period than thirteen hours in all towers, offices, places, and stations operated only during the daytime, except in case of emergency, when the employés named in this proviso may be permitted to be and remain on duty for four additional hours in a twenty-four hour period on not exceeding three days in any week."

The third section provides the penalties for violations of the provisions of section 2 and for prosecutions of such violations, and contains two provisos, the first of which is as follows:

"Provided, that the provisions of this act shall not apply in any case of casualty or unavoidable accident or the act of God, nor where the delay was the result of a cause not known to the carrier or its officer or agent in charge of such employé at the time said employé left a terminal, and which could not have been foreseen."

[1] The first count of the complaint in case numbered 106 alleges, among other things, that the defendant company, during the 24-hour

period beginning at 8 o'clock a. m. of January 19, 1911, required and permitted its telegraph operator at Kelso, Cal.—one Grandee—to be and remain on duty for a longer period than 9 hours in said 24-hour period, to wit, from 8 o'clock a. m. to 8 o'clock p. m. of said 19th day of January; that Kelso was at that time a continuous night and day telegraph station; and that Grandee, while so required and permitted to remain on duty during the said 12 hours, by the use of the telegraph or telephone dispatched, reported, transmitted, received, and delivered orders pertaining to and affecting the movement of trains engaged in interstate commerce. The second and third counts of that complaint contain similar averments in respect to the defendant company's operator Dugan, of whom, in the second count, it is alleged that he was required and permitted to be on duty as such operator at the same station from 8 o'clock p. m. of January 19, 1911, to 8 o'clock a. m. of January 20, 1911, and in the third count that Dugan was required and permitted to be on duty as such operator from 8 o'clock p. m. of January 20, to 8 o'clock a. m. of January 21, 1911.

The answer of the defendant company as amended set up in substance this justification of its action: That at the time in question the force of telegraphers employed at Kelso consisted of an agent operator, whose regular hours were from 8 o'clock a. m. to 4 o'clock p. m., and two other telegraph operators, whose hours were from 4 o'clock p. m. to 12 o'clock midnight, and from 12 o'clock midnight to 8 o'clock a. m., respectively; that on January 16, 1911, one Starkey, one of the regular telegraph operators at the station mentioned, whose hours were from 4 o'clock p. m. to 12 o'clock midnight, was taken suddenly ill and became incapacitated for service; that Kelso is a helper terminal and important telegraph station, continuously operated day and night; that at the time Starkey was taken ill there was no available operator at Kelso to replace him, and that it was necessary for the company to procure another operator and send him to Kelso; and that as soon as possible the defendant did procure an operator named Ham and sent him to Kelso for service to take the place of Starkey, and that Ham began his service as soon as possible, to wit, January 20, 1911—by reason of all of which an emergency arose and existed, which made it imperative for the defendant company to require the said Grandee to work overtime as alleged in the complaint. A similar answer and alleged justification was pleaded by the defendant company to the second and third counts of the complaint in case 106.

The evidence showed the facts to be that Kelso is a station of the defendant company on the desert 236 miles east of Los Angeles, situated between the stations Crucero and Las Vegas, and was at the times in question a continuous day and night office of the company; that Grandee was the agent of the company at that station, as well as one of the telegraph operators—Dugan and Starkey being the other two operators—in receiving and transmitting telegraph orders pertaining to and affecting the movement of trains passing between Nevada and California. We extract from the uncontradicted testimony of the witness Sriith, who was chief clerk of the superintendent of the defendant railroad company, as follows:

"The two men (Grandee and Dugan) were kept on overtime because one of the operators, W. F. Starkey, became ill on January 16th. At this time the office at Kelso was under the supervision of the chief dispatcher at Las Vegas. When Starkey was taken ill, and the chief dispatcher at Las Vegas was apprised of the fact, he wired to Los Angeles on the morning of the 17th, asking for a relief operator. He wired the superintendent of telegraph, who employs the telegraph operators. The superintendent of telegraph did not secure a man to take Starkey's place at Kelso, and on the evening of the 17th the dispatcher at Las Vegas borrowed an operator who was employed in the Las Vegas telegraph office, and started him to Kelso that night. This was the first train from Las Vegas to Kelso after it was learned a man could not be gotten from Los Angeles. When the train reached Lyons, a point between Kelso and Las Vegas, it was derailed and turned over, damaging the equipment and blocking the main line, injuring 14 passengers. The operator, who was on this train No. 1, was instructed by the chief dispatcher to establish a telegraph office at the wreck, in order that he could communicate with headquarters and report conditions and progress there, and enable the dispatcher to move the trains around the wreck when the line was clear. In establishing an office on the line at a wreck, this is a practice we follow on all occasions, as it enables us to clear the line much more quickly. This operator established an office at the wreck and remained until relieved on the evening of January 19th; the chief dispatcher at Las Vegas having employed a man to relieve him and sent him out on No. 1 to the wreck. The operator who had been working at the wreck boarded the same train on which the relief man arrived and went to Kelso. In view of the shortage of help, I would say that a substitute operator was sent to Kelso as expeditiously as could have been done to take the place of Starkey. At that time telegraph operators were extremely scarce. The Western Union and Postal Telegraph companies were using a great many operators, and the men preferred to work in Los Angeles rather than go to the desert points, such as Kelso and Otis. They are both in the desert. At that time we had difficulty in getting operators to go there."

Starkey's illness certainly caused a sudden and unexpected occasion for action on the part of the railway company—a pressing necessity, an emergency, that fairly came within the meaning of the statute. An emergency existing, the defendant company by the first proviso to section 2 of the act was expressly authorized to permit Grandee and Dugan each to remain on duty for 4 additional hours in the 24-hour period on not exceeding 3 days in any week. The case shows that each of them remained on duty for 3 additional hours in a 24-hour period during the 16th, 17th, and 18th days of January. Then the overtime permitted them during that week by the proviso of section 2 of the act of Congress above quoted ended, and if there were nothing more to the case we would have no difficulty in affirming the action of the court below in directing a verdict for the plaintiff upon the first three counts in case 106, for the evidence is that Grandee and Dugan continued to work overtime during the 20th and for part of the 21st of January. But the uncontradicted proof shows that the defendant company on the 17th of January started an operator—one Ham—to Kelso from Las Vegas, to take the place of Starkey, in ample time to have done so before the expiration of the 3-day period during which Grandee and Dugan were each authorized by the statute to work 4 additional hours in each 24-hour period. But unfortunately the train on which Ham was proceeding was derailed at a point between Las Vegas and Kelso, turned over, injuring 14 passengers, damaging the equipment of the train, and blocking the main line. Because of that disaster Ham was instructed by the chief dis-

patcher of the road to establish a telegraph office at the wreck, in order that he could communicate with headquarters and report conditions and progress there, and enable the dispatcher to move the trains around the wreck when the line was cleared, which he did, resulting in the necessary continuance of overtime work by Grandee and Dugan during the 20th and 21st of January. And the question is whether that accident or casualty rendered the act in question inapplicable. We are of the opinion that it clearly did. See United States v. Missouri Pac. Ry. Co., 213 Fed. 169, 175, 176, 130 C. C. A. 5.

For the reasons stated, the judgment of the court below, in so far as counts 1, 2, and 3 of the complaint in case 106 are concerned, must be reversed.

In the case numbered in the court below 243 it is strenuously insisted by counsel for the plaintiff in error that the court erred in directing the jury to return a verdict for the plaintiff upon counts 3, 4, 5, 6, 7, and 8 of the complaint in that case.

[2] The third count of that complaint alleges a violation of the act of Congress, in that the defendant company on October 3, 1912, on its line between Las Vegas, Nev., and Los Angeles, Cal., required and permitted its conductor, Brown, to be and remain on duty as such in connection with its train No. 1, drawn by locomotive No. 3434, engaged in interstate commerce, for a period in excess of 16 consecutive hours; and its fourth and fifth counts are identical with the third, except that in the fourth Brakeman Edwards and in the fifth Brakeman Berringer are included.

The evidence showed without conflict that train No. 1, which was a passenger train, arrived at Las Vegas, which was a terminal station, October 3, 1912, between the hours of 5 and 5:32 p. m. There the train crew was changed; the outgoing crew, consisting of Brown, Edwards, and Berringer, leaving Las Vegas in charge of the train at 5:45 p. m. of that day, and so remained in charge of its movement until it reached Los Angeles, the place of its destination, at 8 p. m. of the succeeding day, so that, including the preparatory period of 42 minutes, that crew remained in service 27 continuous hours. The schedule running time of that train between the points named was 13½ hours. The train left Las Vegas on schedule time, but subsequently a heavy landslide occurred on the defendant company's line between its stations Otis and Crucero, due to heavy rains, which slide was of such character and magnitude as to stop traffic over the road and compel the detour of train No. 1 over the lines, respectively, of the Tonopah & Tidewater and the Santa Fé Companies—over that of the former from Crucero, the junction of the lines of the defendant company and the Tonopah & Tidewater Company, to Ludlow, the junction of the last-named company and the Santa Fé Company, and over the latter from Ludlow to Daggett. The rails of the Tonopah Company being light necessarily required slow running, especially in view of the condition of the ground, occasioned by the heavy rains, all of which resulted in many delays, which were beyond the power of the defendant company to prevent, and none of which could have been foreseen by the defendant company at the time the train left Las Vegas, nor could the necessity of such detour have been then fore-

seen. When the train reached Daggett, the prescribed 16-hour period had expired—17 hours and 5 minutes having been expended in making that run. At Daggett the engine crew of train No. 1 was relieved, but not its conductor nor brakemen; they having continued on to the destination of the train at Los Angeles. San Bernardino, situated between Daggett and Los Angeles, and 60 miles east of the latter city, is a passenger terminal, but not for through trains. Two local passenger train crews lay over there every night, each having one brakeman only. From the evidence it cannot be doubted that the train crew of train No. 1 could have been relieved both at San Bernardino and at Daggett, and the real question in regard to that crew is whether the act of Congress under consideration required the defendant company to do so.

To such an enactment these observations of the Supreme Court in the case of *United States v. Dickson*, 15 Pet. 141, 163 (10 L. Ed. 689), are very pertinent:

"The general rule of law, which has * * * prevailed, and become consecrated almost as a maxim in the interpretation of statutes, [is] that where the enacting clause is general in its language and objects, and a proviso is afterwards introduced, that proviso is construed strictly, and takes no case out of the enacting clause which does not fall fairly within its terms. In short, a proviso carves special exceptions only out of the enacting clause; and those who set up any such exception must establish it as being within the words as well as within the reason thereof."

To hold that the act under consideration is made inapplicable by any and every delay that is the result of a cause not known to the carrier, or its officer or agent in charge of such employé, at the time the latter leaves a terminal, and which could not have been foreseen, would be nothing short of making it a dead letter. Manifestly the whole act must be taken together, and be so construed as to give effect to its humane purpose, and at the same time to give the railroad companies the benefit of the exceptions and provisos in all cases fairly brought within their terms and true intent. There can be no doubt that the paramount purpose of the act was to prevent the overworking of the employés, to the end that their efficiency be not impaired, and that the obligation was thereby imposed upon the carriers to comply with that requirement, unless prevented therefrom because of a valid excuse, secured to them by the provisos and exceptions contained in the act, which was not made effective within the usual time, but its going into effect postponed for one year—the purpose being, as said by the Supreme Court in the case of *Northern Pacific Railway Co. v. Washington*, 222 U. S. 370, 379, 32 Sup. Ct. 160, 162 (56 L. Ed. 237), "to enable the necessary adjustments to be made by the railroads to meet the new conditions created by the act."

[3] It would seem to follow necessarily that in order for the carrier to justify the excess of service beyond the fixed period prescribed by the act, it must show that the same was not in any respect occasioned by the lack of that high degree of care and foresight properly required of the carrier, but was the direct result of an act of God, a casualty, unavoidable accident, or of delay that was the result of a cause not known to the carrier or its officer or agent in charge of

such employé, at the time the latter left a terminal, and which could not have been foreseen. In the very recent case of Great Northern Railway Co. v. United States, 218 Fed. 302, 134 C. C. A. 98, decided October 28, 1914, by the Circuit Court of Appeals of the Eighth Circuit, that court expressly held, among other things, that the proviso in section 3 of the act under consideration—

"does not relieve the officials in charge of train crews from exercising proper diligence to avoid working them overtime, and proper diligence requires train officials to know whether or not engines and cars are in proper condition for use when starting them upon a run."

In the preceding case of United States v. Kansas City Southern Ry. Co., 202 Fed. 828, 833, 121 C. C. A. 136, 141, the same court, having under consideration the act of March 4, 1907, said:

"By the terms of the proviso the carrier is excused 'where the delay is the result of a cause not known * * * at the time said employé left a terminal, and which could not have been foreseen.' Not merely which was not foreseen, but which *could not have been* foreseen. The phrase 'by the exercise of due diligence and foresight' is not present. Counsel argue that by leaving out this phrase Congress intended to limit the liability of the carrier; that it meant to imply that what was not actually foreknown could not, in contemplation of this law, have been foreseen. We cannot assent to this interpretation. Clearly Congress did not intend to relieve the carrier from responsibility in guarding against delays in a matter deemed to be of such importance. By this act it sought to prevent railroad employés from working consecutively longer than the period prescribed, as completely and effectively as could be accomplished by legislation. To bring itself within the exceptions stated, the carrier must be held to as high a degree of diligence and foresight as may be consistent with the object aimed at and the practical operation of its railroad. Conformably to this view it has been uniformly held by the courts that, ordinarily, delays in starting trains by reason of the fact that another train is late; from sidetracking to give superior trains the right of way, if the meeting of such trains could have been anticipated at the time of leaving the starting point; from getting out of steam or cleaning fires; from defects in equipment; from switching; from time taken for meals; and, in short, from all the usual causes incidental to operation—are not, standing alone, valid excuses within the meaning of this proviso. The carrier must go still farther, and show that such delays could not have been foreseen and prevented by exercise of the high degree of diligence demanded."

Such was the view of this court in the case of United States v. Northern Pacific Railway Co., 215 Fed. 64, 131 C. C. A. 372, where the accident under consideration was the sole cause why the crew there in question was engaged on its run for more than 16 hours without a rest of 8 consecutive hours.

In the somewhat analogous case of Newport News & M. Val. Co. v. United States, 61 Fed. 488, 490, 9 C. C. A. 579, 580, involving the act of Congress forbidding interstate carriers of animals from confining them for more than 28 consecutive hours without unloading them for rest, water, and food, unless prevented "by storm or other accidental causes," the Circuit Court of Appeals of the Sixth Circuit, speaking through Judge Lurton, said:

"Congress did not mean that, simply because the carrier had encountered a storm, therefore he should be excused. It must appear that the storm 'prevented' obedience. The storm could not be prevented. Its consequences may be avoided or mitigated by the exercise of diligence. If, with all reasonable exertion, a carrier is unable, by reason of a storm, to comply with the law,

then he has been unavoidably 'prevented' from obeying the law. If, notwithstanding the storm, he could by due care have complied with the law, then he is at fault, because 'his own negligence is the last link in the chain of cause and effect, and in law the proximate cause' of the failure to comply with the law. Therefore, to avail himself of the excuse of 'storm,' the carrier must show, not only the fact of a storm, but that with due care he was 'prevented,' as an unavoidable result of the storm, from complying with the law. We can reach but one conclusion as to the meaning of Congress by the expression 'other accidental causes.' If the storm is no excuse, unless its unavoidable effect was to prevent compliance, then it follows that no other accidental cause would be an excuse, unless that cause and its effect are likewise unavoidable. The meaning of the general words, 'other accidental causes,' must be ascertained by referring to the preceding special words. The rule 'noscitur a sociis' is clearly applicable. A storm is unavoidable, in the sense that it cannot be prevented. 'Other accidental causes' must be taken to mean other unavoidable accidental causes. An effect attributable to the negligence of the appellant is not an unavoidable cause. The negligence of the carrier was the cause; the unlawful confinement and unreasonable detention, but an effect of that negligence. What is an inevitable or unavoidable accident has been very thoroughly considered by this court in the case of *Weeks v. Transit Co.*, 61 Fed. 120, 9 C. C. A. 393. It was there said that an inevitable accident 'was an occurrence which could not be avoided by that degree of prudence, foresight, care, and caution which the law requires of every one under the circumstances of the particular case.' Again, we said: 'An accident is said to be inevitable when it is not occasioned in any degree, either remotely or directly, by the want of such care and skill as the law holds every man bound to exercise.' These definitions apply to an unavoidable accident, which is, in the sense of the law, an inevitable occurrence, as defined in that case, and those cited therein. If the accident was one which might have been avoided by due care, then the carrier must be taken to have contemplated the reasonable consequences of his own negligence."

As under the evidence there can be no doubt that the landslide was the direct and necessary cause of the detour of the train in question and of its numerous delays, and that therefore the defendant company was entirely justified in continuing in service its train crew up to the time it could, with the exercise of proper diligence have relieved it, it is plain that the action of the court below in directing a verdict for the plaintiff on counts 3, 4, and 5 must have been based on the view that the defendant company had the opportunity to relieve that crew either at San Bernardino, or Daggett, or both, and was by the statute, properly construed, required to avail itself of it, in which view we think, for the reasons already stated, the court was right—being unable to agree with the learned counsel for the defendant company that by the adoption of the first proviso to the third section of the act "it was the intention of Congress to permit a crew starting from a terminal to remain with the train overtaken by delay, casualty, or unavoidable accident, until the end of the run."

In support of that contention counsel earnestly rely upon ruling 88 of the Interstate Commerce Commission, made May 25, 1908, which, after quoting the first proviso of section 3 of the act, reads:

"Any employé so delayed may thereafter continue on duty to the terminal or end of that run. The proviso quoted removes the application of the law to that trip."

That ruling must be read and considered in connection with the preceding ruling of the Commission, made March 16, 1908, which reads as follows:

"287 (i). Sec. 3. The instances in which the act will not apply include only such occurrences as could not be guarded against, those which involved no neglect or lack of precaution on the part of the carrier, its agents, or officers; and they serve to waive the application of the law to employés on trains only until such employés, so delayed, reach a terminal or relay point"

—and must also be read and considered in connection with the action of the Commission, shown by the record in this case, that the suit was directed to be brought by the Attorney General at the request of the Interstate Commerce Commission. But, over and above that, it is the obvious duty of the court to give effect to what it conceives to be the true construction of the act of Congress.

What has been above said in respect to counts 3, 4, and 5 of the complaint in case No. 243 in the court below equally governs the proper disposition of counts 6, 7, and 8 of the same complaint.

The result is that the judgment of the court below, in so far as concerns counts 1, 2, and 3 of case No. 106 in the court below, must be and hereby is reversed, and the cause remanded for a new trial thereon; and as to the judgment of the court below in respect to case No. 243 of that court, its judgment must be and is affirmed.

UNITED STATES v. SOUTHERN PAC. CO.

(Circuit Court of Appeals, Ninth Circuit. February 15, 1915.)

No. 2443.

1. MASTER AND SERVANT \Leftrightarrow 17—HOURS OF SERVICE—ACTIONS FOR PENALTIES—ANSWER.

In an action for penalties under Hours of Service Act March 4, 1907, c. 2939, 34 Stat. 1415 (Comp. St. 1913, §§ 8677-8680), for requiring and permitting a train crew to remain on duty for 17½ hours, an answer, alleging that the train was detained for 1½ hours on account of it breaking in two, and that such delay was the result of a cause not known to the defendant or its officers or agents in charge of the train and the employés at the time the train left a terminal, and that it was caused by an unavoidable accident, and one that could not have been foreseen by the defendant or any of its officers, agents, or employés, stated a good defense as against a demurrer, though the defendant might be unable, upon a trial, to establish that the breaking in two was due to a cause which could not have been foreseen.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 16; Dec. Dig. \Leftrightarrow 17.]

2. MASTER AND SERVANT \Leftrightarrow 13—HOURS OF SERVICE—STATUTORY PROVISIONS.

Where the breaking in two of a train, causing the trainmen to remain on duty for more than 16 consecutive hours, is due to defective equipment or improper handling, the case is not within the provision of Hours of Service Act that such act shall not apply in any case of casualty, or unavoidable accident, or act of God, nor where the delay was the result of a cause not known to the carrier or its officer or agent in charge of the employé at the time he left a terminal, and which could not have been foreseen.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 14; Dec. Dig. \Leftrightarrow 13.]

Hours of service of employés, see note to United States v. Houston Belt & T. Ry. Co., 125 C. C. A. 485.]

In Error to the District Court of the United States for the District of Arizona.

Action for statutory penalties by the United States against the Southern Pacific Company. Judgment for defendant on certain counts, and the United States brings error. Affirmed.

Thomas A. Flynn, U. S. Atty., of Phoenix, Ariz., Samuel L. Pattee, Asst. U. S. Atty., of Douglas, Ariz., Monroe C. List and Philip J. Doherty, Sp. Asst. U. S. Attys., both of Washington, D. C., for the United States.

Francis M. Hartman, of Tucson, Ariz., and Chas. J. Heggerty and Knight & Heggerty, all of San Francisco, Cal., for defendant in error.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

ROSS, Circuit Judge. [1] This action was brought by the government to recover from the Southern Pacific Company certain penalties for alleged violations of the act of Congress known as the "Hours of Service Act," approved March 4, 1907 (34 Stat. p. 1415); the complaint containing 12 counts, the first 6 relating to the hours of service on one train, and the last 6 to the hours of service on another train. The last 6 are the only counts involved on this writ of error, and are substantially the same, except as to the names of the trainmen, and charge that on the defendant company's extra train, drawn by locomotive engine 2794, leaving Tucson, in the state of Arizona, at 5:20 a. m. December 22, 1912, for Bowie, in the same state (the said train being then and there engaged in the movement of interstate traffic), the defendant company required and permitted the train crew to be and remain on duty for a longer period than 16 consecutive hours, to wit, from said hour of 5:20 a. m. to 10:50 p. m. of the same day. As an affirmative answer and defense to those counts the defendant company alleged and prayed as follows:

"The defendant alleges, by way of relief and exoneration from the provisions of the statute in plaintiff's said complaint set out, that the said extra train No. 2794 was delayed and detained en route at a station called Esmond, in the county of Pima, state of Arizona, while en route on the day and date named in plaintiff's complaint, for the period of one hour and thirty minutes, on account of and by reason of the said train breaking in two, and that the said break in two and delay of one hour and thirty minutes was the result of a cause not known to the defendant or its officers, agents, or any of them, in charge of said train, and of such employés, at the time said train and employés left Tucson, the terminal, from which it started at _____ a. m., on said date, and that the same was caused by an unavoidable accident, and one that could not have been foreseen by this defendant or any of its officers, agents, or employés; all of which and the time of delay was promptly reported to the Interstate Commerce Commission by the defendant herein, together with the defendant's claim of exemption for the one hour and thirty minutes delay at Esmond as aforesaid.

"Wherefore defendant prays that the delay of one hour and thirty minutes, by reason of the unavoidable accident as aforesaid, be allowed defendant, and that the provisions of this act shall not apply to this defendant in the alleged causes of action contained in counts 7, 8, 9, 10, 11, and 12 set forth in plaintiff's complaint, and that the defendant go hence without day, together with its costs."

The plaintiff in the case demurred to the affirmative defense upon these grounds:

"1. It does not appear that the breaking in two of the train at Esmond, and the delay thereto, was not known to the defendant, or its officer or agent in charge of said employés at the time they left a terminal.

"2. It does not appear that the breaking in two of the train at Esmond prevented the defendant from relieving the employé named in any of said causes of action before he had been continuously on duty more than 16 hours.

"3. It does not appear that the failure of the defendant to relieve the employé named in any of said causes of action before he had been continuously on duty more than 16 hours was due to a casualty or unavoidable accident or the act of God, or that the failure to so relieve such employé was the result of a cause not known to the defendant or its officer or agent in charge of such employé at the time he left a terminal and which could not have been foreseen.

"4. It does not appear that the defendant made any effort whatsoever to relieve the employé named in any of said causes of action before he had been continuously on duty more than 16 hours.

"5. The facts pleaded do not constitute a defense to any of said causes of action."

The trial court having overruled the demurrer, and the plaintiff having duly excepted to the ruling and elected to stand upon the pleadings, the cause was called for trial upon the first 6 counts of the complaint, resulting in a verdict for the plaintiff as to them by direction of the court, and a judgment thereon in favor of the plaintiff, and in favor of the defendant as respects the last 6 counts of the complaint, being the counts here involved. From the latter portion of the judgment the plaintiff brings the present writ of error, assigning as error:

"1. The said District Court of the United States for the District of Arizona erred in overruling the demurrer of the United States of America to the answer of the said Southern Pacific Company to the seventh, eighth, ninth, tenth, eleventh, and twelfth causes of action set forth in the petition or complaint herein, for the reason that it does not appear from the said answer that the breaking in two of the train mentioned in said answer at Esmond, and the delay thereto, was not known to the said Southern Pacific Company, or its officer or agent in charge of the employés mentioned in said causes of action at the time they left a terminal.

"2. The said District Court erred in overruling the said demurrer, for the reason that it does not appear from said answer that the breaking in two of said train at Esmond prevented the said Southern Pacific Company from relieving the employé mentioned in any of said causes of action before he had been continuously on duty more than 16 hours.

"3. The said District Court erred in overruling said demurrer, for the reason that it does not appear from the said answer that the failure of the said Southern Pacific Company to relieve the employé named in any of said causes of action before he had been continuously on duty more than 16 hours was due to a casualty or unavoidable accident or the act of God, or that the failure so to relieve such employé was the result of a cause not known to said Southern Pacific Company or its officer or agent in charge of such employé at the time he left a terminal and which could not have been foreseen.

"4. The said District Court erred in overruling said demurrer, for the reason that it does not appear from the said answer that the said Southern Pacific Company made any effort whatsoever to relieve the employé named in any of said causes of action before he had been continuously on duty more than 16 hours.

"5. The said District Court erred in overruling said demurrer, for the reason that the matters set forth therein as a defense to said causes of action are insufficient in law to constitute a defense to any of said causes of action.

"6. The said District Court erred in rendering judgment in favor of said

Southern Pacific Company and against the said United States of America upon the seventh, eighth, ninth, tenth, eleventh, and twelfth causes of action set forth in said petition or complaint, for the reasons stated in the foregoing assignments of error."

[2] In effect, the averments of the affirmative answer and defense are that the 1 hour and 30 minutes overtime was caused by the breaking in two of the train, which accident was unavoidable and could not have been foreseen by any of the officers, agents, or employés of the defendant company at the time the train left the terminal from which it started. Upon a trial of that matter the burden of proving such facts would, of course, be upon the defendant company, and it might well appear upon such trial that the breaking in two of the train was due to a cause or causes which should have been foreseen, such, for instance, as defective equipment of the train, or the improper handling of it, in which event we regard it as clear that the defendant company would not have brought itself within that provision of the act in question which declares:

"That the provisions of this act shall not apply in any case of casualty or unavoidable accident, or the act of God, nor where the delay was the result of a cause not known to the carrier or its officer or agent in charge of such employé at the time said employé left a terminal, and which could not have been foreseen."

But the allegation of the answer is that the accident was unavoidable and could not have been foreseen, which, as against a demurrer, must, of course, be taken as true. In a case arising under the same statute—Missouri, K. & T. Ry. Co. v. United States, 231 U. S. 112, 34 Sup. Ct. 26, 58 L. Ed. 144—the Supreme Court said:

"It is urged that in one case the delay was the result of a cause, a defective injector, that was not known to the carrier, and could not have been foreseen when the employés left a terminal, and that therefore by the proviso in section 3 the act does not apply. But the question was raised only by a request to direct a verdict for the defendant, and the trouble might have been found to be due to the scarcity and bad quality of the water, which was well known."

Our views regarding the act having been fully stated in the case of San Pedro, Los Angeles & Salt Lake Railroad Co. v. United States, 220 Fed. 737, 136 C. C. A. 343, just decided, it is not necessary to repeat them here.

The judgment is affirmed.

ATCHISON, T. & S. F. RY. CO. v. UNITED STATES.

(Circuit Court of Appeals for the Ninth Circuit. February 15, 1915. Rehearing Denied March 18, 1915.)

No. 2466.

In Error to the District Court of the United States for the Southern Division of the Southern District of California; Olin Wellborn, Judge.

Action at law by the United States against the Atchison, Topeka & Santa Fe Railway to recover penalties for alleged violations of the act of Congress entitled "An act to promote the safety of employés and travelers upon railroads by limiting the hours of service of employés thereon," approved March 4, 1907 (34 Stat. 1415, c. 2939 [Comp. St. 1913, §§ 8677-8680]). Judgment for plaintiff, and defendant brings error. Affirmed.

U. T. Clotfelter, E. W. Camp, and Paul Burks, all of Los Angeles, Cal., for plaintiff in error.

Albert Schoonover, U. S. Atty., and Harry R. Archbald, Asst. U. S. Atty., both of Los Angeles, Cal., and Monroe C. List and Philip J. Doherty, Sp. Asst. U. S. Attys., both of Washington, D. C.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

MORROW, Circuit Judge. The plaintiff in error is charged in the complaint filed by the United States with having permitted three of its employés to be and remain on duty for a longer period than 16 hours, to wit, from the hour of 10:40 p. m. on October 2, 1912, to the hour of 8:25 p. m. on October 3, 1912. It appears from the stipulated facts filed in the court below that the employés of the plaintiff in error were employed as conductor and brakemen, respectively, on one of the trains of the plaintiff in error running between Parker, Ariz., and Los Angeles, Cal.; that the employés went on duty at Parker, Ariz., at 10:40 p. m. on October 2, 1912; that the train on which they were employed left Parker at 11:10 p. m. of that date, and arrived at Barstow, Cal., at 7:10 a. m. on October 3, 1912, having been delayed between the two points for a period of 2 hours and 30 minutes on account of washouts; that the train left Barstow, Cal., at 7:45 a. m. on October 3d, with ample time then remaining to reach Los Angeles within less than 16 hours from the time the employés entered upon their duties, but while the train was being operated between Barstow and San Bernardino an axle broke under the tank of an engine, whereby the movement of the train was unavoidably delayed for a period of 6 hours and 10 minutes, with the result that the train reached San Bernardino at 5:30 p. m. and Los Angeles at 8:25 p. m. on October 3d, the employés having then been on duty for 21 hours and 45 minutes; that before the delay of 6 hours and 10 minutes caused by the broken axle had expired, and before the damage which had caused the delay had been repaired, and before the train left the point where such delay occurred, it was known to the plaintiff in error that its employés would have been on duty in excess of 16 hours by the time the train reached San Bernardino, but no effort was made to relieve the employés before they had been on duty in excess of 16 hours, either previous to or at the time of their arrival at San Bernardino, or at any time before the employés reached Los Angeles; that San Bernardino was a division terminal, but was not a terminal for the employés of the train involved in this proceeding, but the employés of the plaintiff in error could have been relieved at that place and the train placed in charge of another crew.

The position taken by the plaintiff in error is that the facts above set forth constitute no violation of the statute, for the reason that the terminal of its train was Los Angeles, and it was entitled to permit its employés to be and remain on duty until that terminal was reached, regardless of whether the 16-hour period prescribed by the statute had expired. The government's contention is that where delays have occurred the employés may continue to operate the train, but that they cannot be held in service beyond the 16-hour period prescribed by the act, if a suitable stopping place should be reached at which they may be relieved, and that if such a place is reached, and the employés are not relieved, there is a violation of the law.

The positions taken by each of the parties in the present action, and the arguments advanced in support of those positions, are in all substantial respects identical with the positions and arguments of the parties in the case of San Pedro, Los Angeles & Salt Lake Railroad Co. v. United States of America, 220 Fed. 737, 136 C. C. A. 343, decided by this court on February 1, 1915. On the authority of that case, the judgment of the court below is affirmed.

KANSAS CITY BOLT & NUT CO. v. RODD.

(Circuit Court of Appeals, Sixth Circuit. March 2, 1915.)

No. 2561.

1. SALES ~~273~~—WARRANTIES—IMPLIED WARRANTY OF FITNESS FOR PARTICULAR USE.

Where automatic nut-tapping machines, sold by defendant to plaintiff, had been on the market a comparatively short time, plaintiff had never seen or had an opportunity to inspect such a machine, and defendant's circulars stated that they would automatically tap hot or cold pressed nuts and any style of thread or pitch in hexagon or square nuts of iron, steel, brass, or any usual material from which nuts were made, and directed that samples of blank and tapped nuts should accompany inquiries, and the machines were purchased for use on the kind of stock regularly used by plaintiff, with defendant's knowledge of such intended use, there was an implied warranty that they would suitably work such stock, the rule that, when a known, described, and definite article is ordered and supplied, there is no warranty that it shall answer the particular purpose intended by the buyer, though stated by him, did not apply, and it was error for the court to charge that defendant did not warrant that the machines were fit for any particular purpose, or for tapping any special kind of nuts, that plaintiff could recover only by showing that the machines were unsuitable to perform the ordinary work which they were made to do in tapping ordinary nuts, and that evidence of plaintiff's reliance upon the alleged warranty should be disregarded.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 772-776; Dec. Dig. ~~273~~.]

2. SALES ~~288~~—WARRANTIES—WAIVER BY ACCEPTANCE.

The doctrine that an implied warranty does not survive acceptance does not apply, unless the acceptance is with full knowledge of all the conditions affecting the character and quality of the article.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 817-823; Dec. Dig. ~~288~~.]

3. SALES ~~261~~—WARRANTIES—FAILURE TO INCLUDE IN SUBSEQUENT CONTRACT.

Where a contract of sale consisted entirely of correspondence, all of the correspondence together made up the contract, and there was in no proper sense a "subsequent contract," within the rule that representations will not constitute an express warranty, where the parties subsequently enter into a written agreement which is silent upon that subject.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 727-735; Dec. Dig. ~~261~~.]

4. SALES ~~168½~~—WARRANTIES—SALES ON TRIAL.

Where, though a machine was sold on 30 days' trial to enable the buyer to determine whether it would want other similar machines, the buyer was in such urgent need of the machines that, without waiting for the first machine, it asked the seller to build eight machines with the utmost dispatch and ship them to it, and the subject of 30 days' trial was not then or thereafter referred to, it was apparent that the buyer was content to rely upon the situation as disclosed by the seller's circulars and the correspondence with the seller, and not upon a trial of the machines, and instructions on the theory that the sale was a sale on 30 days' trial were improper.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 409-421; Dec. Dig. ~~168½~~.]

5. SALES ~~168½~~—WARRANTIES—SALES ON TRIAL.

Where, exactly 30 days from the receipt of the first two automatic nut-tapping machines ordered by plaintiff, parts thereof were returned to de-

fendant because broken through alleged failure to work properly, correspondence was had concerning trouble with the machines, taps and nuts were returned to defendant by his request, and a man was furnished by him to see if he could make the machines work, without any suggestion that they were subject to 30 days' trial, the parties treated the complaints as made in time, and if the sale was in fact subject to 30 days' trial the provision was waived, so far as not complied with.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 409-421; Dec. Dig. ☞168½.]

6. SALES ☞440—ACTIONS FOR BREACH OF WARRANTY—EVIDENCE.

In an action for breach of a warranty on a sale of eight automatic nut-tapping machines, a question, asked a witness for plaintiff, as to why he continued the effort to use the machines after having trouble with them, to which he would have answered that the seller held out encouragement that continued effort would meet with success, and a question, asked another witness, as to whether there was any marked effort to operate the machines when a single one arrived, as an individual machine or in groups of two, to sustain the buyer's contention that there was no concerted effort to test the machines until all of them arrived and were installed, were pertinent as affecting the good faith of the buyer's claim that it was unable to operate the machines.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1261-1276; Dec. Dig. ☞440.]

In Error to the District Court of the United States for the Northern District of Ohio; William L. Day, Judge.

Action by the Kansas City Bolt & Nut Company against Robert J. Rodd. Judgment for defendant, and plaintiff brings error. Reversed, and new trial ordered.

In the deposition of the witness Stoddard, he testified that they had trouble with the machines. Such testimony was followed by a question as to why he continued the effort to make the machines tap nuts, to which an objection was sustained. The answer in the deposition was that Rodd held out encouragement that continued effort would meet with success. The witness Neville was asked whether or not there was any marked effort to operate or attempt to operate the machines after they were coupled in a battery, or when a single one arrived, as an individual machine or in groups of two, to which an exception was sustained. It was plaintiff's contention that there was no serious, concerted, and determined effort made until all of the machines ordered arrived and were installed.

J. H. Smart, of Cleveland, Ohio, for plaintiff in error.

Orlano Wilcox, of Akron, Ohio, for defendant in error.

Before WARRINGTON, KNAPPEN, and DENISON, Circuit Judges.

KNAPPEN, Circuit Judge. Plaintiff in error, a manufacturer of bolts and nuts, ordered from defendant in error eight automatic nut-tapping machines of defendant's manufacture. The machines were all received, and six were paid for. Plaintiff in error brought this suit for damages for breach of alleged warranty that the machines would do good work and were fit for the purpose for which plaintiff bought them and for which defendant sold them. Defendant denied liability,

☞ For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

and set up a counterclaim for the purchase price of the two machines unpaid for. On a trial by jury the issues were found in defendant's favor, and judgment entered accordingly. The errors assigned relate to the charge of the court and to the exclusion of evidence.

Tapping is the process of threading nuts. Until the purchase in question, plaintiff had used only hand-operated tapping machines. Having seen defendant's circular descriptive of his machine, plaintiff wrote defendant, asking prices. Defendant replied by letter that his machine of the size called for "has only recently been placed on the market, but it has been thoroughly tested," and spoke of the great favor with which the machine had met where already used. Plaintiff accordingly ordered of defendant by letter one machine, at a price of \$500, saying that "if found quite satisfactory" seven more would doubtless be ordered at a price of \$475 each for the eight machines. Defendant replied that he had "such confidence in the merits of the machines and have met with such universal success that we will send you a machine, if you find it satisfactory you will pay for the same in 30 days, if you should order the remaining seven the price will be as you state, \$475"; and on receiving order for shipment wrote plaintiff on October 18th asking that, "in order that I may set the machine up to suit your nuts," plaintiff send a quantity of blanks, "such as you will require the machine to tap." In advance of the delivery of the first machine, plaintiff on October 18th wrote defendant, asking him to "increase our recent order to eight machines." The respective letters of the latter date presumably "crossed in the mails." The last order was accepted by letter; defendant, in connection with the acceptance (and an assurance that the machines would be built as speedily "as is consistent with good work"), asking plaintiff's manager to send samples "of the nuts that you propose to use on the machines," adding:

"I presume you tap your nuts U. S. S. thread, as a general rule. If you will let me have these nuts, I will look them over and write you further."

Five days later defendant asked plaintiff, in case it required the machines to tap both hexagonal and square nuts, to send on a quantity of each kind, and to include a "bolt or stud threaded to show what your threads are." The samples asked for were duly sent. On February 14th following defendant shipped two machines, which reached plaintiff February 28th; the next two machines were shipped March 2d or 3d, and would normally have reached plaintiff about two weeks later. The last two machines were shipped April 29th, and presumably reached plaintiff about the middle of May. Meanwhile, defendant had provided plaintiff with sample taps (threading tools) for each size of machine bought, the samples to be used for making up a supply of taps to be made or procured by plaintiff. Plaintiff's first complaint of the machines was made March 28th, and related only to the breaking of gears and other minor matters, the defects being promptly supplied. But on June 1st plaintiff complained of serious trouble with the machines, including inability to get proper daily output, that the clutches would not pull sufficiently to tap the nuts, and that many of the nuts were "reamed"—that is, the tap went through without

making a thread. After several requests, beginning with June 1st, defendant, about July 13th, sent a demonstrator to instruct in the operation of the machines. There is a sharp conflict as to the effectiveness of this demonstration, but the plaintiff finally abandoned the use of the machines as worthless. Its testimony tends to support the complaints made previous to the demonstration, as well as an alleged frequent breaking of taps, and a general inability of the machines to work plaintiff's stock as well as the ordinary hand machines.

The first question of importance arises out of defendant's contention that the failure of the machines to work satisfactorily was due to the character of the nuts used by plaintiff—defendant's claim being that the nuts (which were hot-pressed) were of poor quality, made of scrap bar, composed of steel and iron, carrying more or less scale and burrs or fins, the burrs preventing the nuts from slipping down in the "fountain" and from engaging the tap; that the holes in many of the nuts were small and out of center, causing reaming; that the quality of the metal (said to be more difficult to work than clear iron or clear steel) caused the taps to wear rapidly, necessitating frequent grinding or renewal, and requiring an unusually hard tap. On the other hand, hot-pressed nuts are naturally less perfect and clean-cut than cold-pressed, and always carry some scale in the holes. There was testimony that the stock on which plaintiff used the machines was the same as always used on its hand machines, and conformed strictly, both in material and otherwise, to the samples furnished defendant, under the circumstances stated. There was also testimony that the class of material used by plaintiff was the ordinary commercial hot-pressed nut.

[1] 1. The jury was instructed that defendant did not warrant "that these machines were fit for *any particular purpose*, or for tapping *any special kind* of nuts," and that plaintiff could recover only by showing that defects existed in the machines "which rendered them unsuitable to perform the *ordinary work* which Rodd's automatic nut tappers are *made to do* in automatically and commercially tapping the *ordinary nuts sold in the trade*." (Italics ours.) This instruction effectually precluded recovery for failure of the machines to properly work plaintiff's stock, as distinguished from *ordinary nuts sold in the trade*, and notwithstanding plaintiff purchased the machines for use on the kind of stock regularly used by it, with defendant's knowledge of such intended use.

We think this instruction erroneous. The general rule, as stated in Dushane v. Benedict, 120 U. S. at page 636, 7 Sup. Ct. at page 697, 30 L. Ed. 810, is this:

"When a dealer contracts to sell goods which he deals in, to be applied to a particular purpose, and the buyer has no opportunity to inspect them before delivery, there is an implied warranty that they shall be reasonably fit for that purpose."

And, as expressed in Jones v. Just, L. R. 3 Q. B. 197 (which case was cited with approval in Dushane v. Benedict):

"It must be taken as established that on the sale of goods by a manufacturer or dealer, to be applied to a particular purpose, it is a term in the contract

that they shall reasonably answer that purpose, and that on the sale of an article by a manufacturer to a vendee who has not had an opportunity of inspecting it during the manufacture, that it shall be reasonably fit for use or shall be merchantable, as the case may be."

See, also, *Kellogg Bridge Co. v. Hamilton*, 110 U. S. 108, 113-116, 3 Sup. Ct. 538, 28 L. Ed. 86, and cases there cited.

The general rule has this qualification, among others, that when a known, described, and definite article is ordered of a manufacturer, although it be stated by the purchaser to be required for a particular purpose, yet if the known, described, and definite thing be actually supplied, there is no warranty that it shall answer the particular purpose intended by the buyer. *Seitz v. Brewers' Refrigerating Co.*, 141 U. S. 510, 518, 12 Sup. Ct. 46, 35 L. Ed. 837. The learned District Judge evidently regarded the instant case as falling directly within the qualification mentioned, and as applied in the case last cited. We think this a mistaken view, and that the case is governed by the general rule rather than by the qualification stated. As we understand the rule, the existence or nonexistence of an implied warranty of fitness for a particular use depends upon whether or not the buyer is presumed to have relied upon his own judgment or on the skill or judgment of the seller. See *Kellogg Bridge Co. v. Hamilton*, *supra*; also *Pullman Car Co. v. Metropolitan Ry. Co.*, 157 U. S. 108, 15 Sup. Ct. 503, 39 L. Ed. 632, where the general rule and the exception stated are referred to.

The Ohio Uniform Sales Act (G. C. § 8395[1]) provides that:

"When the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, and it appears that the buyer relies on the seller's skill or judgment, whether he be the grower or manufacturer or not, there is an implied warranty that the goods shall be reasonably fit for such purpose."

And subdivision 4 provides:

"(4) In the case of a contract to sell or a sale of a specified article under its patent or other trade name, there is no implied warranty as to its fitness for any particular purpose."

We understand that these provisions substantially enact the common-law rule, unless possibly (which we do not decide) subdivision 1 substitutes a question of fact for the presumption that the buyer relied on the seller's skill or judgment. See *Williston on Sales*, § 248. See, also, the reference made by Judge Putnam to the English Sales of Goods Act of 1893 in *Nashua Iron, etc., Co. v. Brush*, 91 Fed. 214, 33 C. C. A. 456. See, also, *Kellogg Bridge Co. Case*, *supra*, 110 U. S. at page 116, 3 Sup. Ct. 538, 28 L. Ed. 86. In fact, plaintiff alleged and offered to prove reliance upon defendant's warranty.

In the instant case, the machines ordered were not in a proper sense a "known" article, so far as plaintiff was concerned. True, they were described in defendant's circular; but no machine of the kind seems ever to have been seen by plaintiff, the machine itself was comparatively recently on the market, and these facts presumably prompted defendant's reference to the great favor with which the machine had already met. Plaintiff had no opportunity for previous inspection, and we think was entitled to rely, and will naturally be presumed to have

relied, upon the seller's skill or judgment. Such right of reliance is strengthened by the express reference in defendant's circular to his machine as "for automatically tapping hot or cold pressed nuts," with the statement that "the machines will tap any style of thread or pitch in hexagon or square nuts of iron, steel, brass, or any usual material from which nuts are made." Whatever implication may be thought to result from the reference to "any usual material" would seem to be overcome by the express direction that "samples of blank and tapped nuts should accompany inquiries," thus naturally implying that the machine, if furnished, will be adapted to work on samples so furnished. We are not called upon to consider whether the circulars contain an express warranty that the machines would suitably work plaintiff's stock; it is enough for the purpose of this review that such warranty be implied.

It is urged that defendant desired samples of plaintiff's stock merely for the purpose of suitably adjusting the machines thereto. But, assuming that this is so, we cannot see that plaintiff's right to rely upon the implied warranty in question is thereby affected. It follows, from the views we have expressed, that the court erred also in instructing the jury not to consider evidence of plaintiff's reliance upon the alleged warranty.

[2, 3] The doctrine that an implied warranty does not survive acceptance of the thing sold does not in any case apply unless at least the acceptance is with full knowledge of all the conditions affecting the character and quality of the article. This would at the most be a question of fact for the jury. Nor is the case affected by the rule that representations as to what the machine will do will not constitute an express warranty, where the parties subsequently enter into a written agreement which is silent upon that subject; for here the contract consists entirely of correspondence, all of which must be considered together as making up the contract. There was not, in a proper sense, a subsequent contract.

[4, 5] 2. The question whether the machine was suitable for tapping the ordinary commercial nuts was submitted to the jury, but with an instruction that if the defects complained of could reasonably be discovered by plaintiff within 30 days after delivery of the respective machines there was a substantial acceptance, precluding recovery, otherwise plaintiff had a reasonable time after the 30 days to examine and return, and that if the defects could reasonably have been discovered within 30 days plaintiff waived the right to refuse the last two machines furnished, provided they were regular Rodd's automatic nut tappers and the same as the six machines furnished and paid for.

This instruction was upon the theory that the order for the first machine was a trial order, and that the inclusion of the other seven converted the sale of the entire eight machines into a sale on 30 days' trial. We think this an incorrect theory. The order for the first machine was accepted as a trial order; the object of the trial being largely, though not entirely, to determine whether plaintiff would want the other seven. But plaintiff was in "such urgent need of tapping machines" that it could not wait for the first machine, and asked to have the eight machines built with the "utmost dispatch," and shipped

to plaintiff. The subject of 30 days' trial was not then or thereafter referred to. We think the parties could not properly have intended so unusual a thing as a trial order of eight machines, each to be built, and that the more natural view is that the plaintiff, considering his urgent need, was content to rely upon the situation as disclosed by the circulars and correspondence. However, exactly 30 days from the receipt of the first two machines, parts were returned to defendant because broken through alleged failure to work properly. The succeeding correspondence contained in the record was had, the return of the taps and nuts requested by defendant and made by plaintiff, and the request for a competent man "to see if he can make [the machine] work," made by plaintiff and complied with by defendant, and all without any suggestion that the machines were subject to 30 days' trial. The parties thus treated the complaints as made in time; and if the sale was in fact subject to 30 days' trial, the provision would seem to have been waived so far (if at all) as not complied with. As the record stood, we think the instruction in question erroneous.

[6] 3. We think the subject aimed at in the question to the witness Neville and the question to the witness Stoddard was pertinent, as affecting the good faith of plaintiff's claim that it was unable to operate the machines.

The judgment of the District Court is reversed, with costs, and a new trial ordered.

TENABO MINING & SMOELTING CO. v. BATES.

(Circuit Court of Appeals, Ninth Circuit. February 15, 1915.)

No. 2441.

EQUITY ~~415~~—DECREE—DETERMINATION OF ISSUES.

In a stockholder's suit for the winding up of a mining corporation, the sale of its property, and distribution of the proceeds, on the alleged ground of insolvency and fraudulent conduct of its officers and directors, on all of which allegations issue was joined and full proofs taken, the entry of an order appointing a receiver, with instructions to sell all of the property of the corporation, without determining any of the issues so tried and submitted, held unauthorized and erroneous.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 932-944, 946, 950, 951; Dec. Dig. ~~415~~.]

Appeal from the District Court of the United States for the District of Nevada; Edward S. Farrington, Judge.

Suit in equity by Charles D. Bates against the Tenabo Mining & Smelting Company. From the decree, defendant appeals. Reversed.

H. C. Edwards, of Salt Lake City, Utah, for appellant.

Corwin S. Shank and Horatio C. Belt, both of Seattle, Wash., and J. D. Skeen, of Salt Lake City, Utah, for appellee.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

ROSS, Circuit Judge. The appellee instituted this suit in the court below, "in behalf of himself and all other stockholders of the defend-

ant Tenabo Mining & Smelting Company similarly situated, who wish to join in this bill, bear their proportion of the expenses of this suit, and become parties hereto." Both bill and answer are very long, but a comparatively brief statement of some of their contents will, we think, be sufficient for the proper disposition of the appeal.

The bill shows that the appellant, defendant below, is a mining company incorporated under the laws of the state of Nevada, November 14, 1908, with a capital stock of \$3,000,000, divided into 1,500,000 shares, of the par value of \$2 each, 450,000 of which shares were issued to another mining corporation, styled Gem Consolidated Mining Company, for certain mining claims owned by it and situated in Nevada, called Little Gem, Ollie, Reno, and Winnemucca, upon which, the bill alleges, there was at the time a mortgage to one McCormick for the sum of \$15,000 and accrued interest, and 300,000 shares to another mining corporation then existing, styled Tenabo Consolidated Mines Company, for certain mining claims and interests therein owned by that company, known as the Two Widows, Two Widows extension, Copper Hill group, and Nevada Phoenix. The bill also alleges that at the times mentioned the Little Gem claim had been developed by a shaft to a depth of about 400 feet, encountering a rich body of ore, the extent of which, however, had not been ascertained by development—the other claims being undeveloped and of unknown value, except such as attached to them by reason of their location in a mining region and close proximity to the Little Gem claim. The bill further alleges that one Tyree controlled the Gem Consolidated Mining Company, and one Locker the Tenabo Consolidated Mines Company, and that together they caused the incorporation of the defendant company for the purpose of taking over the properties of the two other mining companies, which was done, and that together they named and controlled the directors of the defendant company, and alleges various acts of fraud, both on the part of Tyree and Locker, and the directors of the defendant company, in the disposition of its 750,000 shares remaining in the treasury, and in respect to the moneys realized by the sale of a portion of that stock. The bill itself shows upon its face that the mortgage held by McCormick was paid out of the proceeds realized from the sale of a portion of the treasury stock of the defendant company, and it also shows that subsequently the defendant company, by its president and secretary, executed a mortgage on all of its property to one Shearman to secure a loan of \$1,500. The bill also alleges the insolvency of the defendant corporation, and among its prayers are the following:

"(1) That the defendant be required to appear and show cause at a time certain why it should not be enjoined and restrained from selling, agreeing to sell, giving options to sell, or causing to be sold, and from permitting any of its officers, agents, trustees, or representatives to sell, transfer, or agree to sell, in the United States, France, or elsewhere, any of its treasury stock, or any of its capital stock not outstanding, and in the meantime, and until the said orafor can be heard, that defendant, its officers, agents, trustees, and representatives, be temporarily enjoined from doing, or permitting to be done, any of said acts.

"(2) That defendant be required to appear and show cause, if it has any, why a receiver should not be appointed by this court, to take charge of all of the assets of said corporation located within the state of Nevada, and

particularly all mining property and claims owned, claimed, or controlled by said corporation, located in the county of Lander, state of Nevada, or elsewhere in said state.

"(3) That said receiver be authorized and directed to cause ancillary receivers to be appointed in states other than the state of Nevada, to sue for and recover all moneys and property lost or misappropriated by the directors or officers of said corporation.

"(4) That all of the assets of such corporation be sold and converted into money, and after payment of the costs and expenses of this proceeding, including counsel fees, that said assets be distributed among the creditors, and the surplus, if any, be distributed pro rata among the stockholders of defendant corporation.

"(5) That to enable the court to make a just distribution of said assets among the persons entitled thereto that the court cause proper notice to be given to all creditors and stockholders having claims against said corporation or stock therein, and, if claims or stock should be in dispute, that the same be established by the judgment of competent tribunals.

"(6) And your orator further prays, for himself and for all others similarly situated, for such other and further relief as the court may deem meet and proper."

The answer of the defendant company put in issue all of the numerous averments of fraud, and among other things denied that it ever sold or disposed of 300,000 shares of its treasury stock, or any amount thereof in excess of 167,250 shares, for which number of shares it admits it realized the sum of \$26,687.50, out of which money it alleges that the amount due on the McCormick mortgage was paid. And among other things the answer—

"admits that the only source of income which the defendant has had has been from the sale of its treasury stock, but denies that said mining claims are undeveloped property, but admits that up to the present time the same have yielded no income whatever, but this defendant states that prior to the time when the above-described mining claims were conveyed by the Tenabo Consolidated Mines Company and the Gem Consolidated Mining Company to this defendant much development work had been done upon the same and large deposits of milling ore had been developed thereon in, to wit, more than 17,000 tons, of a net value in excess of \$171,000."

The answer admits that on December 13, 1910, the defendant was obliged to and did borrow \$1,500 from one W. H. Shearman with which to pay for the required annual assessment work upon the said mining claims, and that to secure the repayment of that borrowed money it executed a mortgage to Shearman upon all of said claims except the Copper Hill group, and—

"admits that said mortgage is unpaid, but denies that the same is due, and, on the contrary, this defendant states that the time of the payment of said promissory note for which said mortgage was given as security has been extended by said Shearman, and this defendant states that its assets are of sufficient value to enable it to borrow sums of money far in excess of the amount due upon said promissory note, and in addition thereto all debts due and owing by said defendant, with which to liquidate its present indebtedness."

The answer denies the alleged insolvency of the defendant corporation, and the alleged lack of value of its remaining treasury stock, and, on the contrary, alleges that the said remaining treasury stock is of a value in excess of 50 cents per share, and that all of it could and would have been sold by the defendant company, had it not been for the action of the plaintiff in bringing this suit. It alleges that the total

amount of the obligations of the defendant company is the sum of \$8,297.75, and that the property owned and possessed by it is much more than sufficient to pay all of its indebtedness, and denies any mismanagement by the directors of the company.

To the answer the complainant duly filed a replication.

The numerous issues presented by the pleadings came on regularly for trial, and a large amount of evidence was given on behalf of each party tending to support their respective claims, among which is this testimony of a witness for the plaintiff:

"My name is Duncan MacVichie. I live in Salt Lake City. I am 52 years of age. I am a mining engineer. I have been such 25 years or more. I was with the Standard Oil people in Wisconsin and Minnesota from 1889 to 1897, and then in charge of the Mercur from 1897 to 1900, and then with the Bingham Consolidated Mining & Smelting Company for, I think, 8 years. I was general superintendent in all of these. I have examined the Little Gem property in Tenabo, Lander county, Nev. I did so in December, 1908. I was making a report for the board of directors. The ones I examined were: The Little Gem, four lode claims, a total of 70 acres; the Nevada-Phoenix, three lode claims, 52 acres; and the Two Widows group, one and a fraction, 21 acres—a total of 142 acres. These claims all joined each other. The claims of the Gem group joined each other; the Ollie, Winnemucca, and Reno. The Phoenix group contained the Gold Note No. 2, Phoenix, and Standard. The Two Widows was a full claim. The workings of the mines are as follows: It is developed by an incline shaft to a depth on the plane of the vein of about 375 feet, and by six levels, consisting of the 60, 90, 100, 200, 300, and bottom levels. There are upraises and two stopes; a small stope on the 200-foot level. I want to add here that I was unable to reach the bottom of the incline, due to water. It was about 20 feet deep, so that I am unable to say just what the bottom of the incline is like; but the workings are pretty thorough above the water level, which block out the ore pretty thoroughly. There is no ore in the 60, 90, and 100 foot levels. The east drift on the 200-foot level is approximately 300 feet in length. This drift bears to the north quite rapidly as it extends from the incline. The 200-foot level west is approximately 45 feet in length. The 300-foot level east, or easterly, would be approximately 100 feet in length. There is an incline driven in a westerly direction from just below the 300-foot level, to 90 feet in length. It is driven at about right angles to the strike of the vein. All of the levels show a well-defined vein, and the 200 and 300 foot levels, including the incline from the 200-foot level down, and the different raises, show a well-defined vein of merchantable sulphide copper ore. I estimated 7,783 tons straight smelting ore and 17,257 tons of concentrating ore was blocked out and ascertained by me. The smelting ore contained .125 ounces of gold; 17.46 ounces of silver; 5.92 per cent. copper. I did not get the iron contents. Figuring copper at 12 cents and silver at 56 cents per ounce would give a net value of \$13.38. The present value is approximately \$21.13. The gross value of a ton of matte is \$175.20. Seven tons of ore goes into it. There would be \$92.65 profit per ton of matte. That represents 7 tons of ore. It is absolutely necessary to put on a concentrating mill in order to make a success of the property. The proposition of this company presents possibilities a little beyond the average. The Little Gem will not take a large amount of money to demonstrate its value. The Nevada Phoenix, with its high-grade ore, makes possible the mining of narrow veins profitably. The Two Widows has ore of good commercial value. I do not consider the situation as favorable. I think it a very good geological venture. I consider that at the time I examined these properties that twice the amount of ore in sight was capable of being obtained."

Cross-examination by Mr. Skeen:

"I do not do my own assaying. The Union assay office does all of it for me. They can verify the assays, if you wish. It cost about \$4 per ton to mine the ore in 1908."

Redirect examination by Mr. Edwards:

"The prospective values on the Gem and the Phoenix are very attractive; above the ordinary. On the Two Widows there was no ore developed there. The conditions are not particularly favorable to the Two Widows. In the Nevada Phoenix there is considerable ore exposed. It has considerable value. The ore is good quality. I think I would give \$10,000 for it. To the 7,783 tons of straight smelting ore, this gives a net value of \$111,530.39; on the 17,257 tons of concentrating ore, it gives a net value of \$75,240.52—making a total net value of \$186,771.91. The cost of erecting reduction works is:

Concentrating mill	\$25,000 00
Matting plant	30,000 00
Total	\$55,000 00

—leaving an estimated profit on the present available ore of \$131,770.91. This is the most reliable plan of estimating in the United States; suggested by the Engineering and Mining Journal of New York City."

The foregoing testimony on the part of the plaintiff finds corroboration in the following testimony of the witness Alfred E. Raleigh for the defendant company:

"My age is 42 years. I reside at Tenabo, Nev., and have since 1905; am in mining business, and have been for 35 years. I went to Tenabo when the camp was just struck, and have watched its development closely; have been in the employ of the Tenabo Mining & Smelting Company, and was before that. I was in the employ of the Tenabo Consolidated Mining Company. They owned the Gem claim. Before that, I was in the employ of the Reliance Milling & Mining Company. That company also owned the claim prior to the time that the Tenabo Consolidated came in. I supervised the opening up of that claim. There is a fissure vein on the claim, and it appears upon the surface. It can be traced for 500 feet. The incline shaft that has been testified to by Mr. MacVichie in his report is the shaft or incline from which the main workings have been done upon the ground. It is about 320 feet deep. The length of the longest shaft is about 400 feet. I have discovered an ore chute in this vein. It is about northwest with reference to the collar of the shaft. The ore chute that I have discovered is about 350 feet, and runs from 5 feet at the surface to 4 feet at the bottom. I followed the vein down from its entire depth. The vein is 14 feet wide there, with good walls. Between the collar of the shaft and the lowest level a drift has been run about 50 feet. There is another one at 100 feet, running to the north about 20 feet. The next level, about 50 feet deeper than the shaft, there is a cross-cut, the drift running about 75 feet. At 300, there is a drift running about 350 feet to the northwest, and opposite that there is a drift running to the south about 600 feet, and down at the 300 there is a drift running to the east, and there is where the forks—the main shaft that they are running now—the ore chute—turns to the south, and there is a drift running off from that 60 feet; then this long part of the incline runs on through; that is, the 400-foot incline. There is a raise in that incline, and a good deal of stoping done in there. Those workings generally penetrate the ore chute. The ore chute extends from the lowest level made in the mine to the surface. It is continuous all the way. There is nothing in the lower workings to indicate that the vein will not continue into the depth. It all indicates that it will. About the 28th of March last I saw Mr. Kimball and Mr. Sizer going down into the Gold Quartz. I do not know what they did. I do not know that they examined the Gem. I told them I would not have anything to do with their examination, unless there were instructions from the president."

Cross-examination:

"The length of your chute is about 360 feet. I have seen it at all the distance. It is continuous that entire distance. In the last three years we have not added in depth to the main shaft or incline, nor to the main level or the shafts or levels, in any part of the mine. I am sinking a shaft from

the surface there now in order to get air. We have run a raise from just on top of the water 290 feet depth. The length of that raise is 90 feet. When I left the other day, the air shaft was down between 35 and 40 feet. We have done some assessment work on the surface. We have done some work on the other mine there in the last three years. I have done the work on all 11 claims. In the Copper Hill group there are 4 claims, and we have done \$400 worth of work on those claims each year in driving a tunnel. That tunnel, after the first 15 feet, is all in copper ore. The development that has progressed has increased the favorable conditions of the geology of the property. We have taken out but have not shipped any ore. I have taken out ore all the time. At the Copper Hills, we did that as assessment work. The work in taking out the ore was simply the equivalent of \$100 on each claim. There are 11 claims. The Copper Hill group of claims is located about 12 miles from the Gem property."

The evidence also showed, among other things, that on the 5th day of February, 1910, John Janney, Benner X. Smith, E. O. Howard, W. Mont Ferry, and John Pingree were elected directors of the defendant company and served as such during all the times in question; that on the 22d of March, 1910, the defendant company, through its board of directors, entered into a contract with P. B. Locker, by which he was appointed agent and attorney in fact, and authorized to sell 450,000 shares of its treasury stock, he to receive for his services in that behalf all in excess of 50 cents per share. The contract recited, among other things:

That Locker "is desirous of undertaking the sale of said stock, and represents and believes that he can sell a portion of this stock in France or elsewhere, provided the necessary authority be given him to negotiate and execute a contract on behalf of the company and to list the stock upon a French banking market, or other markets," and contained his agreement "to provide and furnish all the fees and expenses for the listing of each 150,000 shares of stock provided for in a special power of attorney set forth in the minutes of the company, and all other expenses required by the law of France or elsewhere, and all trustee's fees and expense, and he further agrees at his own expense to go to Paris in the interests of this company and use diligent effort to negotiate said contract."

The contract contained these further stipulations:

"It is mutually agreed that the entire amount of money received from the sale of said stock shall be deposited to the credit of the company upon the delivery of certificates of stock. It is expressly understood and agreed that the company shall in no way be liable for any fees or expenses for the listing of said stock, or trustee's fees and expenses, or any other expenses whatsoever, and that each and every share of stock so sold shall net the company 50 cents per share. From the first money received from the sale of stock, the company shall pay the said Locker the first \$15,000 advanced to pay taxes and dues for listing the stock on the French market and the \$3,000 fees to the trust company. The company shall, however, be reimbursed said amounts from the moneys received from the sales in excess of said amounts before said Locker shall be entitled to any compensation; the intention being that each and every share of stock sold shall net the company 50 cents per share. Should the sale of stock be not sufficient to net the company 50 cents per share, the said Locker agrees to reimburse the company in stock out of his personal stock in an amount equal to the amount taken from the treasury and for which the company has not received 50 cents net per share. The time allowed said Locker for the carrying out of this contract shall be as follows: Sixty days within which to furnish satisfactory proof that the company has entered in contractual relations with reliable persons whereby the sum of \$15,000 will be furnished to the agent as needed for listing; then 90 days to effect his negotiations in Paris or elsewhere and procure the execution of a satisfactory contract as set out in said special power of attorney: Provided,

that in computing these periods of time, the months of June, July, and August shall be excepted, because of the summer season. Nothing in this contract shall be construed to require the agent to sell any of the said stock in France, but, on the contrary, he may negotiate the sale of the stock at any other place or places desired by him."

There was also introduced in evidence a large number of letters passing between Locker and Janney, and between Locker and the defendant company and various other parties, in respect to the sale of the said stock, and much testimony in respect to arrangements made by Locker with various French banking institutions in regard thereto, and testimony tending to show that the arrangements so under way were about to be consummated when the present suit was brought. There was also testimony to the effect that the treasurer of the defendant company, who was cashier of Walker Bros. Bank of Salt Lake City, received from Locker between \$2,900 and \$3,000, which money was disbursed in the course of the business of the corporation, and there was evidence to show that the directors of the defendant company allowed themselves a monthly compensation of \$50 each, and that they were also given a certain amount of the stock of the company in consideration of their services.

There was other evidence given in the case bearing upon its merits, but enough has been stated to show that the trial court was called upon to render judgment disposing of the issues in the case. Instead of doing so, the court, after a trial of those issues, at the conclusion of all of the evidence, without deciding a single one of them, entered a "decree" appointing a receiver, undertaking to authorize him to, among other things, "sell for cash at public sale all of the real and personal property of said defendant corporation"—the full "decree" being as follows:

"This cause came on regularly to be heard, and was argued by counsel for the respective parties, and upon consideration thereof it was ordered, adjudged, and decreed:

"I. That J. P. Raine, of Pine Valley, state of Nevada, be and he is hereby appointed receiver of the Tenabo Mining & Smelting Company, defendant herein, a corporation organized under and pursuant to the laws of the state of Nevada, and said receiver is hereby authorized and directed forthwith to take possession of all of the real and personal property of said corporation located within the state of Nevada, including all books, papers, and documents of every name, nature, and description, and particularly the following mining claims: Little Gem, Ollie, Reno, Winnemucca, Two Widows, Two Widows extension, Copper Hill group, and Nevada Phoenix—together with all machinery, tools, appliances, and other personal property located upon or used in connection with said mining claims, all of which said property is located in Lander county, state of Nevada.

"II. To examine, or cause the books and records of the defendant Tenabo Mining & Smelting Company to be examined, and from said books, and from such other sources of information as may be available, to ascertain:

"(a) The authorized capitalization of said corporation, the number of shares issued and outstanding on the 1st day of October, 1912, and the number of shares in the treasury of said corporation on said date; also whether or not stock has been issued and sold by the officers and agents of said corporation since said date, and, if so, to whom and for what consideration.

"(b) To ascertain from said books and otherwise the money on hand on the 1st day of October, 1912, if any, and the nature and amount of the indebtedness of said corporation, to whom and when payable, and whether in money or in stock of said corporation; also whether or not any indebtedness has been incurred by the officers and agents of said corporation since the 1st day

of October, 1912, and, if so, the nature, amount, and consideration of said indebtedness.

"III. To sell for cash at public sale all of the real and personal property of said corporation, and particularly the following mining claims located in Lander county, state of Nevada, to wit: Little Gem, Ollie, Reno, Winnemucca, Two Widows, Two Widows extension, Copper Hill group, and Nevada Phoenix—together with all machinery, tools, and appliances, and all other property owned by said corporation and located in the state of Nevada, said sale to be made upon said premises at Tenabo, in Lander county, state of Nevada; it appearing to the court that it is best to sell the said personal property in the manner hereinbefore specified: Provided, that said receiver shall first give notice of said sale of [by] publication thereof for at least once a week for four weeks prior to said sale, in a newspaper printed, regularly issued, and having a general circulation in Lander county, state of Nevada, if any such there be, and if there be no such newspaper published in said Lander county, or if the receiver in his discretion shall consider some other paper more advantageous, then the publication shall be in such paper so specified or selected, and having a general circulation in the state of Nevada, and said notice shall specifically describe the real and personal property to be sold: Provided, that said property shall not be advertised for sale, nor sold, until after the lapse of ninety (90) days from date hereof, nor until the further order of the court fixing the time of sale, and other conditions, if any, that the court may deem proper.

"IV. Said receiver is hereby directed to give notice to all creditors by publishing such notice in the _____, once a week for four consecutive weeks, directing all creditors to file their verified claims with the receiver at an address to be specified, within 90 days from the date of the first publication of such notice, and that all claims not so filed shall be barred, and shall likewise mail a copy of said notice to each known creditor: Provided that, before the presentation of any claims for the approval of this court, notice thereof, with a list of such claims, shall be served upon the attorneys of record herein.

"V. Said receiver is hereby directed to keep a complete record of his doings in the premises, including an inventory of all property received, held, or sold, all money expended and debts incurred, and at the earliest practicable date report fully to this court the exact status and condition of the affairs of said corporation, and of his administration thereof.

"The said receiver is further directed to hold all cash received from any source, to be disbursed under the orders of this court, for the payment of expenses of this receivership, including such reasonable allowances as solicitors' fees and expenses for bringing this action as the court may deem proper, and distribute the balance under the orders of this court.

"VI. That before entering upon the performance of his duties as such receiver said J. P. Raine shall take an oath of office to faithfully perform and discharge his duties, and execute and deliver to the clerk of this court a good and sufficient undertaking, conditioned as provided by law, in the penal sum of \$7,500, payable to the clerk of this court; the court hereby reserving the right to increase said bond at any time.

"Dated this 14th day of February, A. D. 1914."

The "decree" is reversed, and the cause remanded to the court below, for a determination of the issues in the case, and for such judgment thereon as may be appropriate and proper.

WELSCH v. UNITED STATES.

(Circuit Court of Appeals, Fourth Circuit. February 2, 1915.)

No. 1296.

1. PROSTITUTION ~~§~~4—TRANSPORTATION OF WOMEN FOR IMMORAL PURPOSES—SUFFICIENCY OF EVIDENCE.

On a trial for persuading and enticing a girl, with whom accused sustained immoral relations, to return from Ohio, where she was visiting, to her home in West Virginia, for purposes specified in the White Slave Traffic Act (Act June 25, 1910, c. 395, 36 Stat. 824 [Comp. St. 1913, §§ 8812-8819]), evidence *held* insufficient to show any persuasion by accused, but, on the contrary, to show that she returned home at the request of her aunt, transmitted through accused as a mere messenger.

[Ed. Note.—For other cases, see Prostitution, Cent. Dig. § 4; Dec. Dig. ~~§~~4.]

Violations of White Slave Act, see note to Savage v. United States, 130 C. C. A. 2.]

2. PROSTITUTION ~~§~~1—TRANSPORTATION OF WOMEN FOR IMMORAL PURPOSES—OFFENSES.

That accused in communicating to a girl, with whom he sustained immoral relations, her aunt's request that she return home, had in mind the probability or expectation of again possessing her on her return home, did not make him guilty of a violation of the White Slave Traffic Act, where her return was not brought about or influenced by his persuasion.

[Ed. Note.—For other cases, see Prostitution, Cent. Dig. §§ 1, 2; Dec. Dig. ~~§~~1.]

3. PROSTITUTION ~~§~~4—TRANSPORTATION OF WOMEN FOR IMMORAL PURPOSES—SUFFICIENCY OF EVIDENCE.

On a trial for violating the White Slave Traffic Act, evidence *held* to show that when accused communicated to a girl, with whom he sustained immoral relations, her aunt's request that she return home, he had no particular intention respecting the resumption of their relations, and could not have anticipated an act of sexual intercourse, which occurred a few days after her return home.

[Ed. Note.—For other cases, see Prostitution, Cent. Dig. § 4; Dec. Dig. ~~§~~4.]

4. PROSTITUTION ~~§~~5—TRANSPORTATION OF WOMEN FOR IMMORAL PURPOSES—INSTRUCTIONS.

On a trial for persuading and enticing a girl, with whom accused sustained immoral relations, to go from one state to her home in another state for immoral purposes, an instruction that if accused furnished the transportation to the girl solely at the instance of the girl's aunt, because she wanted her to return home, and if he was simply a messenger to convey that and furnish the transportation, and had no other or further intent, he should be found not guilty, but that, if he had the further purpose and intent after she was transported to her home to renew sexual intercourse with her, he should be found guilty, was misleading, if not erroneous, as the jury might have understood therefrom that accused was guilty, however free his words and acts from persuasion or inducement, if he had the secret intention of profiting unlawfully by the girl's return home, especially as the verdict acquitting accused of the charges of transporting and aiding in transporting the girl, and convicting him of unlawful persuasion, was inconsistent and indicated that the jury were confused as to the law.

[Ed. Note.—For other cases, see Prostitution, Cent. Dig. § 5; Dec. Dig. ~~§~~5.]

In Error to the District Court of the United States for the Northern District of West Virginia, at Wheeling; Alston G. Dayton, Judge.

W. A. Welsch was convicted of an offense, and he brings error. Reversed and remanded.

S. O. Boyce and J. B. Handlan, both of Wheeling, W. Va., for plaintiff in error.

J. J. P. O'Brien, Asst. U. S. Atty., of Wheeling, W. Va. (Stuart W. Walker, U. S. Atty., of Martinsburg, W. Va., on the brief), for the United States.

Before KNAPP and WOODS, Circuit Judges, and WADDILL, District Judge.

KNAPP, Circuit Judge. The plaintiff in error (defendant below and herein so called) was indicted in October, 1913, for a violation of the White Slave Traffic Act. The indictment contains three counts, charging the defendant (1) with unlawfully transporting in interstate commerce, for the purposes named in the statute, and aiding in such transportation, a woman under the age of 18 years; (2) with unlawfully procuring, and aiding in procuring, a railroad ticket to be used for the transportation described in the first count; and (3) with unlawfully persuading and enticing the woman in question to go in interstate commerce from and to the places and for the purposes stated in the preceding counts.

At the trial in May, 1914, the defendant was found guilty as charged in the third count of the indictment, and not guilty on the other two counts; and the sentence thereupon imposed was imprisonment for three years in the penitentiary of West Virginia.

The principal question presented by the assignments of error is whether the evidence sustains the verdict of conviction. To appreciate this question, it is necessary to state with care and somewhat in detail the material facts to which the witnesses testified.

[1] The defendant is a locomotive engineer, unmarried, and about 35 years of age. For two or three years prior to July, 1912, he lived at McMechen, W. Va., making his home with a married brother, George Welsch, and his wife. Three doors away on the same street was the house of another brother, Michael H. Welsch, and his wife. Two other brothers, Martin E. Welsch and Charles Welsch, also lived in McMechen, apparently in the same neighborhood. Some time before the date mentioned, Michael Welsch and his wife, who were childless, had taken into their home two nieces, Mary L. Forbes and Bernice Forbes, whom they provided for and treated as their own children. Mary was about 14 when she went to live with this uncle and aunt; Bernice a few years younger. The mother of these girls, a sister of Mrs. Welsch, was dead, and their father, J. E. Forbes, who was a cousin of Mr. Welsch, appears to have lived part of the time at McMechen and part of the time at Barnesville, Ohio. At or near the latter place was the residence of J. T. Forbes, a brother of J. E. Forbes, and his wife, and likewise of their father, the grandfather of Mary and Bernice. At Barnesville also lived James P. Welsch, another brother of the defendant, and two brothers of Mrs. Welsch by

the name of Jackson. The defendant was on familiar terms with all his relatives, especially those living at McMechen, and visited the house of Michael Welsch almost daily.

Although he repeatedly and stoutly denied it, we must assume, under the verdict of the jury, that the defendant seduced Mary Forbes some time in the summer of 1910, when she was between 15 and 16 years of age. After this, according to her testimony, they cohabited nearly every day for some months, and frequently afterwards. On the 8th of July, 1912, after her school closed, Mary Forbes went to Barnesville to spend the vacation with her uncle and aunt, Mr. and Mrs. J. T. Forbes, expecting to stay with them until school opened again about the 1st of September. She traveled there on a pass issued the 20th of May, and was accompanied by her grandfather and a young lady and by the defendant. After their arrival in Barnesville, and on the evening of that day, she testifies that he had connection with her. Instead of remaining in Barnesville until September, she returned to McMechen on the morning of the 31st of July, under circumstances which will presently be related.

It appears that her uncle, Michael Welsch, had gone a few days before to Wilmington, Del., to attend the funeral of a relative. He had been suffering for some time from a serious ailment of the face or jaw, and on that account stopped in Baltimore on his return to consult a physician. He was advised that a surgical operation was necessary and accordingly went to a hospital for that purpose. He sent a postal card to inform his wife of this situation, and she made preparations at once to go to Baltimore and take with her Bernice and the defendant. This was on the 30th of July. As she wanted some one to care for the house during her absence, she requested the defendant, who was going to Barnesville that afternoon, to notify their relatives of the coming operation and also to attend some meeting or banquet of a fraternal organization, to ask Mary to return home, and, as she knew her pass had expired, gave him a dollar to give to her to pay her fare back on the cars. She did in fact return to McMechen the following morning, reaching the house just as her aunt and sister and the defendant were leaving for the train to Baltimore. They reached Baltimore some time after midnight, and learned either then or the next morning that the operation upon Mr. Welsch had already been performed and was successful. Thereupon, according to the testimony, the defendant went back that night to McMechen for the purpose of sending some money to his brother to pay his hospital bill and other expenses. He arrived in McMechen early the next morning, the 2d of August, and sent a money order for \$100 about noon of that day.

When Mary Forbes got home Wednesday morning, as above stated, there was some conversation in front of the house where she met her aunt and the others as they were leaving. She said in substance that although she had come home she had promised to go back to Barnesville for a picnic which was to take place on Saturday. Her aunt thereupon told her that she could go back that afternoon or remain until Saturday and return with some of the relatives who were going to the same picnic. She was also told that another pass had come for her which was on

the mantel in the house, and two or three of the persons there present testified that she went in and got it. Apparently her aunt had been uncertain whether she would come back as requested, and so had made other arrangements for having her house looked after. Some time that day, whether at once or later does not appear, Mary went to Martin Welsch's, where she stayed that night and also Thursday and Friday nights. The testimony describes the arrangement of the rooms in the house where Martin Welsch and his wife lived, and the room where Mary slept with a young girl, Agnes Schuyler, who was there visiting.

Again it must be assumed, under the verdict of the jury, however improbable her story of what occurred on Friday morning, especially in view of the testimony of Mrs. Martin Welsch and Agnes Schuyler, that the defendant, upon reaching McMechen early that morning, went almost at once to Martin Welsch's house, entered it through the kitchen, aroused Mary from sleep, and induced her with some difficulty to go over to Michael Welsch's house, where they had sexual intercourse.

On Saturday morning she went to Barnesville by train; the defendant and several others going with her. She remained there then until about the 1st of September, when she came back to McMechen and entered upon her last year at school. In May, 1913, she graduated from the high school, and then remained at McMechen until about the 1st of August, when she went to Barnesville, and there on the 19th of that month gave birth to an illegitimate child, of which she avers the defendant is the father. She says that during this year also the defendant had frequent intercourse with her. In this connection it may be noted that the testimony is positive and wholly uncontradicted that, up to a short time before she became a mother, none of the relatives had the slightest suspicion of anything improper between her and the defendant.

With this general outline of facts which were undisputed, or presumably found by the jury, we come to a more particular account of what occurred in connection with the return of Mary Forbes on the 31st of July, 1912, from Barnesville to McMechen. Bearing in mind that the defendant was acquitted of the charge of transporting her back to her home, or aiding in such transportation, and also acquitted of the charge of procuring a railroad ticket, or aiding in procuring the same, to be used by her in returning to McMechen, it remains to consider whether there was any evidence which warranted the jury in finding the defendant guilty of that persuasion and inducement which the act denounces and of which he was convicted. We do not see how anything more can be claimed by the government in this regard than the testimony of the girl herself. After telling of her seduction by the defendant two years before, of the illicit relations which thereafter continued between them, of the circumstances connected with her trip to Barnesville on the 8th of July, and the intercourse there on the evening of that date, she speaks of the occasion of his visit to her on the 30th of that month, and this is what she says, and all she says, regarding what took place at that time:

"Q. You say he came to see you there on the 30th? A. Yes, sir. Q. How long did he remain at that time? A. Well he drove down in a buggy, and he asked me to take a drive with him, and we drove down to Bailey's Mills; I don't know just how far it is below there. Q. Did he have intercourse with you at that time? A. No, sir. Q. Then you say you went back to McMechen from Barnesville the next day, the 31st? A. Yes, sir. Q. In what state is Barnesville? A. In Ohio. Q. Please tell the jury why you went back to McMechen. A. Mr. Welsch come out there in the buggy, and he asked me to take a drive with him, and I went with him, and he told me that my uncle was in the hospital in Baltimore, and my aunt wanted me to come down home. Q. You mean come back to McMechen? A. Yes, sir. Q. State whether or not he furnished you any means of transportation to go back to McMechen? A. I told him I had nothing to come back to McMechen on, and he said he would give me money, and he gave me a dollar. Q. What kind of a dollar? A. A silver dollar. Q. Did anybody else see him give you that dollar? A. No, sir; nobody saw him give it to me. Q. Did anybody see you have that dollar? A. Yes, sir; my aunt, Mrs. J. T. Forbes. Q. Then you went back to McMechen on the 31st day of July? A. Yes, sir."

It will be observed that she does not here say that she told him whether or not she would go home as her aunt had requested. However, on her redirect examination, after the cross-examination was concluded, the following question and answer are shown by the record:

"Q. Did you tell him what day you would come from Barnesville to McMechen after he gave you the dollar? A. If I remember right, I believe I told him if I could I would be down in the morning on the 8 o'clock train."

This covers everything testified to by her as to what was said or done by the defendant, or by herself, on that 30th of July, relative to her going home the following day, and no other witness gives a word of material evidence upon that subject. She does not say that he asked or advised her to return, or even intimated a desire that she should do so. Her own version of the occurrence excludes the idea of any wish or hope expressed by him that she would comply with her aunt's request, but represents him as simply communicating that request to her, and giving her the dollar which her aunt had sent by him to pay her fare back to McMechen. Nor were any circumstances shown in connection with his visit to Barnesville that afternoon which permit an inference, not justified by her own testimony, that he made the slightest effort to have her do what her aunt requested. For aught that appears, either directly or indirectly, his attitude in the matter was one of indifference. It is only repeating to say that according to her own testimony he attempted in no manner to influence her one way or the other.

Taking into account everything disclosed which bears upon her going back to McMechen, and her reason for returning, it is impossible for us to discover, in the words or conduct of defendant, anything resembling that persuasion and inducement which the act seems clearly to contemplate, and which appears to us essential to constitute a violation of the provision in question. The only reasonable deduction from the proofs is that the girl went home simply and solely because she felt that under the circumstances she ought to go there. The fact that the message from her aunt was brought to her by the man who had seduced her, and with whom she had immoral relations during the previous two years, cannot be said to have at all caused her

return, because it does not seem open to doubt that she would have gone home just the same if the information and request upon which she acted had come to her through another channel. In short, there was no perceptible relation of cause and effect between her return and the defendant's misconduct with her, whether before or after that event.

[2] In our judgment, it will not do to say, upon the facts here considered, and about which there is no dispute, that the act in question was violated because it may have occurred to him, or he may have had in mind, the probability or expectation of possessing her again in McMechen, unless her return to that place was brought about or influenced by his persuasion. To justify his conviction we think it was necessary to show that except for his expressed desire and inducement she would not have made the journey. It appears to us an untenable proposition, when this girl went back home for a legitimate and commendable reason, because of information coming to her which was of itself ample cause and explanation of her return, that the defendant can be held to have committed the offense of which he was found guilty merely because he might have had the secret desire or intention of using her there for the gratification of his passion, although he had nothing whatever to do with her going back which was not entirely suitable and proper.

[3] Moreover, it seems to us that the evidence negatives the idea that the defendant on the 30th of July, when he had the interview with Mary in Barnesville, had any particular intention respecting the resumption of their relations, or could then have anticipated any such occurrence as she testifies took place in her uncle's house on the morning of the 2d of August. The proof shows that arrangements were made on the 30th of July by Mrs. Welsch to go to Baltimore the next day and take Bernice and the defendant with her. It appears to have been the expectation of all of them that they would be detained in Baltimore a week or more, for they supposed then that Mr. Welsch was to be operated on the following day, Thursday, and did not know until they got to Baltimore that the operation had already been performed. Not only is this the uncontradicted testimony of the persons mentioned and others, but related circumstances were shown which give to their statements in this regard all the appearance of essential truthfulness. It is certainly reasonable to believe that the defendant fully expected when he left McMechen to stay in Baltimore for some days at least, and nothing was shown to indicate any understanding between him and Mary that he would come back so much sooner than he apparently intended. Her own version of what took place on the following Friday morning is quite inconsistent with the idea that she looked for his return at that time or for several days thereafter. Undoubtedly the gist of the alleged offense is the intention which underlies words and acts and gives them significance, but we think the strong preponderance of the evidence, even if it can be said there was anything to support a contrary inference, was against the notion that the defendant had any definite intention concerning intercourse with the girl which was connected with her return from Barnesville on the 31st of July.

[4] In its bearing upon the question here discussed, we are of opinion that the following instruction to the jury was misleading if not erroneous:

"The gist of the whole offense turns upon the intent of the party. At the same time, I feel compelled to instruct you that a person may have one or more intents and purposes in view when he does an act. One of them may be perfectly legitimate and perfectly lawful. At the same time he may have a further intent—that, from the circumstances growing out of the transaction, ultimately he may have an unlawful intent. For example, I instruct and charge you that if this defendant, Welsch, furnished the transportation to this girl to go from Barnesville to McMechen at the instance and solely at the instance of Mrs. Michael Welsch, because of the fact that her husband was to be operated on in Baltimore, and she wanted her to return there to McMechen, if he was simply the messenger to convey that and furnish the transportation, and had no other or further intent, then it is your clear duty to find this defendant not guilty; but if, at the same time that he had that purpose and intent, he had the further purpose and intent, after she was transported from Barnesville to McMechen, to renew sexual intercourse with her, if he had had it before, then it is your duty to find him guilty under this statute."

Even if it be granted that this is not incorrect as an abstract proposition, we are nevertheless convinced that its application to the facts and circumstances of this case was liable to give and probably did give the jury a misleading impression, in that it left them at liberty to find the defendant guilty, indeed made it their duty to find him guilty, if they believed that he had the secret intention of profiting unlawfully by the girl's return, although nothing whatever was said or done by him to persuade or influence her to do so. In other words, the jury were told in effect that his communication to her of her aunt's request and giving her the money furnished to pay car fare, however suitably and properly he may have performed his errand, and however free his words and acts from any persuasion or inducement, should not be permitted to save him from conviction if they believed that he then had in mind that her return would enable him at some indefinite time thereafter to avail himself of opportunities for further sexual intercourse with her. We think this gave the jury unwarranted latitude and involved a construction of the statute which carries it quite beyond its intended scope. And this view of the import of the instruction quoted is confirmed, in our opinion, by the inconsistent verdict which the jury rendered. Of course the fact that a verdict is altogether illogical is not of itself a reason for setting it aside, but the action of the jury in this instance, in acquitting the defendant of the charge of transporting the girl or in any way aiding in her transportation, while convicting him of the separate charge of unlawful persuasion, indicates to us that the minds of the jury were confused and given an erroneous impression of the law and their duty by the instruction in question. If we are right in our conception of this statute, that the prohibited offense was not committed unless the girl's return home was in some way brought about or influenced by the defendant's wrongful intent, unless, in other words, she would not have returned except for such intent, it follows that the jury should have been so instructed, and that the instruction actually given was misleading and prejudicial.

In further support of this conclusion it may be pointed out that the

instruction here considered, as it appears to have been understood and followed by the jury, gives to the statute a scope and meaning which has not been indicated or foreshadowed in any previous decision. We have endeavored to examine with care every reported case under this act, but are unable to find any ruling or intimation which sustains this verdict of conviction. In all those cases there was not only clear evidence of persuasion and enticement, but in every instance the destination of the person enticed was a place and environment which implied a purpose to engage in immoral practices. Thus, in the Athanasaw Case, 227 U. S. 326, 33 Sup. Ct. 285, 57 L. Ed. 528, Ann. Cas. 1913E, 911, the destination was a low-class theater, where the surroundings and associations were such as to furnish potent and almost irresistible temptation to a life of dishonor; in the Wilson Case, 232 U. S. 563, 34 Sup. Ct. 347, 58 L. Ed. 728, the destination was a notorious house of ill fame. In the case at bar there is nothing but speculation and conjecture upon which to rest a finding of that persuasion which the act denounces, while the interstate journey was to the girl's own home, a home of unquestioned respectability, in which she had lived for years and in which she continued to live for nearly or quite a year afterwards, with all the outward appearance of innocence and virtue.

It goes without saying that this statute should receive a construction which will make it efficient to accomplish its intended purpose, but it should not be so enlarged or extended by judicial interpretation as to take in transactions which, however reprehensible, cannot be reasonably regarded as within its aim and intent. The conduct of this defendant, which the verdict requires us to assume, in corrupting a school girl of 15, closely related to himself by blood and a member of his brother's family, was so treacherous and detestable as to class him with the meanest of criminals; but that gives no warrant for punishing him under the White Slave Traffic Act, unless his proven transgressions come fairly within its provisions.

In our opinion it has not been shown, and there was no evidence which would justify the jury in finding, that this unfortunate girl traveled from Barnesville to McMechen on the occasion in question because of any inducement of persuasion by the defendant, or because her return home was brought about by his unlawful intent and purpose respecting her; and we are therefore constrained to hold that the judgment of conviction must be reversed, and the case remanded for further proceedings not inconsistent with this opinion.

Reversed.

In re UNITED MOTOR CHICAGO CO.**HOWARD et al. v. CHICAGO TITLE & TRUST CO.**

(Circuit Court of Appeals, Seventh Circuit. January 5, 1915.)

No. 2146.

BANKRUPTCY ~~200~~—LANDLORD'S LIEN—ILLINOIS STATUTE.

Hurd's Rev. St. Ill. 1913, c. 80, §§ 16-23, 25, provide that a landlord may issue a distress warrant for rent in arrears, and by himself or agent levy the same on any personal property of the tenant found in the county; that the warrant shall then be immediately filed, with an inventory of the property distrained, with a justice of the peace or clerk of the court having jurisdiction, on which a summons shall issue for the tenant and be served as in cases of attachment; that the suit shall thereafter proceed as in attachment, and the warrant shall stand as a declaration and be amendable; that if defendant appears he may plead any set-off or other defense that would be proper in any form of action for rent; that if plaintiff succeeds he shall have a general judgment, enforceable by execution against any property of defendant, while if the latter establishes a set-off larger than plaintiff's claim he shall have judgment for the difference. Section 30 provides that property exempt by law from execution shall also be exempt from distress, except crops grown or growing on the demised premises; and section 31 gives the landlord a lien on such crops. *Held*, that the statute, as construed by the Supreme Court of the state, except as to crops, does not create a lien in favor of a landlord, nor give him any preference over other creditors, prior to levy of a distress warrant, and that the lien or preference so acquired is one "obtained through legal proceedings," within the meaning of Bankr. Act July 1, 1898, c. 541, § 67f, 30 Stat. 564 (Comp. St. 1913, § 9651), and when so obtained against an insolvent within four months prior to his bankruptcy under such section is avoided by the adjudication.

[Ed. Note.—For other cases, see *Bankruptcy*, Cent. Dig. §§ 289, 296-300, 306-316; Dec. Dig. ~~200~~.]

Appeal from the District Court of the United States for the Eastern Division of the Northern District of Illinois; Kenesaw M. Landis, Judge.

In the matter of the United Motor Chicago Company, bankrupt; the Chicago Title & Trust Company, Trustee. From an order denying a lien, Harold A. Howard and John C. Howard, trustees under the will of Sarah J. Howard, deceased, appeal. Affirmed.

This appeal is from an order of the District Court in bankruptcy proceedings denying the appellants' petition to establish a lien on funds in the hands of the trustee in bankruptcy. The claim of lien rests on unpaid rent, arising under a lease of premises occupied by the bankrupt in Chicago, Ill., for which personal property of the bankrupt had been seized by the appellants, as lessors, pursuant to section 16, c. 80, Revised Statutes of Illinois. Such levy was made five days prior to the commencement of proceedings in bankruptcy, but with notice of the fact that the bankrupt was then "insolvent and in contemplation of bankruptcy."

Norman K. Anderson, of Chicago, Ill., for appellants.

C. M. Cavenee, of Chicago, Ill., for appellee.

Before BAKER, SEAMAN, and KOHLSAAT, Circuit Judges.

SEAMAN, Circuit Judge. The rent for which the appellants claim a lien under their statutory proceedings for its enforcement accrued under a written lease between the appellants and the bankrupt, bearing date December 10, 1909, containing no provision for a lien in any form to secure payment of rentals, and thus the claim rests exclusively on the relation of landlord and tenant thereunder, as governed by the provisions of chapter 80, Revised Statutes of Illinois, for creation of the alleged lien for unpaid rent. It is obvious, therefore, that the ruling of this court in the bankruptcy case entitled *In re Robinson & Smith*, 154 Fed. 343, 83 C. C. A. 121, upholding a lien expressly created by written lease between the parties in Illinois, is inapplicable for support of the instant claim. Personal property of the bankrupt was seized by the appellants, pursuant to section 16 of the above-mentioned statute, five days prior to the commencement of bankruptcy proceedings and when the bankrupt was insolvent; and the issue upon the validity of the lien so acquired, as against proceeds in the hands of the trustee in bankruptcy arising from sale of such property, must ultimately hinge for solution on the effect of the Illinois statute for definition of the nature and inception of the lien.

These premises for the inquiry, however, are established by and under the present Bankruptcy Act: That all liens and preferences are recognized and preserved therein which are granted or acquired more than four months prior to bankruptcy, when free from taint and valid under the laws of the state; that the act preserves priority—section 64 (5)—for “debts owing to any person who by the laws of the states or the United States is entitled to priority”; that its policy likewise extends to the preservation of equitable liens and various statutory rights which are designated as inchoate or dormant liens, when their existence and rightfulness are established, and no provision of law is violated therein; and that—section 67f—“all levies, judgments, attachments, or other liens, obtained through legal proceedings against a person who is insolvent, at any time within four months prior to the filing of a petition in bankruptcy against him, shall be deemed null and void in case he is adjudged a bankrupt, and the property affected by the levy, judgment, attachment, or other lien shall be deemed wholly discharged and released from the same, and shall pass to the trustee as a part of the estate of the bankrupt,” etc.

For application of the foregoing proposition to levies made for enforcement of liens asserted in favor of a landlord against personal property of the bankrupt, as tenant, for unpaid rent, two leading decisions under the present Bankruptcy Act upholding liens so obtained are cited and strongly relied upon for reversal of the order of the District Court herein—*Henderson v. Mayer*, 225 U. S. 631, 32 Sup. Ct. 699, 56 L. Ed. 1233, and *In re West Side Paper Co.*, 162 Fed. 110, 89 C. C. A. 110, 15 Ann. Cas. 384 (C. C. A. 3d Circuit). The *Henderson* Case arose under and is necessarily governed by the statutory provisions of Georgia referred to in the opinion, and its doctrine, if applicable as well to the Illinois statute governing the present issue, would be decisive thereof in favor of the lien. In the *West Side Paper Co.* Case (cited with approval in the *Henderson* opinion) the issue arose under the Pennsylvania statute providing for the lien and

its enforcement, and the opinion clearly points out the effect of the provisions on which the ruling in favor of the lien is predicated. Thus the dual question is presented by this appeal: (1) Whether the doctrine settled alike by these rulings applies to the provisions of the Illinois statute; and, if not, (2) whether the instant statutory levy thereunder is within the meaning of section 67f of the Bankruptcy Act. The Illinois provisions plainly differ—as established by the authorities to be considered—both from those of Georgia and Pennsylvania and from the common-law rule, as reviewed in the above-mentioned opinions, and the force of distinctions therein appears from analysis of the definitions and rulings of each of these cases, as follows:

In *Henderson v. Mayer*, the opinion by Mr. Justice Lamar thus states in substance the effect of the Georgia statute: That it expressly (section 2787) "establishes liens in favor of landlords"; that it gives them (section 3124) "power to distrain for rent as soon as the same is due"; that it declares (section 2795) that they "shall have a general lien on the property of the tenant liable to levy and sale * * * which dates from the levy of the distress warrant to enforce the same"; that "prior to levy it covers no specific property, and attaches only to what is seized under the distress warrant," and in this respect "is the full equivalent of a common-law distress, the lien of which is held not to be discharged by section 67f"—citing *In re West Side Paper Co.*, *supra*. We understand the ruling thereupon, which upholds a lien obtained by levy of the statutory distress three days prior to bankruptcy proceedings, to rest on these propositions, as stated in substance in the opinion:

The Bankruptcy Act "was not intended to lessen rights which already existed, nor to defeat those inchoate liens given by statute, of which all creditors were bound to take notice. * * * As against them the landlord had from the beginning of the tenancy the right to a statutory lien, which had completely ripened and attached before the filing of the petition in bankruptcy. The priority arising from the levy of the distress warrant was not secured because Mayer had been first in a race of diligence, but was given by law because of the nature of the claim and the relation between himself as landlord and Burns as tenant. In issuing the distress warrant the justice acted ministerially. *Savage v. Oliver*, 110 Ga. 636 [36 S. E. 54]. The sheriff was not required to return it to any court, and no judicial hearing or action was necessary to authorize him to sell for the purpose of realizing funds with which to pay the rent. Such a lien was not created by a judgment nor 'obtained through legal proceedings.'"

In re West Side Paper Co., the opinion by Judge Gray, upholding a like levy under the Pennsylvania statute, aptly states the distinguishing feature of the statutory proceedings, as the groundwork of the decision, as follows:

"Distress for rent in arrear is one of the most ancient, as well as 'one of the most efficient, of the landlord's remedies for the collection of rent.' It is in most of our states, as it was at common law, a right *sui generis*, belonging to the landlord whenever the relation of landlord and tenant existed. It appears to have been abolished in a few of the states, and in most of them its exercise has been regulated by statute. Its essential characteristics are, however, for the most part the same as existed at common law. In Pennsylvania, as at common law, the distress warrant issues directly from the landlord to his bailiff, who, if he happens to be a constable, is no less the agent and

bailiff of the landlord than if he were a private person. The state law provides that, after the goods have been distrained, or levied upon, unless the same be replevied by the plaintiff within five days, the landlord may apply to the sheriff of the county, or to a constable, who is required to take proceedings for the sale of the said goods, or so much thereof as may be required for the satisfaction of the rent. In other respects, the right of the landlord remains for the most part as it was at common law. The right to distrain or levy upon all the goods upon the demised premises, whether those of the tenant or of a stranger, arises the moment the relation of landlord and tenant is established. It is a right in the nature of a lien, rather than a lien, until the goods are actually distrained under a landlord's warrant. It was originally in the nature of a property right in the redditus or return from the land reserved to the landlord. No suit or proceeding at law, whether in personam or in rem, in the proper sense of those words, was necessary for the assertion of this right. It belongs to that small category of personal rights, the assertion of which has always been independent of legal procedure; of which the right to abate a nuisance, under certain circumstances, and the right to distrain cattle damage feasant, are examples. While there is no specific lien, except on the goods actually distrained under the landlord's warrant, all the goods on the demised premises are to be considered as being under a quasi pledge, which gives superiority to the specific lien established by the distraint. Such a lien is in no sense 'obtained through legal proceedings.' Nor is it within the spirit of the bankrupt law in this regard, as evidenced by other provisions thereof, as well as that of section 67f, above quoted."

The Illinois statute, however, not only in its terms, but through a long line of interpretations by the Supreme Court of the state, is not open, as we believe, to like construction with that involved and upheld in either of the above-mentioned cases, so that there doctrine in reference to the effect of the Georgia and Pennsylvania statutes respectively for preservation of the lien cannot be deemed applicable for support of the levy in the case at bar. This exceptional character of the Illinois law is fundamental, as hereinafter pointed out, both under the express provisions of the statute and through the exclusion of the common-law rule for a landlord's lien in that state.

The statutory provisions, on which the claim of validity of the appellants' levy must rest, are contained in chapter 80 of the Revised Statutes of Illinois, entitled "Landlord and Tenant," and the following sections thereof (Hurd's Rev. Stat. 1913) are pertinent:

"Sec. 16. In all cases of distress for rent, the landlord, by himself, his agent or attorney, may seize for rent any personal property of his tenant that may be found in the county where such tenant shall reside; and in no case shall the property of any other person, although the same may be found on the premises, be liable to seizure for rent due from such tenant.

"Sec. 17. The person making such distress shall immediately file with some justice of the peace, if the amount of the claim is within his jurisdiction, or with the clerk of a court of record of competent jurisdiction, a copy of the distress warrant, together with an inventory of the property levied upon.

"Sec. 18. Upon the filing of such copy of distress warrant and inventory, the justice of the peace or clerk shall issue a summons against the party against whom the distress warrant shall have been issued, returnable as other summons.

"Sec. 19. When it shall appear, by affidavit filed in the court where such proceeding is pending, that the defendant is a nonresident or has departed from this state, or on due inquiry cannot be found, or is concealed within this state, and the affiant shall state the place of residence of said defendant, if known, and if not known, that upon diligent inquiry he has not been able to ascertain the same, notice may be given, if the suit is before a justice of

the peace, as in cases of attachment before justices, or if in a court of record, as in attachment cases in such courts.

"Sec. 20. The suit shall thereafter proceed in the same manner as in case of attachment before such court or justice of the peace: Provided, that it shall not be necessary for the plaintiff in any case to file a declaration, but the distress warrant shall stand for a declaration and shall be amendable, as other declarations: Provided, that no such amendment shall in any way affect any liabilities that may have accrued in the execution of such warrant.

"Sec. 21. The defendant may avail himself of any set-off or other defense which would have been proper if the suit had been for the rent in any form of action and with like effect.

"Sec. 22. If the plaintiff succeeds in his suit, judgment shall be given in his favor for the amount which shall appear to be due him.

"Sec. 23. When the defendant has been served with process or appears to the action, the judgment shall have the same force and effect as in suits commenced by summons, and execution may issue thereon, not only against the property distrained, but also against the other property of the defendant. But the property distrained, if the same has not been replevied or released from seizure, shall be first sold."

"Sec. 25. If the judgment is in favor of the defendant, he shall recover costs and have judgment for the return of the property distrained, unless the same has been replevied or released from such distress. And if a set-off is interposed, and it appears that a balance is due from the plaintiff to the defendant, judgment shall be rendered for the defendant for the amount thereof."

"Sec. 30. The same articles of personal property which are, by law, exempt from execution, except the crops grown or growing upon the demised premises, shall also be exempt from distress for rent.

"Sec. 31. Every landlord shall have a lien upon the crops grown or growing upon the demised premises for the rent thereof, whether the same is payable wholly or in part in money or specific articles of property or products of the premises, or labor, and also for the faithful performance of the terms of the lease. Such lien shall continue for the period of six months after the expiration of the term for which the premises were demised."

The above sections 16, 17, 18, 19, 30, and 31 are preserved from like sections in force in 1874 (mainly from R. S. 1845), but provisions of the other sections, governing the procedure through and upon levy of the distress warrant, were enacted in the Revised Statutes of 1874 and subsequent amendments, and may become decisive of the issue, whether such levy is within the inhibition of section 67f of the Bankruptcy Act. The amendatory provisions, however, are without such force if a lien or other form of security existed in Illinois in favor of the appellants (as landlord), either under the other provisions or under the general common-law rule, so that the primary inquiry must be to ascertain the status of the indebtedness for rent under the Illinois law—excepting as provided by section 31 for a lien upon growing crops, not involved in this controversy—and we assume for its consideration that these twofold tests are involved therein: Whether in effect the indebtedness was either (a) secured by a lien during the term of tenancy, or (b) otherwise secured as preferential over other creditors of the tenant. Upon the question thus stated, in the broadest possible aspect of preferential right, we believe the statute furnishes a conclusive answer, both through its terms and in well-settled judicial rulings on its effect.

In reference to the above-mentioned sections 16, 17, 18, and 30, which were in force from and after 1845, it is to be observed that

no lien is mentioned, nor security in any form beyond such right as may be inferred from their provision for "distress for rent"; that section 31 (of like origin) contains the only declaration of lien throughout the statute, and is applicable alone to "crops grown or growing" upon the premises; that the right provided to distrain by seizing "any personal property of his tenant that may be found in the county," confers no preference over other creditors beyond the mere method of levy, because property "exempt from execution" (section 30) is also "exempt from distress for rent"; and that like benefit is open to other creditors through attachment upon mesne process. On their face, therefore, we are impressed with no view which would sanction an affirmative answer to the foregoing question, in either of its phases. And the further enactments of 1874, governing the distress warrant and procedure thereunder appear to sanction the view, that both levy and procedure are entirely judicial in their nature, in no sense within the ministerial distress provisions involved, either at common law or under the statutes of Georgia and Pennsylvania, in the cases respectively above cited. The Illinois decisions, however, must be accepted as controlling for their interpretation and we believe them to be substantially harmonious in settlement thereof.

Upon the fundamental inquiries of statutory lien or security in any form and of nonapplicability in Illinois of the common-law rule respecting a landlord's lien and right of distress for rent, two of the more recent cases in the extended line of authorities may well be referred to for their pertinent summarization of the Illinois rule. In First Nat. Bank of Joliet v. Adam, 138 Ill. 483, 499, 28 N. E. 955, 957, both questions were directly involved, and it was expressly ruled:

"Independently of the provisions of the lease, a landlord in this state has no common-law lien upon the property of his tenant for rent; and he has no statutory lien except as to growing crops."

In Kellogg Newspaper Co. v. Peterson, 162 Ill. 158, 161, 44 N. E. 411, 412 (53 Am. St. Rep. 300) like questions were involved and the effect of the authorities is thus stated:

"A landlord can in this state, with the above exception" as to growing crops "only acquire a lien by commencing proceedings. Until he does so the tenant is as much the owner of his effects as any other person who owns property and owes debts. No dormant or secret lien of a landlord exists against a tenant's property until a seizure by distress or other proceedings."

For the above ruling in the first-mentioned case the opinion cites (with other precedents) Herron v. Gill, 112 Ill. 247; and that case is of special value for its mention of the groundwork of inapplicability of the common-law rule therein, namely:

"At common law, before the adoption of the statute of 8 Anne, c. 14, the landlord had no lien of any kind, but only a right to distrain" (citing authorities); that such statute is not in force in Illinois, "being of a date later than the fourth year of James I," adopted in that state as limiting the period from which the rules of common law shall be applicable therein; and that "if ever in force here as a part of the laws of Virginia, it has been repealed by implication, or superseded by subsequent acts of our Legislature intended as revision of the whole subject."

It also holds that:

"The present statute, by giving the landlord a lien only upon crops growing or grown, by implication excludes the idea of a lien on any other property of the tenant."

Citations from or review in this opinion of the line of earlier cases—up to and including Hadden v. Knickerbocker, 70 Ill. 677, 22 Am. Rep. 80, cited in the above cases, all arising prior to the Revision of 1874—declaratory of the rule that no statutory lien was conferred in Illinois, is deemed unnecessary, for these reasons: That sufficient review thereof appears in Morgan v. Campbell, 22 Wall. 381, 391, 22 L. Ed. 796, and that the ruling therein upon their effect is cited and reaffirmed in both of the above-mentioned opinions in the First Nat. Bank and Kellogg Newspaper Co. Cases. In Morgan v. Campbell the issue thereupon arose under the Bankruptcy Act of 1867, but the levy in question was "made after the institution of bankruptcy proceedings, but before the decree in bankruptcy was rendered," so that the present issue is not directly involved in the rulings. In the view above stated, however, the opinion is of undeniable force for its conclusion that the laws of Illinois (prior to 1874) did not confer "upon the landlord a statutory lien upon the personal property of the tenant in the county prior to the levy of the warrant," nor (in effect) any form of security over other creditors.

We believe, therefore, that the authorities concur in establishing the rule in Illinois, that no lien or preferential right exists therein in favor of the landlord upon which a valid preference may be predicated through the distress levy in question.

The further contention for reversal is, in substance, this: That the above-mentioned Henderson and West Side Paper Co. decisions are controlling for the proposition that such distress levy is not within the meaning of section 67f of the Bankruptcy Act, nor otherwise violative of the purposes of the act. While the distinctions above pointed out in those cases leave no room, as we believe, for application of their doctrine under the above-stated Illinois rule, the nature of the Illinois distress levy, as a judicial proceeding—and thus not within their rulings—is established both by the provisions of the present statute and through its judicial interpretation. The distress for rent involved in those cases, as clearly defined in the opinions, was of the common-law nature, "a right sui generis, belonging to the landlord whenever the relation of landlord and tenant existed," for which "no suit or proceeding at law, whether in personam or in rem, in the proper sense of those words, was necessary for the assertion of this right." For its exercise the landlord was the sole actor (through his own agents) for sale of the goods, if not replevied by the tenant, and thus it "belongs to that small category of personal rights, the assertion of which has always been independent of legal procedure." *In re West Paper Co.*, *supra*.

On the other hand, the Illinois provisions for enforcement of rent plainly constituted a suit, after the amendments of 1874, if not prior thereto. In Morgan v. Campbell, *supra*, the statutory distress warrant of the earlier provision is so defined, as "in the nature of mesne

process," if not "strictly speaking an attachment upon mesne process," under distinctions therein pointed out in the opinion. It cites approvingly the opinion of Judge Drummond, in *Re Joslyn*, 2 Biss. 235, Fed. Cas. No. 7,550, of like import, in a case directly involving such issue; and it is noteworthy, to say the least, that in the light of these decisions, the only changes in the statute thereafter adopted by the Legislature related to procedure under the warrant and all tended to establish the levy as institution of a suit. These rulings that the distress proceedings under the prior statute constitute a suit were clearly supported by the Illinois authorities—*Lapointe v. Stewart*, 16 Ill. 291; *Wade v. Halligan*, 16 Ill. 507—and the first-mentioned case in the opinion aptly points out the distinctions from the common-law distress upon which this statutory distress is held to be a judicial proceeding. Under the amendments of 1874, however, the issue directly arose in *Bartlett v. Sullivan*, 87 Ill. 219, whether the "proceeding by a distress warrant must be regarded as a suit for the collection of rent, in which the plaintiff has the right to invoke the aid" of the general Practice Act; and the opinion reviews the several amendatory provisions and holds that "this proceeding is made by the statute a suit, and it was brought upon a contract for payment of money" and is therefore within the Practice Act. No Illinois decision is called to our attention which tends to modify these interpretations, nor are we advised of any ground for doubting their applicability and force for settlement of the effect of the statutory provisions.

The contention that the distress warrant, as the mere personal act of the landlord, does not amount to judicial process, is beside the inquiry if assumed to be tenable, for the reason that the statute requires (section 17) that "the person making such distress shall immediately file with" the proper court "a copy of the distress warrant, together with an inventory of the property levied upon"; that upon filing thereof (section 18) the court "shall issue a summons against the" adverse party; that (section 20) "the suit shall thereafter proceed in the same manner as in case of attachment," and "the distress warrant shall stand for a declaration and shall be amendable as other declarations"; that (section 21) the defendant may interpose set-off or other defenses which would be available in a suit for rent in any other form of action; and that (section 23) "the judgment shall have the same force and effect as in suits commenced by summons, and execution may issue thereon"—through which alone the unpaid rent is to be realized, not through the landlord's sale under a *sui generis* right to be court and sheriff—"not only against the property distrained, but also against the other property of the defendant." Thus the levy under the warrant institutes the suit (for recovery of rent) within the well-recognized meaning of judicial process, and the fact that neither warrant nor levy are made by an officer of the court is without force. In that respect the authorization to proceed thus far, either personally or by personal agent, is merely equivalent to that of Wisconsin (and other so-called Code states), whereby the suit is instituted by a summons issued by the plaintiff, which may be served upon the adverse party with or without the intervention of an officer.

We are of opinion, therefore, that the appellants' lien claim in controversy rests exclusively on the statutory distress levy above defined; and that section 67f of the Bankruptcy Act bars recovery thereupon.

The order of the District Court accordingly is affirmed.

ERNST v. FIDELITY & DEPOSIT CO. OF MARYLAND et al.

(Circuit Court of Appeals, Second Circuit. January 12, 1915.)

No. 101.

1. INDEMNITY ~~12~~—DISCHARGE OF INDEMNITOR—CHANGE OF CONTRACT.

A railroad company agreed to pay a contractor for building a railroad \$120,000 in stock and \$300,000 in bonds, the contractor to furnish a surety bond. A surety company agreed to give such bond, provided the railroad bonds were deposited with it, to be delivered to the contractor in payment for work done, and provided, also, that \$50,000 be deposited with it as indemnity against loss. The railway company delivered to the contractor the stock and bonds and \$70,000, with an understanding that any bonds remaining after completion of the road were to be returned. The bonds were deposited with the surety company, and \$50,000 delivered to it as indemnity. A second contract between the contractor and the railway company, of which the surety had no notice, provided for payment to the contractor of the actual cost, plus a profit of 15 per cent., the sum of \$70,000 to be deducted, and such of the bonds as exceeded the balance of the construction cost returned. On the contractor's default the surety company completed the work under a contract with the surety for the railroad bonds and such of the stock as had not been disposed of by the contractor. *Held*, that the railroad company had no rights under the second agreement with the contractor against the surety company, and such contract did not change the first contract, but merely provided a means for determining the number of bonds returnable upon completion of the contract; and hence the indemnitor was not discharged, on the theory that the surety company contracted with the railroad company on different terms than the contract between the railroad company and the contractor.

[Ed. Note.—For other cases, see Indemnity, Cent. Dig. §§ 26, 27; Dec. Dig. ~~12~~.]

2. INDEMNITY ~~12~~—DISCHARGE OF INDEMNITOR—CHANGE OF CONTRACT.

That a contractor's surety, which completed a contract upon the contractor's default, executed an additional contract with the other party to the contract, did not discharge one that had agreed to indemnify it, if the contract made no material change prejudicial to the indemnitor.

[Ed. Note.—For other cases, see Indemnity, Cent. Dig. §§ 26, 27; Dec. Dig. ~~12~~.]

Appeal from the District Court of the United States for the Southern District of New York.

A. B. Boardman, of New York City, for appellants.

H. S. Dottenheim, of New York City, for appellee.

Before LACOMBE, COXE, and WARD, Circuit Judges.

WARD, Circuit Judge. This is an appeal from a decree of the District Court for the Southern District of New York for \$50,000 in favor of the plaintiff, as trustee in bankruptcy of the McCord Contracting

Company, against the defendant, the Fidelity & Deposit Company of Maryland.

[1] On or about December 8, 1911, the Elberton & Eastern Railway Company, a corporation of the state of Georgia, entered into a contract with Ira L. McCord, a citizen of the state of New York, whereby the latter agreed to build a single track railroad about 21 miles long from the city of Elberton to the town of Signall, both in the state of Georgia, and the railway company agreed to pay therefor \$420,000 in \$120,000 of its full-paid capital stock and \$300,000 of its first mortgage bonds, McCord to furnish the company with the bond of a surety company acceptable to it in the sum of \$80,000 for the faithful performance of the contract. This contract will be called Exhibit A.

The defendant, the Fidelity & Deposit Company, a corporation of the state of Maryland, agreed to give the bond, provided the \$300,000 of bonds were deposited with it, to be delivered to McCord in payment for work done at 85 per cent. of their par value upon certificates of the railway company's chief engineer, and provided, also, that \$50,000 in cash be deposited with it as an indemnity against any loss under the bond. On the same day, to carry out the negotiation, the railway company advanced \$70,000 in cash to McCord, and delivered to him \$120,000 of its capital stock and \$300,000 of its first mortgage bonds. He deposited the bonds with the surety company, accompanied by a letter directing it to deliver the same in the manner above stated, any bonds remaining after the completion of the road to be delivered to the railway company. This letter will be called Exhibit B. At the same time McCord paid \$50,000 to the McCord Contracting Company, which immediately deposited the same with the surety company as collateral, to be returned, so far as not needed as indemnity, to it, in accordance with the terms of an indemnity bond executed by it to the surety company. This bond will be called Exhibit C.

On the same day the surety company delivered its bond in the sum of \$80,000 to the railway company. This bond will be called Exhibit D.

On the same day McCord and the railway company entered into an agreement, of which the surety company had no notice, which ratified and confirmed Exhibit A, recited the advance by the railway company to McCord of \$70,000, and the deposit of the \$300,000 of bonds with the surety company as above stated. This contract will be called Exhibit E. Article 4 reads as follows:

"Fourth. It is mutually understood and agreed that, upon the completion of the undertaking of the contractor under the said construction contract, a statement shall be rendered by the contractor to the company, showing the actual cost of all labor, materials, and incidentals entering into and pertaining to the cost of the construction and equipment of the said part of the company's railroad, to which shall be added a profit to the contractor of fifteen per cent. (15%). The sum thus arrived at shall be taken as the actual cost of the construction and equipment of said part of said railway.

"From the cost of said part of said railway, arrived at in the manner stated, the contractor shall deduct the sum of seventy thousand dollars (\$70,000), and for the remainder of said cost the contractor shall retain a sufficient amount of the first mortgage bonds of the company which, at 85% of the par value thereof shall equal the said remainder of construction cost, and all other first mortgage bonds of the company shall be forthwith returned to the company, or delivered upon its order."

On or about April 5, 1912, after work to the amount of \$6,000 had been done, McCord notified the surety company that he was unable to continue and would abandon the work. April 16th the surety company exercised the option given it in Exhibit D to complete contract Exhibit A, and entered into an agreement with the railway company whereby the railway company waived any rights it might have as against the surety company under Exhibit E, which then for the first time came to its knowledge, and the surety company agreed to perform Exhibit A for the \$300,000 of bonds deposited with it and \$15,000 of the \$120,000 of capital stock of the railway company not disposed of by McCord. The \$50,000 received from the McCord Contracting Company as collateral was naturally not mentioned. This contract will be called Exhibit H. On or about April 30th an involuntary petition in bankruptcy was filed against the McCord Company, and it was adjudicated a bankrupt on or about June 19th.

The surety company thereupon did complete contract Exhibit A to the entire satisfaction of the railway company. March 24, 1913, the plaintiff, as trustee in bankruptcy, began this suit to recover the \$50,000 deposited from the surety company. The surety company having moved to dismiss the complaint, Judge Noyes held that it had made a new and different contract from Exhibit A in Exhibit H, and so had discharged the McCord Company, its indemnitor, and lost its right to retain the \$50,000 deposited with it. He said:

"As already shown, the real contract between the parties was that contained in Exhibit A, as changed by Exhibit E. This is recognized expressly in Exhibit H. Under this modified contract payment was—as we have seen—to be made on a cost and percentage basis. But under the agreement, Exhibit H, by which the defendant undertook to complete the work, the performance of Exhibit E was waived, and the defendant agreed to do the work for a fixed price, *viz.*, \$15,000 in stock and \$300,000 in bonds. This in my opinion was a new and independent contract. I am unable to reach any other conclusion than that Exhibit A was modified by Exhibit E, and that Exhibit E was none the less modified by Exhibit H, because the provisions of the last agreement approximated those of the first."

At final hearing Judge Mayer, following this view, entered judgment in favor of the complainant.

[2] In our opinion Exhibit E was not a departure from Exhibit A. On the contrary, it affirmed Exhibit A in express terms. The only doubt is raised by article 4, *supra*. But this we think was introduced to supply a means whereby to determine the number of bonds, if any, returnable upon completion of the contract to the railway company on account of the advance of \$70,000. In order to do so, it would be necessary to calculate the cost of building the railroad. While it is not apparent to us why 15 per cent. on the actual cost was to be added as profit to McCord in making this calculation, we are clear that the parties did not intend to alter Exhibit A, or to make the contract one of cost plus percentage, which might impose a liability upon the railroad far in excess of the consideration agreed upon in Exhibit A. The mere fact that the surety company executed an additional contract with the railway company does not discharge its indemnitor, if that contract made no material change prejudicial to it. *Smith v. Molleson*, 148 N. Y. 241, 42 N. E. 669; *St. Johns College v. Ætna Indemnity Co.*, 201

N. Y. 335, 94 N. E. 994. The surety company completed, to the satisfaction of the railway company, McCord's contract, Exhibit A, faithful performance of which it had guaranteed, for what was left of the consideration paid to him by the railway company, viz., \$15,000 of the \$120,000 of its full-paid capital stock and \$300,000 of its first mortgage bonds. When it delivered its bond, Exhibit D, it had no knowledge of the existence of Exhibit E. Although that came to its notice before it entered into the agreement, Exhibit H, the railway company had no possible right under Exhibit E against the surety company. While the mention of it in Exhibit H does create confusion, we think it in no respect altered Exhibit A, or the surety company's rights and duties under Exhibit D. If upon an accounting it shall appear that the \$50,000 deposited as indemnity, or any part of it, was not necessary for the protection of the surety company against loss, then it, or so much of it, must be returned to the trustee of the McCord Company, the bankrupt indemnitee.

The decree is reversed, with costs, and without prejudice to further proceedings in accordance with this opinion.

TANANA TRADING CO. v. NORTH AMERICAN TRADING & TRANSPORTATION CO.

(Circuit Court of Appeals, Ninth Circuit. February 8, 1915. On Cross-Appeal, March 18, 1915.)

No. 2172.

1. RELEASE ☞29—JOINT WRONGDOERS—EFFECT OF RELEASE OF ONE.

A corporation had seven directors, who owned all of its stock, a majority of which was owned by B. and S., president and vice president and treasurer, respectively, of the corporation. B., who was authorized to sell certain boats and barges, sold them to defendant on terms less favorable than those authorized. After the transfer the directors other than B. and S. disaffirmed the contract, and having, without consideration, issued enough stock to L., one of their number, to give them a majority, removed B. and S. from office, and brought suit against them and defendant for fraudulent conspiracy in the sale. B. and S. sued to restrain the issuance of the additional stock, and obtained an injunction. Subsequently all the directors entered into mutual agreements, whereby the suit of B. and S. was to be dismissed, and B. and L. given full charge of the corporation's business for the purpose of winding it up, and a resolution was passed releasing B. and S. from all causes of action and damages arising out of the sale. *Held*, that such release operated also to release defendant, as the dismissal of the suit by B. and S. was a sufficient consideration for the release, there was no reservation of any right of action against defendant, and the action of all of the directors was the action of the corporation itself.

[Ed. Note.—For other cases, see Release, Cent. Dig. §§ 64-70; Dec. Dig. ☞29.]

2. TORTS ☞22—ACTIONS—PARTIES—JOINT TORT-FEASORS.

In cases of joint torts, the injured person may sue one or all of the joint tort-feasors, or any number less than all.

[Ed. Note.—For other cases, see Torts, Cent. Dig. §§ 29, 31; Dec. Dig. ☞22.]

3. RELEASE ☞29—JOINT TORT-FEASORS.

Where there is but one injury by joint tort-feasors, there can be but one satisfaction.

[Ed. Note.—For other cases, see Release, Cent. Dig. §§ 64-70; Dec. Dig. ☞29.]

4. RELEASE ☞29—JOINT WRONGDOERS—EFFECT OF RELEASE OF ONE.

If an injured person executes a release to one joint tort-feasor, it bars an action against the others, as the cause of action is satisfied and no longer exists.

[Ed. Note.—For other cases, see Release, Cent. Dig. §§ 64-70; Dec. Dig. ☞29.]

5. CORPORATIONS ☞417—ACTS OF DIRECTORS AS ACTS OF CORPORATION.

The action of all of the directors of a corporation, owning all of its stock, in releasing two of them from liability for an alleged fraudulent conspiracy with a third party in connection with a sale of property to such third party, was the action of the corporation itself, especially where the corporation was conducted as a joint venture of the stockholders, without regular meetings of the directors.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1670-1675; Dec. Dig. ☞417.]

In Error to and Cross-Appeal from the District Court of the United States for the Fourth Division of the Territory of Alaska.

Action by the Tanana Trading Company against the North American Trading & Transportation Company. Judgment for defendant, and plaintiff brings error. Affirmed.

At the close of the trial in this action the court below directed a verdict in favor of the defendant in error. That ruling is the only error which is assigned. The parties to the action will be named herein plaintiff and defendant, as they were in the court below. The plaintiff was engaged in carrying on a trading business on the Yukon and Tanana rivers. In connection therewith it owned the steamer Ella, two barges, the Independence and the Dakota, and a nine-sixteenths interest in the steamer J. P. Light. From the owner of the remaining interest therein it held a lease. The plaintiff had seven directors, Bain, Struthers, Dwyer, Bishoprick, Cameron, Livingston, and Blair, and the directors owned all of the stock which had been issued. Bain and Struthers owned the majority thereof. Bain was the president, and Struthers was the vice president and treasurer. The plaintiff had been unsuccessful in its business, and desired to dispose of its vessels and barges. In July, 1906, Bain, who was at Seattle, entered into an agreement with Isom, the general manager of the defendant, for the sale of the boats and barges. The plaintiff was to receive therefor \$60,000, and was to have from the defendant a special freight rate for the remainder of that season at \$60 per ton, the usual rate being \$70. The directors had previously agreed to sell, and had authorized Bain to sell the boats and barges upon the payment of \$57,000 and an agreement for a freight rate of \$30 per ton. The sale was made and the vessels were transferred to the defendant by Struthers as vice president and Dwyer as secretary. Subsequently all the directors except Bain and Struthers disaffirmed the contract, on the ground that it had been made in violation of the terms upon which the property was to have been sold, and that Bain and Struthers had concealed from them knowledge of the provision for the payment of \$60 per ton freight rate. In the latter part of October, 1906, 325 additional shares of capital stock were issued to Livingston, although he paid nothing therefor. The minority, claiming to have attained thereby a majority of the stock, removed Bain and Struthers from office and directed that a suit be brought against the defendant and Bain and Struthers, charging the three defendants with fraudulent conspiracy in the sale. That suit was brought on December 1, 1906. At the same time Bain and Struthers brought a suit against the other directors to declare void and restrain the issuance of the additional stock to Livingston.

About January 1st all the directors met and entered into mutual agreements, the effect of which was that the corporation be wound up, that the suit of Bain and Struthers against the other members be dismissed, and that Bain and Livingston be left in full charge of the business of the corporation for the purpose of winding it up. A resolution was passed releasing the defendants Bain and Struthers from any and all causes of action and damages arising out of the matters and things set forth in the complaint in the action in which they were defendants. Thereafter in its amended complaint the plaintiff omitted Bain and Struthers as parties defendant. The amended complaint, on which the cause was tried, alleges that the defendants conspired together to cheat, deceive, and defraud the plaintiff, and made the sale of the boats in violation of the authority which had been given to Bain and Struthers, and that they fraudulently and wrongfully represented to the plaintiff that the sale had been made according to the terms of its resolutions. The plaintiff prayed for a judgment against the defendant for the sum of \$169,000 as damages, and for the return of the boats and barges, or for the value thereof in the sum of \$65,000, in case possession could not be had.

Louis K. Pratt and A. R. Heilig, both of Fairbanks, Alaska, and John F. Cassell, of San Francisco, Cal., for plaintiff in error.

Frederick Bausman, R. P. Oldham, and R. C. Goodale, all of Seattle, Wash., and Chas. J. Heggerty, of San Francisco, Cal., and McGowan & Clark, of Fairbanks, Alaska, for defendant in error.

Before GILBERT and ROSS, Circuit Judges, and WOLVERTON, District Judge.

GILBERT, Circuit Judge (after stating the facts as above). [1] The court below sustained the defendant's motion for an instructed verdict on two grounds: First, that the plaintiff was estopped from bringing the action by its acts and conduct after it had discovered the nature of the transactions between Bain and Isom; and, second, that by releasing Bain and Struthers the plaintiff released the defendant. We do not deem it necessary to discuss the first ground on which the motion was granted, as, in our opinion, the second ground was sufficient to support the ruling of the court. There was a consideration for the release of Bain and Struthers. They had brought a suit against the corporation and the other directors to declare invalid and to enjoin the issuance of the 325 shares of stock to Livingston. In that suit they had obtained an injunction. What it may have been worth in money to the corporation or to the other stockholders to obtain a dismissal of that suit in view of its interference with corporate action and its embarrassment to the other directors and the officers who ostensibly controlled the action of the corporation, does not appear; but we may assume that the consideration was equivalent to full satisfaction for all the wrong done by the acts of those two directors. We have this situation, then: Here were these other directors, who were also stockholders of the corporation, who had made a settlement with the two officers whom they charged with conspiracy to defraud them, and to whose acts all the loss which had been sustained by reason of the sale to the defendant was attributable, accepting full satisfaction from them, and restoring them to their confidential relations to the corporation and to the other stockholders, restoring Bain, the principal actor in the alleged fraudulent transactions to the office of president, and adding to that office the office of treasurer, and in-

trusting to him the winding up of the corporation and the collection and distribution of its assets, and yet it is claimed that the corporation could, after doing all these things, go on and prosecute its demands against the defendant on account of its participation in the alleged fraud.

[2-4] In cases of joint torts, the injured person may sue one, or any number less than all, of the joint tort-feasors, or may sue all; and, where there is but one injury, there can be but one satisfaction. If the injured person executes a release to one of the joint tort-feasors, it operates to bar an action against the others, for the reason that the cause of action is satisfied and no longer exists. The law applicable to the case is stated in a well-considered opinion by Judge McClain in *Farmers' Sav. Bank v. Aldrich*, 153 Iowa, 144, 133 N. W. 383, where it is said:

"The weight of authority in this country seems to be unquestionably in support of the rule that an adjustment with one wrongdoer, and his release from all further liability, discharges all the joint wrongdoers, even though there is a reserved intention, either expressed or implied, to look to the other wrongdoers for further damages or compensation."

See, also, *The St. Cuthbert* (D. C.) 157 Fed. 799; *Gore v. Henrotin*, 165 Ill. App. 222; *Seither v. Philad. Traction Co.*, 125 Pa. 397, 17 Atl. 338, 4 L. R. A. 54, 11 Am. St. Rep. 905; *Rogers v. Cox*, 66 N. J. Law, 432, 50 Atl. 143; *Abb v. Northern Pacific Ry. Co.*, 28 Wash. 428, 68 Pac. 954, 58 L. R. A. 293, 92 Am. St. Rep. 864; *McBride v. Scott*, 132 Mich. 176, 93 N. W. 243, 61 L. R. A. 445, 102 Am. St. Rep. 416, 1 Ann. Cas. 61; *Wallner v. Chicago Traction Co.*, 245 Ill. 148, 91 N. E. 1053; *Sircey v. Rees' Sons*, 155 N. C. 296, 71 S. E. 310; *L. & N. R. R. Co. v. Allen*, 67 Fla. 257, 65 South. 8; *Casey v. Auburn Tel. Co.*, 155 App. Div. 66, 139 N. Y. Supp. 579.

The plaintiff relies on *Gilbert v. Finch*, 173 N. Y. 455, 66 N. E. 133, 61 L. R. A. 807, 93 Am. St. Rep. 623. That was a case in which certain directors of a corporation had diverted funds thereof. It was held that an instrument purporting to be a release by a receiver of the corporation to persons who had conspired with the defaulting directors, executed upon a compromise by which the receiver obtained a portion of the funds demanded, but providing in terms that the execution of the release should not affect any cause of action of the receiver against any person not named therein, did not, under the law of New York, relieve the directors of the company from liability when sued by the receiver to recover the balance of the diverted moneys. It was held, further, that the fact that prior to the appointment of the receiver mutual releases had been exchanged between the insurance company and one of the directors would not relieve the other directors from liability, and that the board of directors could not waste the funds of the corporation and then relieve themselves from liability by a release granted by themselves to a codirector.

[5] That case differs in its facts from the case at bar. The release given by the receiver in that case contained the express reservation of the right to recover the remainder of the money. In the present case we have an absolute release, containing no reservations, made by all the other directors, who represented all the stock, and purport-

ing to be made by the corporation itself, and, although it was not signed by the corporation, it was signed by all the other directors and stockholders, Livingston, Bishoprick, Blair, Cameron, and Dwyer. The action of all the directors in such a case should be taken to be the action of the corporation itself. Especially should this be held in the case of a corporation conducted as this was, as a joint venture of the stockholders and without regular meetings of the directors. A corporation will not be dealt with strictly as a legal entity in a case where the notion of legal entity is relied upon to justify wrong, "contrary to the real truth and substance of things." Linn & Lane Timber Co. v. United States, 196 Fed. 593, 116 C. C. A. 267; McCaskill v. United States, 216 U. S. 504, 30 Sup. Ct. 386, 54 L. Ed. 590; In re Rieger (D. C.) 157 Fed. 609; United States v. Milwaukee Refrigerator Transit Co. (C. C.) 142 Fed. 247; Exploration Mercantile Co. v. Pacific H. & S. Co., 177 Fed. 825, 829, 101 C. C. A. 39; Smith v. Moore, 199 Fed. 689, 118 C. C. A. 127.

The judgment is affirmed.

On Cross-Appeal.

In this case there was a cross-appeal by the North American Transportation & Trading Company from the judgment of the court below, wherein that court affirmed the decision of the clerk of the court below in taxing costs in favor of said appellant upon objections made to such cost bill by the plaintiff in said action. The transcript contains no statement of evidence in regard to the costs, the allowance of which was based on the facts in the case, and not on questions of law. It follows that there is before this court nothing upon which the court is authorized to act.

The judgment of the court below upon the cost bill is affirmed.

POWER V. FUHRMAN.

In re FUHRMAN.

(Circuit Court of Appeals, Ninth Circuit. February 15, 1915.)

No. 2344.

1. BANKRUPTCY ~~136~~—ORDERING DELIVERY OF PROPERTY TO TRUSTEE—ENFORCEMENT BY CONTEMPT PROCEEDINGS.

The duty of a bankrupt and his wife to comply with a judgment requiring them to pay over to the trustee money which the referee and District Judge found to be in their possession and under their control was enforceable by contempt proceedings.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 233, 235; Dec. Dig. ~~136~~.]

2. BANKRUPTCY ~~136~~—ORDERING DELIVERY OF PROPERTY TO TRUSTEE—ENFORCEMENT BY CONTEMPT PROCEEDINGS.

In contempt proceedings for the enforcement of a judgment requiring a bankrupt and his wife to pay to the trustee money found to be in their possession and under their control, the burden was upon the wife to prove her claimed inability to comply with the judgment.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 233, 235; Dec. Dig. ~~136~~.]

3. BANKRUPTCY ~~cc~~136—ORDERING DELIVERY OF PROPERTY TO TRUSTEE—ENFORCEMENT BY CONTEMPT PROCEEDINGS.

In such proceeding, the burden resting upon the wife to show her inability to comply with such judgment was not discharged or satisfied by a finding that the court was unable to find that the wife had the ability to turn over such money, or any part thereof, to the trustee.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 233, 235; Dec. Dig. ~~cc~~136.]

4. BANKRUPTCY ~~cc~~136—ORDERING DELIVERY OF PROPERTY TO TRUSTEE—ENFORCEMENT BY CONTEMPT PROCEEDINGS.

In such proceeding, the question of the wife's ability to turn such money over to the trustee as ordered was one of fact, and the court erred in holding that under the community property laws of the state, giving the husband complete possession, control, and management of community property, a presumption arose, as a matter of law, that the wife no longer had in her possession or control the money so ordered paid.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 233, 235; Dec. Dig. ~~cc~~136.]

Petition to Revise, in Matter of Law, a Certain Order of the District Court of the United States for the Northern Division of the Western District of Washington; Edward E. Cushman, Judge.

In the matter of Daniel Fuhrman, bankrupt. On a petition by J. B. Power, as trustee in bankruptcy of Daniel Fuhrman, bankrupt, to revise, in matter of law, a certain order discharging a prior order requiring Ray Fuhrman to show cause why she should not be punished for contempt. Reversed and remanded.

Leopold M. Stern, of Seattle, Wash., for petitioner.

E. H. Guie, of Seattle, Wash., for respondent.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

ROSS, Circuit Judge. This is a petition to revise the judgment of the court below discharging an order theretofore made requiring the respondent, Ray Fuhrman, the wife of the bankrupt, to show cause why she should not be attached and punished for contempt in failing to comply with a previous order of the court.

The record shows that on the petition of the trustee of the estate of the bankrupt, Daniel Fuhrman, an order was made requiring him and his wife to turn over to the petitioning trustee the sum of \$9,000, found to be in their possession and under their control and to belong to the estate of the bankrupt. To that petition the bankrupt and his wife had filed a verified answer, and the issues thereby raised came on regularly for hearing before the referee in bankruptcy, who, upon the testimony introduced, made the following findings and order:

"That the undersigned referee is satisfied beyond all reasonable doubt that at the time of the filing of said petition by the trustee, and ever since, and at the present time, said Daniel Fuhrman, bankrupt, and his wife, Ray Fuhrman, had, and now have, in their possession and under their control, the sum of \$9,000 in cash, belonging to said estate in bankruptcy, which sum the said Daniel Fuhrman, bankrupt, and Ray Fuhrman, his wife, have concealed and withheld, and now conceal and withhold, from the trustee herein. And the undersigned referee in bankruptcy is satisfied beyond all reasonable doubt of the present ability of the said Daniel Fuhrman, bankrupt, and his said wife, Ray Fuhrman, to comply with the order of this court herein made. Where-

fore it is ordered that the said Daniel Fuhrman, bankrupt, and Ray Fuhrman, his wife, within 10 days after the date of the entry of this order, pay to J. B. Power, the trustee in bankruptcy herein, the sum of \$9,000 cash, belonging to the said estate in bankruptcy, and which this court finds to be now in their possession and under their control."

A review of that action of the referee by the court below resulted in this action of the court:

"Upon the hearing before the referee, a large amount of testimony was submitted to the referee upon the questions involved and determined. A review or analysis of the evidence is not deemed necessary. There was ample testimony to support the findings and order of the referee, and the same are in all things confirmed, save that, as the time allowed the bankrupts in the referee's order to comply therewith has expired, the order is now modified to read 'on or before July 31st,' instead of 'within 10 days after the date of the entry of this order,' as recited in the order reviewed."

A judgment in accordance with that opinion and order was entered by the court below July 23, 1913, and on the same day was served on both the bankrupt and his wife by the marshal. No review of that judgment having been sought by either the bankrupt or his wife, and not having been complied with, the matter was again brought to the attention of the court, and resulted in the following findings of fact, conclusions of law, and order of the court below, which the trustee of the estate seeks to have here revised:

"This proceeding having come on for hearing upon the order of the court requiring Daniel Fuhrman and Ray Fuhrman, his wife, and each of them, to personally appear before the Honorable Edward E. Cushman, judge of said court, on the 29th day of August, 1913, at the hour of 10 o'clock in the forenoon of said day, and show cause why they should not be attached and punished for contempt in having willfully and contumeliously disobeyed the order of this court dated July 23, 1913, directing the said Daniel Fuhrman and Ray Fuhrman to pay over to said trustee in bankruptcy the sum of \$9,000, and the court, after considering the petition of the trustee in bankruptcy, the evidence offered in support thereof, the joint and several answers and supplemental answers made on oath by each of said respondents, the argument of counsel for the respective parties, and being fully advised in the premises, now on this 17th day of October, 1913, makes the following findings of fact and conclusions of law:

"Findings of Fact.

"I. That at all the times referred to in said proceedings in bankruptcy herein, and for many years prior thereto, and at the time of the receipt of said sum of \$9,000, at all times referred to in said bankruptcy proceedings, the said Daniel Fuhrman and Ray Fuhrman were and still are husband and wife, and living together as such, in the city of Seattle, state of Washington.

"II. That the said Daniel Fuhrman has been convicted of the crime and offense of concealing from his trustee in bankruptcy, while a bankrupt, the said sum of \$9,000, and other property, in that certain cause entitled 'United States of America v. Daniel Fuhrman, No. 2545,' in the District Court of the United States for the Western District of Washington, Northern Division, and that judgment of conviction has been entered by the court, and the said Daniel Fuhrman is now an inmate of the United States penitentiary, serving under said sentence, at McNeal Island, in the state of Washington.

"III. That on the 2d day of April, 1913, the said Daniel Fuhrman and Ray Fuhrman, his wife, were indicted by grand jurors duly selected and sworn for the Northern division of the Western district of Washington; they having, as it is alleged, *therefore* [theretofore] unlawfully conspired to conceal said sum of \$9,000 from the trustee in bankruptcy, while said Daniel Fuhrman was a bankrupt, which said indictment is still pending and undisposed of against said respondents, and each of them.

"IV. That thereafter, on the 12th day of September, 1913, the grand jurors of the United States of America, duly selected, impaneled, sworn, and charged to inquire within and for the Northern division of the Western district of Washington, duly indicted the said Daniel Fuhrman, Ray Fuhrman, and one Jake Gross for conspiring, among other things, to conceal the said sum of \$9,000 from the trustee in bankruptcy, while he, the said Daniel Fuhrman, was a bankrupt, which said indictment is still pending and undisposed of as to each of said respondents.

"V. That the court is unable to find from the evidence introduced that the respondent, Ray Fuhrman, has the present ability, or had the ability at the time of said contempt hearing, to turn over said sum of money, or any part thereof.

"VI. That at the time the said sum of \$9,000 was taken and received by the said Daniel Fuhrman, which was before the said Daniel Fuhrman was adjudged a bankrupt herein, the said Daniel Fuhrman was the husband of said Ray Fuhrman, and said parties were then and there living together as husband and wife in the city of Seattle, county of King, and state of Washington, and said sum of \$9,000 was the property of the said community composed of said Daniel Fuhrman and Ray Fuhrman under the laws of the state of Washington, and said Daniel Fuhrman under the laws of said state had the right to exercise complete possession, control, and management of said sum of \$9,000.

"Conclusions of Law.

"The court finds as conclusions of law:

"I. That under and by virtue of the community property law of the state of Washington the presumption arises, as a matter of law, that the said Ray Fuhrman no longer has in her possession or control the said sum of \$9,000, or any part thereof; but that the same has passed into the legal and actual possession and legal and actual control of said Daniel Fuhrman, her husband, and that this presumption of law is sufficient to overcome the presumption of fact, arising from the finding of the referee and court that respondent, Ray Fuhrman, had, with her husband, one of the respondents, Daniel Fuhrman, received and withheld said \$9,000 from the trustee in bankruptcy.

"II. That an order should be made herein discharging said order to show cause as to the said Ray Fuhrman, and without prejudice to the right of the trustee to renew said application hereafter.

"Done in open court this 17th day of October, 1913.

"Edward E. Cushman, Judge."

Accordingly, on the 3d day of November, 1913, this order was entered by the court below:

"It is ordered that the said order requiring the said Ray Fuhrman to show cause why she should not be attached and punished for contempt be and the same is hereby discharged as to her, without prejudice to the right of the trustee to renew said application hereafter. On motion of the trustee, it is further ordered that the said proceeding, in so far as the same concerns Daniel Fuhrman, be and same hereby is continued indefinitely, to be hereafter brought on for hearing and determination at the option of the said trustee. To so much of this order as concerns Ray Fuhrman, the trustee duly excepted. Exception allowed."

Various extensions of time for the filing of a brief on behalf of the respondent having been granted, the matter is just now for determination.

[1-4] The judgment of the court below, confirming the findings and order of the referee, not having been appealed from or otherwise questioned by either of the respondents established that at the date of its entry—July 23, 1913—the money in question was in the actual possession and under the control of the said bankrupt and his said wife, and was then being by them fraudulently concealed and withheld from the

creditors of the bankrupt. That judgment placed the legal duty upon both husband and wife of complying with its requirements. That such compliance is enforceable by proceedings in contempt is beyond question. Equally plain is it that the burden is upon the delinquent, who claims to be incapable of making the delivery decreed, to prove the fact of such inability. That burden is not discharged or satisfied either by the fifth finding of fact made by the court below:

"That the court is unable to find from the evidence introduced that the respondent, Ray Fuhrman, has the present ability, or had the ability at the time of said contempt hearing, to turn over said sum of money or any part thereof"

—or by the conclusion of law drawn by the court below:

"That under and by virtue of the community property law of the state of Washington the presumption arises, as a matter of law, that the said Ray Fuhrman no longer has in her possession or control the said sum of \$9,000, or any part thereof, but that the same has passed into the legal and actual possession and legal and actual control of said Daniel Fuhrman, her husband."

The question is one of fact, and not of presumption of law.

The judgment of the court below, entered November 3, 1913, is reversed, with costs in favor of petitioner and against respondent, and the cause remanded for further proceedings in accordance with the views above expressed.

MERCHANTS' & INSURERS' REPORTING CO. et al. v. JONES et al.
(two cases).

(Circuit Court of Appeals, Ninth Circuit. February 15, 1915.)

Nos. 2476, 2477.

CORPORATIONS ~~621~~—DISSOLUTION—APPOINTMENT OF RECEIVER.

In a suit by a California holding corporation against an Arizona insurance company, all of whose stock, with the exception of a few shares issued to individuals to qualify them as directors and officers, was held by the holding corporation, for the dissolution of the insurance company and for the appointment of its officers as trustees to wind up its affairs, in which the insurance company joined in the prayer for a dissolution, the allegations of an intervening complaint by a stockholder in the holding corporation and an accompanying affidavit as to the wasting of the assets and mismanagement of the affairs of the insurance company by its officers, the failure to collect its assets and to enforce notes of the president and other stockholders of the holding corporation turned over to the insurance company in payment for stock, and the disregard of an order of the Arizona Corporation Commission relating to the affairs of the insurance company, *held* to justify the appointment of a disinterested person as receiver of the insurance company's property.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2461-2469, 2471; Dec. Dig. ~~621~~.

Dissolution of foreign corporation, see note to Republican Mountain Silver Mines v. Brown, 7 C. C. A. 421.]

Appeal from the District Court of the United States for the District of Arizona; William A. Sawtelle, Judge.

Two actions, by the Merchants' & Insurers' Reporting Company, against the Bankers' Fire Insurance Company and the Phoenix Fire

Underwriters, respectively, in each of which actions F. A. Jones intervened. From an order in the first action appointing Lysander Cassidy as receiver of the Bankers' Fire Insurance Company, complainant and the Bankers' Fire Insurance Company appeal; and from an order in the second action appointing Lysander Cassidy as receiver of the Phoenix Fire Underwriters, the complainant and the Phoenix Fire Underwriters appeal. Affirmed.

Marshall Stimson, of Los Angeles, Cal., and F. C. Struckmeyer, Jos. S. Jenckes, Richard E. Sloan, William M. Seabury, and James Westervelt, all of Phoenix, Ariz., for appellants.

Stoneman & Ling, of Phoenix, Ariz., and Henry W. Nisbet, of Los Angeles, Cal., for appellees.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

ROSS, Circuit Judge. These cases were submitted together under stipulation of the respective parties that the records in the two cases be used interchangeably, including the affidavits contained in case No. 2477, and that the judgment of this court therein apply to and be determinative of the companion case.

The suits were brought on the 25th day of October, 1913, by the Merchants' & Insurers' Reporting Company, a corporation organized under the laws of the state of California for the purpose of acquiring, holding, and owning stock in other corporations, which thereafter, according to the averments of the bills and the admission of the parties, acquired all of the stock of two fire insurance corporations that were organized under the laws of Arizona, namely, the Bankers' Fire Insurance Company and the Phoenix Fire Underwriters except four shares issued in the names of the persons who served as directors and officers of those corporations, of which shares the complainant, according to the allegations of the bills, was the equitable owner, one of which persons had, prior to the institution of the suits, ceased to be a director or officer, leaving three directors only, namely, Leroy H. Civille, C. S. Feldman, and Harry A. Davis, each of whom was a director of both of the insurance companies; Civille being president, Feldman vice president, and Davis secretary and treasurer, respectively, of each of them. The object of the bills was the winding up of the affairs of the insurance companies and the dissolution of them, and to that end they prayed, among other things, that Civille, Feldman, and Davis be appointed trustees of the properties of the defendant corporations for the purposes stated. On the same day that the bills were filed, the defendant corporations, respectively, appeared and answered, admitting all of the allegations of the bills, and also asking that they be dissolved.

When the cases came on for hearing the court took them under advisement, and thereafter one Jones, who was a holder of stock in the complainant corporation, asked leave to intervene in the suits and show cause why the prayers of the bills should not be granted, which leave was given by the court over the objections interposed on behalf of the complainant, and accordingly Jones filed a complaint in intervention in each suit—that against the Bankers' Fire Insurance Company alleging, among other things:

"That since on or about the month of February, 1913, the defendant company has not been engaged in the conduct of any business except the collection of certain outstanding notes, and that large amounts of money have been expended by the officers of said defendant in salaries of the officers and traveling expenses. That ever since said month of February, 1913, the officers of said defendant have been drawing large sums of money from the treasury of said company for alleged services, and have paid out large sums of money to attorneys as attorney's fees, and that said officers of said company have expended large sums of money for alleged traveling expenses, all of which said allowances and amounts have been expended from the funds of defendant company, and to the great loss of the stockholders of said company. That at a stockholders' meeting of said complainant, a majority of the stockholders, or over two-thirds of the issued stock of the complainant, was represented, and at said time it was agreed by said stockholders and the officers-elect that a dissolution of the defendant should immediately take place, and that the officers elected at said time pledged themselves and agreed with the stockholders that a dissolution of said defendant should be speedily obtained and that the assets of said company should be distributed to those entitled by law to receive the same. That since said time the officers of said defendant company have wasted the assets of said company, and have grossly mismanaged the affairs of said company to a large extent, and have wholly failed to take any steps toward a dissolution of said defendant before the institution of this action, and on or about the 15th day of September, 1913, various stockholders of the complainant herein filed a petition with the Arizona Corporation Commission, at the city of Phoenix, setting forth certain facts, and praying that said Corporation Commission take such steps and make such order or orders as would prevent the carrying on of any further business of the defendant, and would take such other steps as would be beneficial to your petitioners herein, and to the complainant and the defendant, and that the reason for the filing of said petition was to secure the aid and assistance of the Arizona Corporation Commission in taking such steps as would cause the dissolution of the defendant, and the carrying out of the agreement and understanding entered into by and between the officers of the defendant and its stockholders and prevent any further dissipation of the funds of said defendant, which said petition is hereto attached and made a part hereof, and prayed to be read in connection with this petition.

"That notwithstanding the fact that the officers elected at said stockholders' meeting held in the month of July, 1913, as aforesaid, agreed to and with the stockholders that immediate steps would be taken by them to secure the dissolution of the defendant herein, and the winding up of its affairs in an orderly and proper manner, no action was taken by said officers until the institution of this action, when for the purpose of carrying out a plan and scheme for further dissipating and expending the resources of the defendant, and thus depriving your petitioners and all of the other stockholders of the complainant and the owners of the assets of the defendant, the bill in equity herein was filed, and in said bill certain officers of said company, and the ones who have been instrumental and engaged in the dissipation of the funds and assets of the defendant, are asked to be by this honorable court constituted trustees for the purpose only of a dissolution of said defendant and the winding up of its said affairs.

"Wherefore, your petitioners pray that inasmuch as it appears from the record in this cause that both complainant and defendant desire that an order of dissolution be made dissolving the defendant and providing for the distribution of its assets to those lawfully entitled thereto, that they may be joined as defendants in this action, that a receiver be appointed by this honorable court under the rules thereof, who shall be empowered to speedily and without great expense directed to properly administer the affairs of the defendant, to the end that its assets shall not be further dissipated, and the same be distributed to those lawfully entitled thereto; and your petitioner will ever pray."

In support of the petition in intervention, the intervener filed the following affidavit:

"P. A. Parker, being duly sworn, says: That the complainant corporation was incorporated in the fore part of the year 1906, under the laws of the

state of California, with a capital stock of \$500,000, divided into 50,000 shares, of a par value of \$10 each. That at or about the time of its incorporation of said stock there was sold an amount thereof, for cash, to various and divers persons and individuals, in excess of \$100,000. That there was also a large amount of said stock sold to various and divers persons and individuals for which they did not pay cash, but gave their promissory five-year notes therefor, which would mature, and which did mature, on the 1st day of July, 1913. Said promissory notes totaled to the amount of approximately \$250,000, and in each individual case, where the stock was issued to the purchaser thereof, the same was not delivered to him, but was attached to said promissory note as collateral security therefor.

"That thereafter, on the 3d day of December, 1909, the defendant, to wit, Bankers' Fire Insurance Company, was incorporated under the laws of the then territory of Arizona, with a capital stock of \$200,000, divided into 2,000 shares, of a par value of \$100 each. That almost immediately thereafter the said complainant became the owner of all of the stock of the said defendant corporation, to wit, said 2,000 shares of stock, with the exception of 3 shares thereof, which were held by other persons to complete the board of directors of said defendant corporation. That in payment therefor the said complainant paid the sum of \$5,000 in cash, and turned over to said defendant corporation of said promissory notes \$195,000 thereof, which said notes thereupon became an asset of the defendant corporation.

"That the said defendant corporation, prior to the month of February, 1913, did a large insurance business, and issued policies of insurance to the stockholders of the complainant corporation and to others in excess of the sum of \$600,000.

"That the only object and purpose of incorporation of complainant was to become a holding company of insurance companies, and that the purpose of the incorporation of the defendant was to engage in the fire insurance business. That about two years prior to the 1st day of July, 1913, one Robert Mitchell, an attorney at law of the city of Los Angeles, California, began an attack against the integrity and honor of both the complainant corporation and the defendant corporation, and persistently during said period of two years kept up said attack. That he wrote scurrilous articles concerning both of said corporations, in which he repeatedly referred to said corporations as fake corporations and fraudulent corporations, and that said Mitchell, in connection with other persons, succeeded in sowing such discord among the stockholders of complainant corporation that at the annual meeting of the stockholders of complainant corporation, held in the city of Los Angeles, California, in the month of July, 1913, a new board of directors were elected, who were at said meeting pledged to take immediate steps to bring about the dissolution of the defendant corporation, as well as the Phoenix Fire Underwriters, another insurance company incorporated under the laws of Arizona on the said 3d day of December, 1909, with a capital of \$100,000, and of which said last corporation the complainant herein, soon after its incorporation, became the owner of all the stock thereof, with the exception of three shares which were held by other persons to fill the board of directors thereof. That notwithstanding the pledge upon which said new board of directors was elected, no steps whatsoever were taken to bring about the dissolution of the said two corporations, other than in the manner as appears of record herein. That no steps have ever been taken by the officers of the said Bankers' Fire Insurance Company, nor the Phoenix Fire Underwriters, at the instigation or solicitation of complainant, to liquidate the affairs of the said two corporations, by collecting in its assets or otherwise. That no attempt has been made by the officers of the defendant corporation to enforce payment of any of the promissory notes given as hereinabove stated, and turned over to the defendant corporation in payment for its stock as hereinbefore stated, notwithstanding the fact that said notes matured on the 1st day of July, 1913. That four of the board of directors of the complainant corporation, to wit, John Casteria, who is president of said corporation, Marshall Stimson, H. Y. Stanley, and F. W. Boynton, all stockholders of said corporation, gave their promissory notes for their stock, and have never paid any cash therefor, nor have they ever paid their said promissory notes, or any part thereof.

"That on the 21st day of October, 1913, the president of complainant cor-

poration, to wit, John Casteria, and the president of the Bankers' Fire Insurance Company, to wit, Leroy H. Civille, and the said Phoenix Fire Underwriters, by its president, Leroy H. Civille, made and entered into a contract with the Fireman's Fund Insurance Company whereby all of the insurance business held by the said two Arizona corporations, to wit, Bankers' Fire Insurance Company and the Phoenix Fire Underwriters, was rewritten with and taken over by the said Fireman's Fund Insurance Company at a great expense and loss to the said Arizona corporations, a copy of which said agreement is attached hereto, marked 'Exhibit A,' and made a part of this affidavit. That said agreement was entered into notwithstanding the fact that the Arizona Corporation Commission had made its order relating to the affairs of the defendant Bankers' Fire Insurance Company, a copy of which said order is attached hereto, marked 'Exhibit B,' and made a part of this affidavit, and that a similar order, at the same time, was made by said corporation commission concerning the affairs of the Phoenix Fire Underwriters. That the said Phoenix Fire Underwriters and the said defendant, the Bankers' Fire Insurance Company, are not now and have not been, since the month of February, 1913, engaged in any business whatsoever. That they have no income from any source, and that notwithstanding large amounts of money have been expended by the officers of said defendant corporation, as well as the Phoenix Fire Underwriters, in salaries of the officers and traveling expenses. That ever since the said month of February, 1913, the officers of said defendant corporation have been drawing large sums of money from the treasury of said company for alleged services, and have paid out large sums of money to attorneys for attorney's fees, and that said officers of said company have expended large sums of money for alleged traveling expenses, all of which said allowance and amounts have been expended from the funds of defendant company and the Phoenix Fire Underwriters, to the great loss of the stockholders of complainant corporation. That stockholders of complainant corporation, although demand therefor has been made, have been refused access to the books of the defendant corporation, as well as the Phoenix Fire Underwriters, notwithstanding the fact that the complainant corporation is the owner of all of the stock of said two insurance corporations. That affiant is informed, and upon such information believes, that all of the directors of both the defendant corporation and the said Phoenix Fire Underwriters, each of which is composed of three directors, have resigned, with the exception of Leroy H. Civille, and that the said Leroy H. Civille is the sole and remaining director, or other officer, of either of said two insurance companies. That the said Leroy H. Civille is absolutely under the dominion and control and direction of the board of directors of complainant corporation. That since the election of the board of directors at the annual stockholders' meeting in July, 1913, at which a board of directors was elected as hereinbefore stated, the law firm of Mitchell & Slosson, the hereinbefore said Robert Mitchell being a member of said firm, together with said Marshall Stimson, have been the attorneys for the complainant corporation, the defendant corporation, and the said Phoenix Fire Underwriters, and that the said Mitchell, notwithstanding his attack upon the said corporation as hereinbefore stated, is now directing, as legal adviser, the affairs of said corporations.

"That the defendant Bankers' Fire Insurance Company and the complainant corporation, by its officers and its said attorneys, are now engaged in maintaining costly and unnecessary suits in the courts of California, and that the assets of said corporation are being consumed in such litigation. That notwithstanding the fact that the defendant Bankers' Fire Insurance Company and the Phoenix Fire Underwriters were incorporated under the laws of Arizona, with the principal place of business of both of said corporations at Phoenix, Arizona, neither of said corporations maintain an office in Arizona. That the said Leroy H. Civille, president of both of said Arizona corporations, is a citizen of Los Angeles, California, and in conjunction with John Casteria, president of complainant corporation, is conducting and carrying on a general insurance and real estate business in the said city of Los Angeles. And affiant further says that the assets of both of said Arizona corporations, as well as all of the books and papers of both of said corporations, are in the city of Los Angeles, and without the state of Arizona.

"Affiant modifies this affidavit to the following extent: That one suit at law was instituted shortly after the election of the new board of directors in July, 1913, upon a promissory note given by one J. E. Youtz, in payment of stock in complainant corporation to the value of \$11,000, and that as a preliminary to said suit the stock of said J. E. Youtz in complainant corporation, given as collateral security for said note, was sold as a pledge without notice of sale, for the sum of one cent a share, notwithstanding the fact that said stock was worth \$10 a share, and that the said stock was bid in at the sale in the presence of said Leroy H. Civille, representing the defendant corporation; that the said stock was sold to a man named Wiser, and was not bid in for the benefit of defendant corporation."

The specific and material facts stated in the affidavit of Parker are uncontradicted, and in view of them it requires no argument to show that the court below was entirely right in appointing a disinterested person receiver of the properties of the defendant corporations.

In each case the orders appealed from are affirmed.

TAYLOR v. WELLS FARGO & CO.[†]

(Circuit Court of Appeals, Fifth Circuit. February 8, 1915.)

No. 2716.

MASTER AND SERVANT ~~CO~~100 — LIABILITY FOR INJURIES — EXEMPTION CONTRACTS—VALIDITY.

Where an express messenger was an employé of a railroad company over whose line he was employed to run, a contract whereby he agreed that the railroad company should not be liable for injuries sustained by him was void under Employers' Liability Act (April 22, 1908, c. 149, § 5, 35 Stat. 65 [Comp. St. 1913, § 8661]) providing that any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by that act, shall to that extent be void.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 166-170; Dec. Dig. ~~CO~~100.]

Pardee, Circuit Judge, dissenting.

Appeal from the District Court of the United States for the Northern District of Mississippi; Henry C. Niles, Judge.

Suit by Wells Fargo & Co. against Oscar G. Taylor. Decree for plaintiff, and defendant appeals. Reversed and remanded.

Thomas Fite Paine, of Aberdeen, Miss., for appellant.

E. O. Sykes, of Aberdeen, Miss., for appellee.

Before PARDEE and WALKER, Circuit Judges, and MAXEY, District Judge.

WALKER, Circuit Judge. The relief sought by the bill in this case, filed by the appellee, Wells Fargo & Co., a corporation, is an injunction against the enforcement by the appellant of a judgment for damages recovered by him against the St. Louis & San Francisco Railroad Company on account of personal injuries sustained by him in the wreck of a train of that company upon which he was riding while acting as an employé of the appellee. This relief was sought as a means of enfor-

~~CO~~ For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes
† Rehearing denied April 5, 1915.

ing the specific performance of a contract whereby the appellant, an employé of the appellee, agreed that neither the appellee nor the railroad company upon the line of which he was employed to travel and run as an express messenger of the appellee should under any circumstances, or in any case whatever, be liable for any injuries occurring to him while so traveling, whether such injuries arose from any fault, carelessness, or negligence, gross or otherwise, on the part of said railroad company. The averments of the bill do not, further than is above indicated, show what ground of liability was asserted by the appellant in the suit brought by him against the railroad company, the enforcement of the judgment in which is sought to be enjoined.

The averments of the bill not showing the contrary, it may be presumed that the business in which the appellant was employed and engaged at the time he was injured was one of interstate commerce, carried on by means of the train which was wrecked; that the appellant at that time was, and was acting as, an employé of the railroad company as well as one of the express company, the contract between those two companies, a copy of which is made an exhibit to the bill, expressly providing for the express company having the right to employ the agents and servants of the railroad company as its own agents, when such employment will not, in the opinion of the railroad company, be to the interruption or detriment of its business; and that he was injured in such circumstances as, if the contract relied on does not prevent this result, would render the railroad company liable to him in damages under the Employers' Liability Statute. 35 Stat. 65, Fed. Stat. Ann. (Supp. 1909) 584. It hardly requires a resort to the rule that the averments of a pleading are to be construed most strongly against the pleader to construe the bill as an application to the court so to specifically enforce the contract between the appellant and the appellee as to deny to the former the right of enforcing a judgment recovered by him against a railroad company engaged in interstate commerce for damages from his suffering injury while he was employed by such carrier in such commerce. For such a carrier to be able, by the device of permitting one of its employés to be employed also by an express company, which makes with him such a contract as the one set out in the bill, to exempt itself from the liability created by the statute just referred to, would be in plain contravention of the explicit provision of section 5 of that statute.

There is no suggestion in the bill that there was any occasion for a resort to a court of equity for the enforcement of the specific performance of the contract relied on other than the institution by the appellee of his suit against the railroad company and his recovery of judgment therein. If the liability asserted in that suit was one of the railroad company to its own employé which was provided for by the federal Employers' Liability Act, as, in the absence of averments to the contrary, it may be presumed to have been, the appellee was not entitled to have its contract with the appellant given the effect of exempting the defendant in that judgment from the liability thereby adjudged. The bill, in failing to show that the liability so adjudged was not such a one, failed to show that the appellee was entitled to the relief prayed, whether or not the contract set out was effective to exempt the appellee

and the railroad company from a liability for a personal injury suffered by one who was an employé of the former but not of the latter. It follows that the bill is to be regarded as one which fails to show that the plaintiff therein is entitled to the relief prayed, and that the court was in error in the decree rendered thereon.

That decree is reversed, and the cause is remanded; the costs to be taxed against the appellee.

MAXEY, District Judge (concurring). The writer concurs in the conclusion announced in the foregoing opinion of Judge WALKER, but he bases his concurrence on grounds different from those stated. It is admitted by the appellee that, at the time the appellant sustained his injuries, it was engaged in interstate and intrastate commerce as a common carrier. Under the law as it existed prior to the enactment in 1908 of the Employers' Liability Act (35 Stat. c. 149, p. 65), the contracts, relied upon by the appellee in this case, were valid and binding upon the appellant. *Railway Company v. Voigt*, 176 U. S. 498, 20 Sup. Ct. 385, 44 L. Ed. 560. The Voigt Case was decided in 1900, and eight years later the Congress passed the statute referred to, the fifth section of which reads as follows:

"That any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this act, shall to that extent be void."

Referring to section 5, it was said by the Supreme Court, in *Railroad Company v. Schubert*, 224 U. S. at page 611, 32 Sup. Ct. at page 591, 56 L. Ed. 911, that:

"The evident purpose of Congress was to enlarge the scope of the section and to make it more comprehensive, by a generic rather than a specific description. It thus brings within its purview any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this act."

If, then, the appellant was an employé of the St. Louis & San Francisco Railroad Company, or if the railroad company was an agent of the appellee, in either event, in the judgment of the writer, the contracts were absolutely void, and the railroad company became liable to the appellant for injuries received by him through the wrecking of its train. That, under the contracts, the appellant was an employé of the railroad company, is an inference deducible from the Voigt Case; the language of the court being as follows:

"The relation of an express messenger to the transportation company, in cases like the present one, seems to us to more nearly resemble that of an employé than that of a passenger. His position is one created by an agreement between the express company and the railroad company, adjusting the terms of a joint business—the transportation and delivery of express matter. His duties of personal control and custody of the goods and packages, if not performed by an express messenger, would have to be performed by one in the immediate service of the railroad company. And, of course, if his position was that of a common employé of both companies, he could not recover for injuries caused, as would appear to have been the present case, by the negligence of fellow servants."

Not only so, but the writer is further of the opinion that the railroad company was an agent of the appellee (*Bank of Kentucky v.*

Adams Express Company, 93 U. S. at page 187, 23 L. Ed. 872; Hooper v. Wells Fargo & Co., 27 Cal. 11, 85 Am. Dec. 211), and hence the contracts between these two carriers are embraced within the denunciation of section 5 of the statute.

The contracts being void, so far as they affected the right of the appellant to recover of the railroad company for injuries received by him in the wrecking of the train, it follows that the bill of the appellee is without equity, and should be dismissed.

PARDEE, Circuit Judge (dissenting). While the railroad company was a common carrier engaged in interstate commerce, appellee Taylor was not employed by the railroad company in such commerce within the purview and meaning of the Employers' Liability Act, which act it is contended with much plausibility and force applies only to railroad companies which are engaged in interstate commerce. (See appellee's brief, pages 11 and 12, and authorities cited.) Taylor was not an employé of the railroad company in any reasonable sense, for the railroad company neither hired him, paid him, used him, nor controlled him. He was a person that the railroad company contracted with the express company to carry free on its trains as an agent or employé of the express company, and he had no duties of any kind to perform in connection with the operation or maintenance of the railroad company's cars, trains, nor track.

Quoad the railroad company, the express company was a shipper engaged at times in interstate commerce, and when so engaged was a carrier in interstate commerce, and Taylor, as agent, represented the express company, and was no more an employé of the railroad company than was his principal. In *Baltimore & Ohio Ry. v. Voigt*, 176 U. S. 498, 20 Sup. Ct. 385, 44 L. Ed. 560, the question was whether Voigt, the express company's agent, was a passenger for hire, and the court, in giving reasons for answering in the negative, did intimate, but did not decide, that Voigt, under the facts in that case, resembled more an employé than a passenger of the railway company; and the opinion also suggests that between the railway company and the express company a sort of partnership relation was created, from which might result that the express company's agent was also a sort of employé of the railway company.

In the case the question whether the express company's agent was an employé of the railroad company was an abstract one, only argued, and not decided; here, under a different state of facts, the question is concrete, and is whether, under the facts shown by the transcript, the express company's agent is an employé of the railroad company within the purview of the Employers' Liability Act; and it is this question, which is one of far-reaching importance, that I think might well be certified.

NOTE.—See *Robinson v. Baltimore & O. R. Co.*, 236 U. S. —, 35 Sup. Ct. 491, 59 L. Ed. —, decided April 5, 1915.

MEYER et al. v. UNITED STATES.

(Circuit Court of Appeals, Ninth Circuit. February 15, 1915. Rehearing Denied March 18, 1915.)

No. 2413.

1. CRIMINAL LAW ~~150~~—LIMITATION OF PROSECUTIONS—COMMENCEMENT OF PERIOD OF LIMITATION—CONSPIRACIES.

Limitations did not run against a prosecution for conspiring to defraud the United States by selling zinc to it at an exorbitant price, and securing the approval of the account and the issuance and delivery of a paymaster's check therefor, until credit was given on the check by the bank of deposit of public funds against which the paymaster was authorized to check, or until it was paid by the national treasury, as a conspiracy attended with appropriate acts and conditions may consist of a continuing offense, and while the mere continuance of the result of a crime does not continue the crime, the acts of the conspirators in negotiating the check and securing its payment by the government were designed and calculated to effect the object and purposes of the scheme to defraud, and were not acts of private arrangement between the conspirators; the government not being defrauded while it was still within its power, by stopping payment, to prevent the misappropriation of the public funds.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 274, 275; Dec. Dig. ~~150~~.]

2. CRIMINAL LAW ~~338~~—EVIDENCE—CONSPIRACY TO DEFRAUD.

On a trial for conspiracy to defraud the United States by selling zinc to it at an exorbitant price, evidence as to sales of zinc by the conspirators to various purchasers for some time prior to the sale to the government was admissible to show the market value of the zinc, and that it was sold to the government at an exorbitant figure.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 752, 753, 755, 756, 787, 788, 801, 855; Dec. Dig. ~~338~~.]

In Error to the District Court of the United States for the Northern Division of the Western District of Washington; Jeremiah Neterer, Judge.

Edwin F. Meyer and another were convicted of conspiracy to defraud the United States, and they bring error. Affirmed.

Edwin F. Meyer was principal clerk in the office of the general storekeeper of the United States navy yard, Puget Sound, Wash., with authority to make requisitions for the purchase of supplies for the use of the navy yard. J. A. Kettlewell was chief clerk to the navy pay officer in the United States navy pay office at Seattle, Wash., with authority to send out proposals for the purchase of supplies to different merchants, to examine bids, and to recommend to the paymaster of the United States navy pay office the acceptance or rejection of such bids. Emar Goldberg was manager of the Seattle branch of the Great Western Smelting & Refining Company, of San Francisco, Cal. W. A. Corder was manager of W. A. Corder Company, and E. Silverstone was engaged in conducting a hotel in Seattle.

The indictment alleges in effect that Meyer and Kettlewell (setting out in great detail their official positions and the duties and authority attached thereto), on or about the 2d day of June, 1908, conspired and confederated with Goldberg, Corder, and Silverstone, and certain other evil-disposed persons, "to defraud the United States of divers large sums of money" by means of a certain fraudulent scheme, which scheme was first devised and concocted and put in operation about the 1st day of April, 1908, and was continuously in process of execution until and including the 2d day of June, 1908. The scheme is then set out with much detail, and in brief consisted in Meyer's causing to be issued a requisition for the purchase for the use of the navy

yard of a large quantity of zinc, rolled sheet, boiler plates, causing to be placed in said requisition, as the estimated cost price of said zinc, a price in excess of the fair market value thereof, and causing to be fixed by such requisition so short a time for the delivery of the zinc that none but merchants of Seattle and vicinity could comply therewith, and, when said requisition should in due course reach the United States navy pay office, in Kettlewell's sending out proposals to a list of merchants in Seattle and vicinity, to contain the names of no merchants other than the Great Western Smelting & Refining Company and W. A. Corder Company, both of Seattle, and Fowler Metal Company, of San Francisco, except such as Kettlewell knew would be unable to furnish the zinc, or to bid for such contract, and in so arranging that competition would be simulated only, and not real, and that an exorbitant price should be bid and accepted, so that an unreasonable profit would be realized in furnishing the commodity, which unreasonable profit so fraudulently realized the said Meyer, Kettlewell, and Goldberg, acting as agent of the Great Western Smelting & Refining Company, Corder, acting for W. A. Corder Company, and E. Silverstone, "should appropriate and convert to their own use," and which should be divided among them in some proportion to the grand jury unknown.

The indictment further charges that several overt acts were committed in furtherance of the conspiracy, as follows: That on or about June 1, 1908, Kettlewell delivered to Goldberg a certain check of date May 26, 1908, for \$7,417.09, signed by "Robert H. Orr, Paymaster U. S. N." and on the same date delivered the same check to Silverstone; that on or about the 1st day of June, 1908, Goldberg, having the check in his possession, wrote on the back thereof the words: "Pay to the order of E. Silverstone. Fowler Metal Co., Per E. S. Fowler, Treas. & Mgr."—and caused it to be delivered to E. Silverstone; that on or about the same date E. Silverstone, having the check in his possession, wrote upon the back thereof an indorsement, "E. Silverstone," and deposited it with the First National Bank to his credit; that on or about the same date Silverstone issued his check on the First National Bank, payable to the order of the Great Western Smelting & Refining Company, in the sum of \$7,417.09, and delivered the same to Goldberg; that on or about the 1st day of June, 1908, Goldberg, having the last-named check in his possession, indorsed the name of the company thereon, and deposited the same to his credit in the National Bank of Commerce of Seattle.

Evidence was adduced at the trial tending to establish the conspiracy alleged, at least as to Meyer, Goldberg, and Kettlewell. The check designed to be delivered in payment for the zinc bears date May 26, 1908, and is in form: "Pay to Fowler Metal Co., or order, seventy-four hundred and seventeen $\frac{09}{100}$ dollars (\$7,417.09)," signed "Robert H. Orr, Paymaster U. S. N." It was delivered at the office of the paymaster by Kettlewell, to either Silverstone or Goldberg (there is some dispute as to which), on the day it bears date, probably in the evening, after banking hours. Goldberg, at least, soon came into possession of the check, and held it until Monday, June 1st. He proposed to Silverstone that the latter take the check and give to the Great Western Smelting & Refining Company his personal check in exchange, which was agreed to. The check was then by Goldberg indorsed with the words: "Pay to the order of E. Silverstone. Fowler Metal Company." Silverstone, not having funds in bank to his credit to check against to the amount of the government check, insisted that he should have the latter check deposited to his credit before delivering his own check to Goldberg; so he took the government check to his bank (The First National) in Seattle, and attempted to make the deposit, writing out the deposit slip for the bank. When the teller observed the indorsement by the Metal Company, however, he refused to accept it, for the reason that such indorsement did not show by whom it was made. Thereupon Silverstone returned with the check to Goldberg, who added to the indorsement the words "Per E. S. Fowler, Treas. & Mgr." On returning to the bank, Silverstone obtained the desired credit, and then gave his personal check to Goldberg for a like amount. The Metal Company check was cleared on the Seattle National Bank on June 2, 1908, and by that bank charged against Paymaster Orr, or the funds there on deposit in his name as paymaster.

It should be further explained that Fowler Metal Company was supposed to be a subsidiary company of the Great Western Smelting & Refining Company, that Silverstone put in the bid for the Metal Company at Goldberg's request, and that company was the successful bidder; hence the reason for issuing the check payable to it. The Great Western Smelting & Refining Company, however, as Goldberg explains, "was entitled to every cent of that money. The Great Western Smelting & Refining Company had delivered the entire amount of the material called for on that proposal."

Goldberg insists that Kettlewell delivered the check to him, and not to Silverstone, and relates that Kettlewell threatened to hold it up at first, and did not give it to him until after he (Goldberg) had gone out and consulted his counsel. As explanatory as to why he did not dispose of the check sooner, he says: "After we got the check, I was afraid that perhaps they would reject the zinc, or do something. I didn't know what authority he had, or what he could possibly do; so I took the check down to the office, and we kept it there for four or five days, thinking perhaps that the paymaster or some one might call us up and tell us to return the check, or tell us the material was going to be rejected or returned, or something; and it was on Friday or Saturday that finally I decided we would deposit the check, and I called up Mr. Silverstone and asked him to come down town so he could deposit the check, because he had originally made out the bid." And he further explained, on cross-examination: "Because I was holding the check to see if anything would be done by the navy pay office about stopping payment or anything of that kind."

Kerr & McCord, Morris & Shipley, and Andrew R. Black, all of Seattle, Wash., and Bert Schlesinger, of San Francisco, Cal., for plaintiffs in error.

Clay Allen, U. S. Atty., and Winter S. Martin, Asst. U. S. Atty., both of Seattle, Wash., for the United States.

Before GILBERT and ROSS, Circuit Judges, and WOLVERTON, District Judge.

WOLVERTON, District Judge (after stating the facts as above). [1] The strong contention of counsel for defendants is that the object and purposes of the conspiracy ended with the delivery of Paymaster Orr's check to Goldberg or Silverstone on May 26, 1908, and that whatever was done thereafter in the disposal of the check by and between the alleged conspirators was mere private arrangement between them by way of settlement, and was not potent in any way in effectuating the object and purposes of the alleged conspiracy, and therefore, the indictment having been found and returned May 31, 1911, the offense charged was barred by the statute of limitations of three years from the date of commission. The contention is thought to be the more persuasive inasmuch as it is alleged, among other things, by the indictment, indicating in part the things that Kettlewell should do in carrying out the unlawful scheme, as follows:

"And said J. A. Kettlewell should recommend and secure the approval of the account as shown by a certain certified bill to be filed, and caused to be filed, by said E. Silverstone with the United States navy yard, Puget Sound, Washington, purporting to be the certified bill of the Fowler Metal Company, showing delivery of said zinc, rolled sheet boiler plates, and the acceptance of same at said navy yard, Puget Sound, and that none of said zinc, rolled sheet, boiler plates had been paid for, and should recommend and secure the issuance by the paymaster at the United States navy pay office at Seattle, Washington, of a check payable to the order of the said Fowler Metal Company for the amount appearing to be due the said Fowler Metal Company

according to the account so to be rendered as aforesaid, and should arrange to have said check delivered to said E. Silverstone or said Emar Goldberg."

In contemplation of section 5440, R. S., a conspiracy may be entered into "to defraud the United States in any manner or for any purpose." The indictment is drawn under this clause. That a conspiracy attended with appropriate acts and conditions may consist of a continuing offense has been settled by adjudication of the Supreme Court. We quote the language of Mr. Justice Holmes in *United States v. Kissel*, 218 U. S. 601, 607, 31 Sup. Ct. 124, 125 (54 L. Ed. 1168):

"The argument, so far as the premises are true, does not suffice to prove that a conspiracy, although it exists as soon as the agreement is made, may not continue beyond the moment of making it. It is true that the unlawful agreement satisfies the definition of the crime, but it does not exhaust it. It also is true, of course, that the mere continuance of the result of a crime does not continue the crime. *United States v. Irvine*, 98 U. S. 450 [25 L. Ed. 193]. But when the plot contemplates bringing to pass a continuous result, that will not continue without the continuous co-operation of the conspirators to keep it up, and there is such continuous co-operation, it is a perversion of natural thought and of natural language to call such continuous co-operation a cinematographic series of distinct conspiracies, rather than to call it a single one. Take the present case. A conspiracy to restrain or monopolize trade by improperly excluding a competitor from business contemplates that the conspirators will remain in business and will continue their combined efforts to drive the competitor out until they succeed. If they do continue such efforts in pursuance of the plan, the conspiracy continues up to the time of abandonment or success. A conspiracy in restraint of trade is different from and more than a contract in restraint of trade. A conspiracy is constituted by an agreement, it is true; but it is the result of the agreement, rather than the agreement itself, just as a partnership, although constituted by a contract, is not the contract but is a result of it. The contract is instantaneous; the partnership may endure as one and the same partnership for years. A conspiracy is a partnership in criminal purposes. That as such it may have continuation in time is shown by the rule that an overt act of one partner may be the act of all, without any new agreement specifically directed to that act."

To the same purpose, see *Brown v. Elliott*, 225 U. S. 392, 400, 32 Sup. Ct. 812, 56 L. Ed. 1136.

It would seem, therefore, that so long as it may be shown that the conspirators are acting together for the common purpose comprehended by the scheme formed and entered upon with the view to defraud the government, and have, while so acting together, committed some overt act to effectuate the purpose, all within the three years prior to the finding of the indictment, the statute has not run. *Lonabaugh et al. v. United States*, 179 Fed. 476, 103 C. C. A. 56; *United States v. Raley (D. C.)* 173 Fed. 159.

It is true that the mere continuance of the result of a crime does not continue the crime. It was so held in *United States v. Irvine*, 98 U. S. 450, 25 L. Ed. 193, a case where the defendant was indicted for withholding a pension from the person for whom it was obtained. The court was of the opinion that the crime was committed when the money was received and a reasonable time had elapsed for allowing it to be handed over to the pensioner, dependent somewhat upon the circumstances of the case, and that the offense was barred, the indictment having been found practically five years after the defendant had obtained the pension. So it was held in the *Lonabaugh Case*, which

arose under an alleged conspiracy to defraud the government out of certain public lands, that the conspiracy had served its whole purpose, under the scheme adopted and entered upon for defrauding the government out of such public lands, and was at an end when the patent had been executed and recorded in the office of the General Land Office at Washington, D. C., and that the transfers by deed by individual conspirators to the corporation to which it was designed the lands should be eventually conveyed were not acts to effect the object of the conspiracy. The reasoning of the eminent jurist who announced the decision, which sets forth very clearly the viewpoint of the court, is as follows:

"The subsequent acts (that is, the acts of deeding by individual conspirators to the corporation) are not open to the same objection, for they were the acts of one or more of the conspirators. But were they done to effect the object of the conspiracy; that is, to defraud the United States of the possession and title? This depends upon whether or not that object had been effected before those acts were done. If it had, the answer must be in the negative, because of the obvious inconsistency in treating an object already effected as still requiring something to be done to effect it."

These cases are fairly illustrative of the present situation. The indictment charges that those certain persons named in the indictment conspired "to defraud the United States of divers large sums of money by means of a certain fraudulent scheme," defining the scheme and setting out with much particularity and detail the means by which it was to be accomplished; one of such means being for Kettlewell to secure the approval of the account as shown by a certain certified bill, showing the delivery of the zinc and acceptance at the navy yard, and to secure the issuance of the paymaster's check payable to the order of the Fowler Metal Company, and arrange to have the same delivered to Silverstone or Goldberg. We say it is alleged that this was one of the means employed for defrauding the government out of divers large sums of money, and we inquire: Was the scheme to defraud wholly effectuated by that act? If it was, then the statute will apply, and the defendants ought to go free. If, however, it was not, and the securing of the public money beyond the delivery of the check was required to complete and consummate the fraud contemplated under the scheme adopted, then the statute has not run; for the defendants did not obtain the public funds until credit was extended by the bank in which Orr had the public deposits. The very point was within the mind of Goldberg when he was holding the paymaster's check from the evening of May 26th to the day of May 31st without depositing it for credit. He was holding it "to see if anything would be done by the navy pay office about stopping payment or anything of that kind." It is clear that, if the navy pay office had gotten information of the scheme in the meantime and stopped payment, the government would not yet have been defrauded out of the public money, albeit defendants could have been indicted for conspiracy to obtain the check.

The auditor of the Seattle National Bank, the bank in which Orr kept the public funds, describes how such funds are handled. The money is deposited by the government to Orr's credit, and as demands

arise Orr checks against the account thus created, and his declaration is that a check is never paid until it is accepted by the bank and charged to the account upon the books.

It is unnecessary to go into the authorities to determine whether the issuance of a check and delivery of the same constitutes payment. Our firm conviction is that public funds are not appropriated or converted while there is opportunity on the part of the government to prevent such appropriation, and in this case it was still within the power of the government to stop payment of this check, at least until credit was given for it by the bank of deposit of public funds against which Orr was authorized to check, or it was paid by the national treasury. It follows, therefore, that the acts of Silverstone and Goldberg in negotiating this check and securing its payment by the government were acts not merely of private arrangement between themselves, but designed and calculated to effect the object and purposes of the scheme to defraud the government of its public money, and the statute of limitations had not run when these acts were concluded.

[2] Complaint is further made that the court committed error in allowing evidence to go to the jury as to sales of zinc at various times to various purchasers for the purpose of establishing the reasonable value of the zinc sold to the government. In reality, the testimony was offered and admitted for the purpose of showing that the zinc in question was sold to the government at an unreasonable and exorbitant figure. The testimony consisted in showing the market price of zinc from time to time, running back perhaps as much as six months previous to the transactions attending the sale to the government, and, through an expert accountant, in showing from their own books sales of zinc made by the Great Western Smelting & Refining Company and the W. A. Corder Company, also running back as far as September 4, 1907.

This was an attempt to prove value by the market, which is always admissible. Zinc was being sold on the market in and around Seattle and elsewhere constantly, and the sole purpose of the testimony was to show what that market value was. We find no error in the ruling of the court.

Judgment affirmed.

MARSH v. WALTERS et al.

(Circuit Court of Appeals, Sixth Circuit. March 2, 1915.)

No. 2553.

1. BANKRUPTCY ~~165~~—“PREFERENCE”—TRANSFERS CONSTITUTING PREFERENCE.

Where, within four months before bankruptcy, the president of a bank, to whom the bankrupt was indebted, with sufficient information to put him on inquiry as to the bankrupt's insolvency, loaned his own money to the bankrupt solely to enable the bankrupt to pay the bank, though the payment to the bank might have been recovered as a preference, a mortgage taken by the president to secure his loan was also a “preference,” under Bankr. Act July 1, 1898, c. 541, § 60b, 30 Stat. 562 (Comp.).

For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

St. 1913, § 9644), making transfers, while a bankrupt is insolvent and which operate as a preference, voidable, if the person receiving the transfer or benefited thereby shall have reasonable cause to believe that its enforcement will effect a preference.

[Ed. Note.—For other cases, see *Bankruptcy*, Cent. Dig. §§ 259, 260, 266; Dec. Dig. ☞165.]

For other definitions, see *Words and Phrases*, First and Second Series, *Preference*.]

2. BANKRUPTCY ☞302—PREFERENCE—SUITS TO SET ASIDE—VARIANCE.

Where, in a suit by a trustee in bankruptcy against the president of a bank, to which the bank was not a party, to set aside as a preference a chattel mortgage given the president, the bill proceeded on the theory that the mortgage was given to secure an antecedent debt to the bank, and attributed knowledge that a preference would result to the president only, and not to the bank, while it appeared from the evidence that the mortgage was given to secure a loan of the president's own money, made to enable the bankrupt to pay the bank, a decree setting aside the mortgage could not be sustained; it being theoretically possible that the president, by reason of the form of the bill, had failed to assert defenses otherwise open to him.

[Ed. Note.—For other cases, see *Bankruptcy*, Cent. Dig. §§ 456, 457; Dec. Dig. ☞302.]

3. DOWER ☞49—BAR—EFFECT OF JOINDER IN PREFERENTIAL CONVEYANCE.

The dower interest of a bankrupt's wife was no part of the bankrupt's estate, and her joining in a preferential conveyance, afterwards declared invalid, would not deprive her of her right of dower.

[Ed. Note.—For other cases, see *Dower*, Cent. Dig. §§ 154–174; Dec. Dig. ☞49.]

Appeal from the District Court of the United States for the Northern District of Ohio; John M. Killits, Judge.

Suit by S. E. Walters, trustee in bankruptcy of L. F. Zimmerman and another, individually and as partners, doing business as the Zimmerman Music Company, against George H. Marsh. From a decree for complainants, defendant appeals. Reversed and remanded, with directions.

H. W. Fraser, of Toledo, Ohio, for appellant.

Lawrence C. Spieth and A. V. Cannon, both of Cleveland, Ohio, for appellees.

Before WARRINGTON, KNAPPEN, and DENISON, Circuit Judges.

KNAPPEN, Circuit Judge. This is an appeal from a decree setting aside an alleged preferential transfer under section 60b of the Bankruptcy Act. The transfer in question is a real estate mortgage for \$12,000, given to appellant within four months of bankruptcy by L. F. Zimmerman, one of the bankrupts (his wife joining in the mortgage), upon certain of the mortgagor's real estate. The partnership at the time owed the First National Bank of Van Wert, Ohio, upwards of \$19,000; the bank holding in pledge as security certain bonds worth about \$6,000. The partnership had at the time a checking account at the bank, on which there was a balance to the firm's credit. The bill alleges an indebtedness from the bankrupts to the bank, the making of the mortgage "for the benefit of" the bank, al-

leges lack of consideration from appellant for the mortgage, and, in effect, that appellant knew or should have known that the effect of the mortgage was to enable the bank to obtain a greater percentage of its debt than other creditors. The record shows, however, that in fact appellant, who was the president of the bank (though not its active manager), turned over to the mortgagor \$12,000 of his own money; the latter being immediately, and as part of one transaction, applied upon the bank's debt. We assume, for the purposes of present disposition, that not only the partnership, but the individual members as well, were actually insolvent when the mortgage was given, although the record is not definite on this point. But the evidence justifies the conclusion that both the bank and appellant had sufficient information to put them on inquiry as to the debtors' insolvency.

While, so far as form goes, the evidence, as already said, negatives the theory of the bill that the mortgage was given merely as security for a pre-existing debt, and (by implication) that appellant was merely the bank's agent in taking and holding the mortgage, yet it appears, according to the record here, that the mortgage was taken at the instance of and for the benefit of the bank, and was so taken, not because the loan was an attractive one in itself, but solely to enable the bank to obtain payment; for we have no difficulty in concluding, on the record before us, that the mortgage was the result of a three-cornered arrangement between the cashier, appellant, and Zimmerman, one of the debtors, by which the proceeds of the mortgage loan should be, as part of one and the same transaction, directly and immediately applied in payment of the bank debt. This conviction results from the testimony of the three parties most directly concerned, in connection with the fact that the amount of the mortgage loan, plus what was available on the sale of the pledged bonds, added to the amount of the bankrupt's deposit, was but \$2 more than the bank debt, the entire of which was immediately paid according to previous understanding.

[1] The important question, then, is whether the mere fact that appellant furnished his own money, as a means of enabling the bank of which he was the president to obtain a preference, relieves his mortgage from attack as a preferential security under section 60b. Assuming insolvency, the transaction amounted, upon the present record, to a preference in favor of the bank; but the bank was not made a party, and for this reason the question of appellant's liability, under the pleadings, becomes specially material. Had the bill been so drawn as to cover the situation shown, we see no insuperable objection to a setting aside of the mortgage itself as a preferential transfer, so far, at least, as necessary to complete relief against such transfer; for circuituity of arrangement cannot avoid the effect of a transfer intended to be in fact preferential. *Newport Bank v. Herkimer Bank*, 225 U. S. 178, 184, 32 Sup. Ct. 633, 56 L. Ed. 1042; *Stearns Salt & Lum. Co. v. Hammond* (C. C. A. 6) 217 Fed. 559, 562, 133 C. C. A. 411. And while there can be no preferential transfer without a depletion of the bankrupt estate (*Continental Trust Co. v. Chicago Title Co.*, 229 U. S. 435, 443, 33 Sup. Ct. 829, 57 L. Ed. 1268), yet the transaction in

question, in view of the bankrupts' insolvency, was bound to have the effect of depleting the estate otherwise available for ratable distribution among creditors.

In these circumstances, we cannot think that the mere fact that the bank's president used his own money as a means of effecting a preferential transfer relieved his security from the ban of section 60b, so far as it may stand in the way of full relief to creditors. The case is within the reasoning of the Beerman Case (D. C.) 112 Fed. 662, and of Dean v. Davis, 212 Fed. 88, 128 C. C. A. 658. True, there was here no indemnity bond, as in the Beerman Case; but the element of personal interest, which in the latter case was represented by the indemnity bond, is here represented by appellant's personal and official interest in the bank and in the preferential payment of its debt. The case is therefore, we think, readily distinguished from the Van Iderstine Case, 227 U. S. 575, 33 Sup. Ct. 343, 57 L. Ed. 652, where (a) the Discount Company had no knowledge that a preferential payment was intended, and (b) had no notice whatever of the intended application of the money loaned, while here appellant not only knew of the intended preference, but was directly interested in the payment, not only in his official capacity, but individually as a stockholder. The case here also differs from the Baar Case, 213 Fed. 628, 130 C. C. A. 292, for there the uncle who made the loan was interested in but \$500 out of \$2,500 advanced, and so could not be said to have received a preference as to more than the \$500.

Moreover, the case seems to have turned upon the question of fraudulent conveyance, and there was in fact there no fraud. While, therefore, it would have been proper to sue the bank to recover its preference, the mortgage is not necessarily relieved from attack.

[2] The bill, however (which was perhaps filed under a misapprehension of the facts), is not in form to permit recovery upon the record made. Its theory is that the mortgage merely secured the antecedent debt, and the allegation of knowledge that a preference would result is attributed to appellant only, and not to the bank. We do not feel justified in sustaining the decree in the face of an allegation in the bill that no advance was made, merely because the advance actually made by appellant was designed to effect a preference to the bank. As between appellant and the bank, there is no inequity in putting the burden upon the bank, which, indeed, as between itself and appellant is primarily liable; and while, if the bill had been in proper form to meet the actual transaction, appellant could not now be heard to complain that the bank was not made a party (for he made no such defense by answer), yet under a bill stating the actual case he would be entitled to have the bank before the court, and it is at least theoretically possible that appellant has failed, by reason of the form of the bill, to assert defenses otherwise open to him.

What we have said concerning the effect of the transfer in question is, of course, based upon the record before us. We do not attempt to pass upon the bank's rights in its absence, nor finally to decide the rights of appellant as they may appear under issue joined on prop-

er pleadings and such new or further testimony as may be presented thereunder.

[3] We may add that Mrs. Zimmerman's dower interest was not a part of the bankrupt's estate, and her joining in a preferential conveyance, afterwards declared invalid, would not deprive her of the right of dower. *In re Lingafelter*, 181 Fed. 24, 104 C. C. A. 38, 32 L. R. A. (N. S.) 103.

The decree will be reversed, and the cause remanded to the District Court, with directions to permit amendment of the bill so as to allege the actual transaction, and with leave to make the bank a defendant, and for further proceedings not inconsistent with this opinion. The costs of this appeal will be equally divided between appellant and complainant trustee.

MICHIGAN CENT. R. CO. v. SCHAFFER.

(Circuit Court of Appeals, Sixth Circuit. March 2, 1915.)

No. 2560.

1. MASTER AND SERVANT ~~286~~—ACTION FOR INJURIES—QUESTIONS FOR JURY.

Where, in a railway brakeman's action for injuries, there was evidence that a car load of piles, 30 feet long and from 10 to 15 inches in diameter, on a flat car, was loaded in the customary method of loading sawlogs, but there was also evidence that it was not loaded and secured in the customary and recognized way of loading telegraph poles, the piles differed enough from sawlogs and sufficiently resembled telegraph poles to make it a question for the jury whether reasonable care demanded that the load should have been secured in the manner or with some of the precautions generally used with telegraph poles, and evidence as to whether the method adopted was reasonably safe was properly admitted.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1001, 1006, 1008, 1010-1015, 1017-1033, 1036-1042, 1044, 1046-1050; Dec. Dig. ~~286~~.]

2. EVIDENCE ~~539½~~—OPINION EVIDENCE—COMPETENCY OF WITNESSES.

On the question, in a railway brakeman's action for injuries, as to the proper method of loading timber upon a flat car, witnesses whose experience had been confined to junction point inspection under rules adopted by most railroads, though not by defendant, were competent to testify, as there is no such substantial dissimilarity between the proper standard of safe loading for hauling from the point of shipment and the proper standard for transfer at junction points that one could have no bearing on the other.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2350-2352; Dec. Dig. ~~539½~~.]

3. MASTER AND SERVANT ~~243~~—LIABILITY FOR INJURIES—INSPECTION—DUTY OF EMPLOYÉ.

A rule of a railway company that it was the duty of all train crews to examine stakes, wires, and crosspieces used to secure material loaded on flat cars, before moving cars, did not impose upon each member of the train crew the duty of examining and checking up all the work of the other members, or prevent them from making a suitable and appropriate subdivision of the duties imposed upon the crew among the members thereof, and where the duties had been thus subdivided, and the duty imposed upon the conductor by general custom, and the practice adopted in the particular instance of inspecting such stakes, wires, and

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crosspieces, a brakeman's failure to make such inspection himself did not defeat a recovery for injuries caused by the conductor's negligent inspection, especially as any other construction would practically preserve the fellow servant rule, notwithstanding its statutory abrogation.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 682, 759-775; Dec. Dig. ~~216~~-243.]

4. MASTER AND SERVANT ~~216~~-LIABILITY FOR INJURIES—ASSUMPTION OF RISK.

Where a railway brakeman, injured by reason of the improper method in which timber loaded upon a flat car was secured, had never seen timber of that kind loaded and shipped until shipments just preceding the particular shipment, had received no special instructions on the subject, and could not have known of the improper method of twisting the wires securing the load without climbing on the car and repeating an inspection which the conductor had already made, and even then might not have appreciated the danger, he did not in law assume the risk of injury from the conductor's negligence, since, while the common-law defense of assumption of risk is available in actions under Employers' Liability Act April 22, 1908, c. 149, 35 Stat. 65 (Comp. St. 1913, § 8657), to make the defense good in cases depending on the negligence of fellow servants, it must appear that such negligence was in fact known to the injured employé, or was so customary that he should be charged with knowledge, and also that he appreciated or was bound to appreciate the danger.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 567-573; Dec. Dig. ~~216~~.]

Assumption of risk incident to employment, see note to Chesapeake & O. R. Co. v. Hennessey, 38 C. C. A. 314.]

In Error to the District Court of the United States for the Northern Division of the Eastern District of Michigan; Arthur J. Tuttle, Judge.

Action by Marion F. Schaffer against the Michigan Central Railroad Company. Judgment for plaintiff, and defendant brings error. Affirmed.

W. S. Humphrey, of Saginaw, Mich., for plaintiff in error.

F. W. De Foe, of Bay City, Mich., for defendant in error.

Before WARRINGTON, KNAPPEN, and DENISON, Circuit Judges.

DENISON, Circuit Judge. Schaffer was a brakeman in the railroad's employ upon a logging branch. A car load of piles had been accepted from a shipper on this branch, and while the car was being hauled to the main line the forward end of one pile dropped from the car to the ground, the rear end was driven through the caboose in which Schaffer was riding, and he was hurt. He brought this action under the federal Employers' Liability Act, in the court below, and recovered verdict and judgment.

It is conceded that the duty to load this car properly and safely rested upon the shipper alone, and the sole negligence alleged against the railroad and submitted to the jury was that the conductor of this train failed properly to inspect this car at the time of shipment. That the duty of inspecting and of rejecting any car unsafely loaded did rest upon the railroad is admitted. There have been presented to us only two main questions: First, was there evidence for the jury tending

to show negligence for which the railroad could be liable to Schaffer? and, second, was the injury the result of a risk which Schaffer had assumed?

[1] This car load of material, intended for use as piles, comprised 17 sticks just as cut from the stump, 30 feet long and varying in diameter from 12 to 15 inches at the butt to 10 to 12 inches at what had been the upper end. They were not required to be perfectly straight, and they contained some "sweep." They were pyramided on the flat car; that is to say the bottom tier comprised as many as would lie side by side on the floor of the car, the next tier was one less in number, the sticks lying in the notches between those of the tier below, and so on up. In the sockets provided for that purpose on each side of the car were three stakes 12 to 15 inches high above the car floor. In addition, at the front and rear stakes, a wire was passed from the top of the load down around one stake socket, up across the load and down around the other socket and back to the top, then the free ends were united, and then the double wire was tightened by turning a bar passed underneath and so making a loop around the bar and twisting the loop as much as possible. The specific faults alleged, and upon which the verdict depends, are that the stakes should have been higher, that their tops should have been wired together and with several strands of wire, and that these strands should have been tightened by twisting together like a cable;¹ and it is very likely that if the car had been so treated this accident would not have happened.

The railroad claims—and for the purposes of this review we may consider it established—that this pyramiding was the customary method of loading logs; that it had long been accepted by the employés, including Schaffer, as a proper and safe method, and that the use of any wires or tying was an additional and uncalled-for precaution. On the other hand, there was testimony that, generally, the country over, the customary and recognized way of loading telegraph poles was with the high side stakes and with several cross-wires properly tightened between the stakes. The railroad's whole position that there was no negligence rests on the assumption that the safe loading of these piles is to be judged by the rules applicable to sawlogs. A jury might accept this assumption, but a court cannot do so. This material differed enough from logs and sufficiently resembled telegraph poles, so that it was proper to receive testimony bearing on the question whether the method adopted was reasonably safe, and to leave to the jury the issue whether reasonable care demanded that this load should have been secured in the manner, or at least with some of the further precautions, generally used with the smaller product.

[2] From this conclusion, it follows that witnesses were competent to testify, even though their experience had been confined to junction

¹ A plausible theory of the accident—and one which we may assume the jury accepted—seems to be that the wire was weakened by twisting the loop, that it broke at this point, that as the front end of the stick worked out of position the wire slipped around one of the stake sockets for a distance and then caught, thus holding the end of this pile from falling further, and that the engagement with the socket then gave way, letting the wire slip further, and the end of the pile fall to the ground.

point inspection under the rules of the Master Car Builders' Association, adopted by most of the railroads, but not by defendant. Between the proper standard of safe loading for hauling from the point of shipment and the proper standard for transfer at junction points there can be no such substantial dissimilarity that one can have no bearing on the other. Even if the liability was to be wholly fixed by defendant's rules relating to logs, as defendant claims, there would still be evidence tending to show improper inspection, because these rules required side stakes extending 24 inches above the car floor, and the stakes actually used extended up not over 16 inches. It is at least probable that a 24-inch stake would have prevented any serious injury following the breaking of the wire.

[3] One of the defendant's rules on this subject provided:

"It is the duty of all train crews to examine such stakes, wires, and cross-pieces before moving cars, whether the same have been loaded by the shipper or by the company; and should it appear that such stakes, wires, or cross-pieces are insufficient, or not in good order, they are instructed to decline to remove the cars until the proper safeguards for securing the freight shall have been furnished."

This train crew consisted of the engineer, fireman, and two brakemen—of whom plaintiff was one. It is defendant's theory that the duty of inspection was, by this rule, so far imposed on plaintiff as to prevent any recovery by him because of a negligent inspection; while it is plaintiff's theory, submitted by the court to the jury and by the verdict impliedly adopted, that by the long-continued general custom, and by the practice adopted in this instance, the duty had been turned over to the conductor, so that the company's negligence could be rested solely on the conduct of the conductor, and so that any carelessness by the brakeman would be, at the worst, contributory negligence. It seems obvious that this rule cannot be interpreted according to its extreme literal force, as imposing the duty equally on each member of the crew. It is not to be supposed that the engineer and fireman were expected to leave their positions and inspect loading; nor is it reasonable to think that each brakeman must examine and check up all the work of the other brakemen and of the conductor, or else be himself guilty of a breach of duty which would amount to participation in the others' negligence.

We think these rules contemplate that the crew should make suitable and appropriate subdivision among its members of the duties imposed upon that body; and observing that, by other rules, the conductor is declared to be responsible for the care and safety of the train and "must know that train has been inspected before starting," and that two different bulletins regulating inspection of such cars are addressed to freight conductors, it was entirely permissible for the jury to find that the duties had been thus subdivided, that the rule had been interpreted and applied according to plaintiff's theory, and that the failure of proper inspection might be chargeable to the conductor, and not to plaintiff. Indeed, the other construction would, in practical effect and *pro tanto*, preserve the fellow servant rule, in the face of its statutory abrogation.

[4] Upon the subject of assumption of risk, no question is open, save whether the undisputed testimony showed such a risk assumption as required the direction of a verdict for defendant. Such assignments of error as complain of the charge given by the court on its own motion on this subject rest upon no exception taken, and cannot be considered. Those which complain of the modifications made by the court of the charges on this subject requested by defendant rest on no exception pointing out any particular in which the modification was inaccurate or incomplete, and so there is only the question whether it was error to refuse the requests as presented. By Seaboard Air Line v. Horton, 233 U. S. 492, 34 Sup. Ct. 635, 58 L. Ed. 1062, it is now settled that the common-law defense of assumption of risk remains in actions brought under this statute, but it is also recognized by recent decisions in this court (Yazoo v. Wright, 207 Fed. 281, 285, 125 C. C. A. 25, affirmed 235 U. S. 376, 35 Sup. Ct. 130, 59 L. Ed. —; Tennessee Co. v. Gaddy, 207 Fed. 297, 298, 125 C. C. A. 41; Illinois Co. v. Porter, 207 Fed. 311, 314, 125 C. C. A. 55; Sterling Co. v. Hamel, 207 Fed. 300, 304, 125 C. C. A. 44) that to make the defense good, in cases depending on the negligence of fellow servants, it must appear, first, that the negligence was either in fact known to plaintiff, or was so customary that he must be charged with knowledge, and, second, that he must appreciate, or be bound to appreciate, the danger.

Both these elements are left out of sight in the claim that a verdict should have been instructed against Schaffer. Until the just preceding shipments of this same consignment, he had never seen piling loaded or shipped. He had received no special instructions from any one on the subject. He had no reason to think that his conductor had carelessly accepted an unsafe tying. Unless he climbed on the cars and repeated the inspection which the conductor had already made, he would not know of the use of that method of twisting the wires which very probably was the fatal error; and if he had seen all the details of the fastening, it could not be said, as matter of law, that he either did or was bound to appreciate the danger which, as the event proved, attended this method of loading and tying this particular material.

The judgment below is affirmed, with costs.

FARRIS v. CABIN CREEK CONSOL. COAL CO.

(Circuit Court of Appeals, Fourth Circuit. February 2, 1915.)

No. 1292.

1. MASTER AND SERVANT ~~97~~—LIABILITY FOR INJURIES—ACCIDENTAL INJURIES.

Plaintiff was employed to hook and unhook coal cars at a tipple at the foot of a tramroad extending up a steep hillside from the tipple to the opening of the mine. Another parallel tramroad was used for mine supplies, and to take the miners up and down, and was equipped with a flat car hauled by an electric hoist. Plaintiff and another employé were directed to go up on the last-mentioned tramroad to get a barrel of oil which had rolled off the car, and two other employés on the bench at the

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head of the tramroads were directed by the mine boss to help them in loading the barrel, and for that purpose they took with them a heavy plank. One of them slipped on a "slick" place, allowing the plank to escape, and to descend towards the car. Plaintiff jumped from the car, but was struck by the plank. There was no claim that the bench along which the employés were carrying the plank was unsafe, or in an improper condition; but it was claimed that a lighter board, which might, perhaps, have answered the purpose, was available. *Held* that, as it did not appear that the plank was unsuitable for the work to be done, or, if it was unsuitable, that the mine boss directed its use, or had any knowledge that it was taken by the employés, a jury finding of negligence would not have been warranted, and a verdict for defendant was properly directed, since the injury was one which resulted from pure accident, or from causes which could not have been reasonably anticipated, unaccompanied by want of ordinary care on the part of the employer.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 163; Dec. Dig. ~~97~~.]

2. MASTER AND SERVANT ~~97~~—LIABILITY FOR INJURIES—INJURIES RECEIVED IN WORK OUTSIDE EMPLOYMENT.

As there was evidence only of what plaintiff actually did during the few days, he was at work prior to the accident, and no evidence as to what he was hired to do, and as the unforeseen and extraordinary accident was one just as liable to occur where he had been working as on the incline where he was injured, he could not recover on the theory that he was injured in the performance of a required task outside his contract of employment.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 163; Dec. Dig. ~~97~~.]

3. EVIDENCE ~~471~~—FACTS OR CONCLUSIONS.

A question asked a witness as to what effect the plank would have had if it had struck the car was properly excluded, as it called for an opinion which the witness was not competent to express, and which would have been without probative value, especially as its only object was to show that plaintiff was not chargeable with contributory negligence in jumping from the car, while the case was not defended, and could not be defended, on that ground.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2149-2185; Dec. Dig. ~~471~~.]

In Error to the District Court of the United States for the Southern District of West Virginia, at Charleston; Benjamin F. Keller, Judge.

Action by Dominic Farris against the Cabin Creek Consolidated Coal Company. Judgment for defendant, and plaintiff brings error. Affirmed.

Maynard F. Stiles, of Charleston, W. Va., for plaintiff in error.

George S. Couch, Jr., of Charleston, W. Va. (Brown, Jackson & Knight, of Charleston, W. Va., on the brief), for defendant in error.

Before KNAPP and WOODS, Circuit Judges, and WADDILL, District Judge.

KNAPP, Circuit Judge. This is an action for personal injuries received by the plaintiff in error (plaintiff below) as the result of a singular accident. The defendant operates a coal mine on Cabin creek, Kanawha county, W. Va., the opening of which is on a steep

hillside about 1,000 feet above the creek. Near the creek is a tipple from which a tramroad extends up to the opening of the mine. This tramroad is used for lowering the coal from the mine to the tipple, where it is discharged into cars. The plaintiff, a young Italian, was employed at the tipple to hook and unhook the coal cars as they came down from the mine and were returned, and to keep the tipple in order. About 75 yards up the creek is another tramroad, which begins at a hoisthouse some distance above the creek and runs up the hillside, practically parallel with the other tramroad, to a point on the same bench as the mine. This tramroad is used for mine supplies and to take the miners up and down, and was equipped with an open flat car hauled by wire cable and electric hoist.

On the day of the accident, the plaintiff, who had been at work only a week, and a man by the name of Stover, were directed by the mine boss to go up on this tramroad to get a barrel of oil and take it up to the top of the hill to the mine. It appears that this barrel of oil had rolled off the car, while being taken up the day before, and had lodged on the ground near the tramroad about 25 yards from its top. Two other men, Green and Adams, were sent from the drumhouse, at the head of the other incline, to assist in loading the barrel, and for that purpose took from a stock of car timber at the drumhouse an oak plank, about 12 feet long, 12 inches wide, and 2 inches thick, which they carried on their shoulders some 75 yards around the hillside to the head of the incline in question, intending to take it down on the car to the barrel and then roll the barrel on it up onto the car. Just as they got to the head of this incline, one of the men slipped, and the other being unable to hold the plank, which is said to have weighed about 96 pounds, it escaped from their control and went "tearing down the hill" towards the ascending car, on which the plaintiff and Stover were seated. The car had gone about half way up to the top when the plank began its swift descent down the incline. When the plank fell, one of the men who had been carrying it gave out a warning cry, and the man at the hoisthouse, seeing the plank coming, put on the brake to stop the car. It seems that at or about the same moment the plank was seen by the men on the car, and Stover called to the plaintiff to jump. Both of them jumped when the plank was 30 to 50 feet away, Stover first and the plaintiff immediately afterwards. The plank had been coming down on or between the rails, but presently took a different course, probably because the sudden stopping of the car jerked up the cable, which threw the plank off the track, and kept on its downward flight alongside the tramroad. It happened to hit the plaintiff, either as he was jumping or about the instant he struck the ground, and he was severely injured; one of his legs being so badly broken as to require amputation above the knee.

[1] At the conclusion of the evidence the trial court directed a verdict for the defendant, and the correctness of that ruling is the main question to be determined. It seems quite unnecessary in this opinion to review the familiar principles which have been developed and applied in an endless number of negligence actions. In this case there is no dispute about the material facts and they are easily apprehend-

ed. The plaintiff did not attempt to show that the bench along which Green and Adams were carrying the plank was unsafe, or in any respect in an improper condition. One of the witnesses says that Adams, who was carrying the front end of the plank, "slipped over a little place that was slick," whatever he meant by "slick," and this unforeseen and purely accidental happening, so unlikely to occur that no degree of prudence would have anticipated it, or thought of guarding against it, was the proximate cause of the plaintiff's misfortune. The case, therefore, at once narrows down to the contention, and this appears to be the principal ground relied upon for reversal, that the defendant was negligent, or might have been found so by the jury, because Green and Adams, who were sent by the mine boss to help recover the barrel of oil, without other directions so far as the record discloses, took with them for that work a heavy oak plank, when they had there available, as would presumably have appeared if offered proof had been admitted, a lighter board which might perhaps have answered their purpose.

There is no sustainable basis for this contention. All that appeared about the plank was its material and dimensions, and the fact that two men carried it on their shoulders some 75 yards from the drumhouse to the point where they unfortunately let it fall. But this proof would not warrant the inference that the plank was unsuitable for the work to be done. Indeed, the presumption would seem to be the other way, when account is taken of the weight of this barrel of oil and the place from which it was to be extricated. Moreover, it was not shown that the mine boss directed the use of the plank, or had any knowledge that it was taken by the men sent to get the barrel. The most that can be said about it, if anything, is that they made an error of judgment; but, even if this be assumed, it was a mistake for which the defendant is not liable.

Taking the entire testimony, as we do, in the aspect most favorable to the plaintiff, we think it clear that nothing was shown which permitted an inference of negligence on the part of the defendant. Indeed, we do not perceive any ground upon which Green and Adams, fellow servants of the plaintiff, could be deemed at fault; and, if they were not negligent, the defendant surely cannot be held responsible because they failed to keep the plank from falling down the incline. We have examined all the authorities cited in the brief of plaintiff's counsel, including those referred to in his supplemental memorandum; but none of them goes to the extent of upholding a recovery upon the facts which the plaintiff proved or offered to prove in this case. With the sympathy which his disabled condition naturally excites, we have scrutinized the record with especial care, but are impelled to the conclusion that he failed to make out a case which would warrant a jury in finding the defendant guilty of negligence, and we are therefore of opinion that the verdict in its favor was properly directed. The rule of law which is believed to have controlling application to the facts here presented is stated in 26 Cyc. 1092, as follows:

"For an injury which results from pure accident, or from causes which could not be reasonably anticipated, unaccompanied by want of ordinary care on the part of the master, he is not liable."

In our judgment, the case at bar is such a case, and it must be decided accordingly.

[2] It is argued, however, that the plaintiff was entitled to recover, or to have his case submitted to the jury, because he was injured in the performance of a required task which was outside his contract of employment. But we are clearly of opinion, upon the undisputed facts of record, that this contention cannot be sustained. In the first place the evidence does not show with any definiteness or certainty what the plaintiff was hired to do; it only shows what he actually did during the few days he had been at work before the accident. Under the circumstances of this case, and in the absence of proof to the contrary, we think it cannot be said that the particular service in which he got hurt was not a service which he could be properly called upon to perform. The incline down which the plank happened to fall was a part of the plant which the defendant used in its mining operations, and any incidental service in or about that plant would seem to be fairly within the scope of his employment. But a more conclusive answer to the argument here considered is that the plaintiff was not sent to a place or for a task of any inherent or reasonably anticipated danger. Such an unforeseen and extraordinary accident as the one that happened was just as liable to occur at the tipple, where he had been working, as on the incline, where he lost his limb. In short, the work in which he was sent to assist exposed him to no hazard, which was apparent or probable, and his injury resulted from a pure accident, quite beyond the range of experience or precaution.

[3] There is a minor assignment of error which should, perhaps, receive a word of notice. A witness for the plaintiff was asked this question: "Can you tell what effect it [the plank] would have, if it had struck the car?" The answer was excluded. We think this ruling clearly correct, because the question called for an opinion which the witness was not competent to express, and which, if given, would have been without probative value. Moreover, its only purpose was to show that the plaintiff was not chargeable with contributory negligence because he jumped off the car. But the case was not defended, and could not be defended, on that ground. It was perfectly natural for the plaintiff to attempt to escape by jumping, and the most prudent and careful of men would have been likely to do what he did under the circumstances. The verdict was not directed against him because of any fault on his part, and it is evident that, if not free from contributory negligence as a matter of law, the jury would have been amply justified in finding for him on that issue.

The record discloses no reversible error, and the judgment appealed from will therefore be affirmed.

DAY v. UNITED STATES.

(Circuit Court of Appeals, Fourth Circuit. February 18, 1915.)

No. 1264.

1. CRIMINAL LAW ☞369—**EVIDENCE—SIMILAR OFFENSES.**

On a trial for carrying on the business of a wholesale liquor dealer in the years 1910 and 1911 without paying the special tax as required by law, in which accused claimed that he acted merely as the agent of his brother, in whose name the distillery was bonded, and there was no proof of general facts and circumstances such as usually indicate occupation, and it therefore became necessary for the government to show particular sales of such character and number as would justify a finding that accused carried on the business for himself, it was error to admit evidence of sales in 1909, similar in character and about equal in number to the transactions proved in 1910, as such sales did not show that accused carried on such business in 1910, and were not admissible to prove accused's intent, as his intent was no part of the offense.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 822-824; Dec. Dig. ☞369.]

2. CRIMINAL LAW ☞436—**EVIDENCE—DOCUMENTARY EVIDENCE.**

On a trial for carrying on the business of a wholesale liquor dealer without paying the special tax as required by law, where it was the government's contention that accused's claim that he was acting as agent for his brother, in whose name the distillery was bonded, was merely a subterfuge, and that he was running the business for himself, an official form, supposed to show all the operations of the distillery for a particular season, including the dates when, and persons to whom, sales were made, and a record of the visits of government officers, signed by themselves, should have been admitted, as it was not, as claimed, a mere self-serving declaration; no reason being suggested for false entries therein.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1023; Dec. Dig. ☞436.]

Woods, Circuit Judge, dissenting.

In Error to the District Court of the United States for the Western District of Virginia, at Lynchburg; Henry Clay McDowell, Judge.

George S. Day was convicted of an offense, and he brings error. Reversed and remanded.

Charles A. Hammer and John Paul, both of Harrisonburg, Va., for plaintiff in error.

Richard E. Byrd, U. S. Atty., of Richmond, Va., for the United States.

Before PRITCHARD, KNAPP, and WOODS, Circuit Judges.

KNAPP, Circuit Judge. The plaintiff in error (defendant below) was convicted of carrying on "the business of a wholesale liquor dealer without having paid the special tax therefor as required by law." The indictment contains two counts: the first charging commission of the offense in the year 1910, and the second charging a like violation of the statute in 1911. The facts which appear to be material and the contentions disclosed by the assignments of error may be summarized as follows:

The distillery in question, which is located near Timber Ridge, in the county of Rockbridge, Va., was operated for a number of years for the production of apple brandy. During the years named in the indictment, and apparently before that, the land on which the distillery building stands, if not the building itself, was owned by defendant's wife, while the distillery apparatus and fixtures belonged to his brother, T. T. Day, who lived some 50 miles away in Amherst county, but who spent more or less of his time at Timber Ridge during the brandy-making season. In the previous years of operation, as well as in 1910 and 1911, the distillery was bonded by T. T. Day. The defendant asserts that the business at all times belonged to his brother and was actually conducted by him, and that he was merely the agent of his brother in looking after the distillery and selling the brandy produced. The government contends that, although the distillery was bonded by T. T. Day, the business in fact was carried on by the defendant, and the sales in question made for his own benefit. This appears from the following clear statement in the charge to the jury:

"If you believe from the evidence beyond all reasonable doubt that the defendant made the sales of brandy as testified by the government witnesses in chief, and if you also believe beyond all reasonable doubt that the defendant was in fact the owner and proprietor of the distillery in question at the time said sales were made, you should find him guilty as charged in the indictment, although you may believe that in making such sales the defendant was ostensibly acting as the agent of T. T. Day. On the other hand, if T. T. Day was in fact the proprietor of the distillery, and if in making the aforesaid sales of brandy the defendant was in fact acting as the agent of said T. T. Day, you should acquit the defendant. You are further instructed that an agent, if such in fact, may lawfully do any act which his principal may lawfully do."

[1] In making out its case the government was allowed to show, against the defendant's objection, that he had made sales of brandy in his own name in November, 1909, and two checks in payment thereof, drawn to his order by one Willis, and dated the 9th and 24th of that month, were received in evidence. Later in the trial, when the defendant was under cross-examination, the government was permitted, against his objection, to introduce in evidence two checks drawn to his order by one Franey, dated, respectively, December 17 and 24, 1909, which he admitted were given to him in payment for brandy. It thus appears that at least four transactions in 1909, similar in character and about equal in number to the transactions proven in 1910, were allowed to be shown by the government in support of the charge of carrying on the business of a wholesale liquor dealer in the years covered by the indictment.

We are of opinion that it was error to admit this evidence, and its prejudicial effect can scarcely be doubted. It is a familiar and long-established rule that similar acts or misdeeds of the accused are inadmissible against him, except where they are material in proof of some necessary element of the offense for which he is on trial. This rule is laid down by all the text-writers and in numberless decisions. An exception is found in cases where the criminality of the act depends upon the intent of the accused, and the wrongful intent must therefore be established. In such cases evidence may be given of prior mis-

conduct of like character, for the purpose of proving the intent with which the particular act was committed. But it seems clear to us that the offense for which the defendant was indicted does not embrace the element of intention. No such element is included or implied in the language of the section which he is charged with violating, and nothing in its provisions or purpose indicates that proof of intent is necessary to warrant conviction. Moreover, it was not claimed that defendant openly engaged in, or held himself out as carrying on, the business of a wholesale liquor dealer. The distillery with which he was connected was bonded by the brother, in whose name and for whose benefit it was ostensibly conducted.

There was no proof of general facts and circumstances, such as usually indicate an occupation, from which the jury could find that the business was in fact carried on by defendant; and it therefore became necessary for the government to show particular sales of such character and number as would justify a finding that he carried on the business for himself, and so came within the statutory prohibition. But it was the nature of these transactions and the circumstances attending them, whether they disclosed the defendant as acting for himself or as agent for his brother, which the jury was authorized to pass upon, and he could not be heard to say that he did not intend to be a wholesale liquor dealer, if his acts and doings warranted the inference that he was actually engaged in that business. In other words, the question of his guilt or innocence turned upon what he did, upon the deductions justified by the transactions themselves, and not at all upon his motive or intention. It follows from this, as we think, that evidence of similar transactions in the year 1909 was erroneously received. The sales made in that year did not show that defendant "carried on the business" of a dealer in 1910, and proof of such sales was not necessary or proper to show his intent respecting the sales he made in the last-named year, because intent is no part of the offense for which he was indicted. We have examined all the authorities cited by the learned counsel for the government, and are satisfied that none of them sustains his contention. Indeed, it seems to be well settled that exception to the rule which excludes proof of prior misconduct is limited to cases in which intent is a necessary element of the offense charged. In our judgment this is not such a case, and therefore does not come within the exception.

[2] We are further of opinion that under the circumstances of this case the defendant was entitled to put in evidence the entire record described as form 25½. The trial court admitted the entries relating to the particular sales which the government proved, but excluded the balance of the record. As we understand it, this is an official form, which is supposed to show all the operations of the distillery for the particular season, the entries covering fruit bought, pomace made, brandy distilled therefrom, times when it was gauged, and disposition made of the product, including the dates when and persons to whom it was sold. It also contains a record of the visits of government officers signed by themselves. Bearing in mind that the defendant was charged with running this business for himself, and that his claim to be acting as agent for his brother is asserted to be

a mere subterfuge, we think the record kept from day to day of what was actually done at the distillery, showing, among other things, in whose name the output purported to be shipped, was proper evidence for submission to the jury.

It seems to us hardly sufficient to say that this form is only a self-serving declaration. No reason is suggested for making false entries in a record which appears to have been always open to inspection by the revenue officers, whose visits were attested by their signatures. If this record disclosed a large number of sales during the period in question, which were generally entered as sales by T. T. Day, and contained other indications that he was the real proprietor, it would in our judgment be admissible as tending to negative the government's contention that the business was in fact carried on by defendant. Without amplifying the argument, we are constrained to hold that the record as a whole was improperly excluded.

The other assignments of error are not sustained; but, for the reasons stated, we are of opinion that the judgment should be reversed, and the cause remanded for further proceedings not inconsistent with the views herein expressed.

Reversed.

WOODS, Circuit Judge (dissenting). Evidence of carrying on the business of a wholesale liquor dealer at any time before bill found, within the statutory limitation, was admissible. *Ledbetter v. United States*, 170 U. S. 610, 18 Sup. Ct. 774, 42 L. Ed. 1162. Besides, the charge of the government really was that the defendant was carrying on the business himself under a license issued to his brother. This involved the element of deceit, and evidence of other like transactions fell within the principle of the rule that similar acts to those charged may be proved where intent is involved. *Wigmore on Evidence*, §§ 216 and 300.

The testimony on both sides was very full as to the sales alleged by the government to have been made in the defendant's own name, including the book entries. This was a practical admission by the government that the other sales appeared regularly on the books as made and entered in the name of the defendant's brother who held a license.

For this reason, it seems to me the defendant was not prejudiced by the refusal to admit the books themselves.

MEYER v. UNITED STATES.

(Circuit Court of Appeals, Fifth Circuit. February 8, 1915.)

No. 2704.

1. BANKRUPTCY ~~494~~—CRIMINAL OFFENSES—CONCEALMENT OF PROPERTY—SUFFICIENCY OF INDICTMENT.

An indictment charging a bankrupt with concealing property from his trustee, which commenced with averments substantially following the language of the statute and alleged the bankrupt's acquisition of such property, the appointment of a receiver, that while he was a bankrupt he knowingly, willfully, and fraudulently concealed such property from the receiver, that a trustee was selected, appointed, and qualified, and that, after such selection, etc., the bankrupt continued to conceal knowingly, fraudulently, willfully, and unlawfully from the trustee, such property belonging to the estate in bankruptcy, and while he was a bankrupt, charged an offense under Bankr. Act July 1, 1898, c. 541, § 29b, 30 Stat. 554 (Comp. St. 1913, § 9613), providing that a person shall be punished as therein provided upon conviction of the offense of knowingly and fraudulently concealing while a bankrupt from his trustee any of the property belonging to his estate in bankruptcy, since it was sufficiently plain therefrom that it was the continuance of the concealment after the appointment and qualification of the trustee that was made the basis of the criminal charge preferred, and the unnecessary averment as to the concealment from the receiver did not impair the sufficiency of the indictment.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 911; Dec. Dig. ~~494~~.]

2. BANKRUPTCY ~~494~~—CRIMINAL OFFENSES—CONCEALMENT OF PROPERTY—SUFFICIENCY OF INDICTMENT.

As Bankr. Act, § 29b, does not make a demand on a bankrupt for property concealed from his trustee a prerequisite to the commission of the offense of concealing such property, an indictment was not demarable for failure to allege such a demand.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 911; Dec. Dig. ~~494~~.]

3. WITNESSES ~~268~~—CROSS-EXAMINATION—SCOPE.

On the trial of a bankrupt for concealing property from his trustee in bankruptcy, the prosecution introduced evidence tending to prove such concealment, and that it was a part of a scheme or plan manifested by that and other similar transactions. The trustee testified that he made a demand on defendant for the assets of the estate, and that he made it previous to the bringing of a suit to recover an automobile and a diamond ring. On cross-examination he was asked whether that was the suit which he dismissed for want of evidence, to which question an objection was sustained. *Held* error, as the jury might have inferred from the trustee's testimony that the assets of the estate had been reduced by withholding or concealing articles of luxury, and might have drawn an inference unfavorable to accused, and accused was entitled to show by explanatory or rebutting evidence that the circumstance was not capable of supporting an unfavorable inference, and he was not confined to his remedy by a motion to strike out.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 931-948, 959; Dec. Dig. ~~268~~.]

4. CRIMINAL LAW ~~1170½~~—APPEAL—HARMLESS ERROR—EVIDENCE.

The exclusion of such question was not rendered harmless by accused's testimony that the automobile was the property of his wife, and was given to her by her brother, especially where such testimony was given in answer to a question as to whether he did not sport in an auto two

or three days before the adjudication, and fly around the city just a few days after he was adjudicated a bankrupt, and where the prosecution introduced evidence which, if believed, was well calculated to discredit any testimony the bankrupt might give.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3129-3135; Dec. Dig. ☞1170½.]

5. BANKRUPTCY ☞495—CRIMINAL OFFENSES—CONCEALMENT OF PROPERTY—EVIDENCE.

On the trial of a bankrupt for concealing assets from the trustee in bankruptcy, a question asked the bankrupt on cross-examination as to whether he sported in a \$3,000 auto two or three days before the adjudication, and whether he did not fly around the city a few days after he was adjudicated a bankrupt, could not properly be admitted over objection, except in connection with other evidence tending to prove that the bankrupt had some property interest in the automobile inquired about.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 912; Dec. Dig. ☞495.]

6. CRIMINAL LAW ☞1144—APPEAL—PRESUMPTIONS IN SUPPORT OF JUDGMENT—OMISSIONS FROM RECORD.

Where the charges given by the court are not in the bill of exceptions, it may be presumed that the proposition stated in a requested charge was embodied in the charge given, and hence reversible error is not shown.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2736-2764, 2766-2771, 2774-2781, 2901, 3016-3037; Dec. Dig. ☞1144.]

Maxey, District Judge, dissenting.

In Error to the District Court of the United States for the Southern District of Alabama; Harry T. Toulmin, Judge.

Morris M. Meyer was convicted of an offense, and he brings error. Reversed and remanded.

Francis J. Inge, of Mobile, Ala., and John R. Hunter, of Alexandria, La., for plaintiff in error.

Alexander D. Pitts, U. S. Atty., of Selma, Ala., and H. T. Pegues, Asst. U. S. Atty., of Mobile, Ala., for the United States.

Before PARDEE and WALKER, Circuit Judges, and MAXEY, District Judge.

WALKER, Circuit Judge. [1] The case went to the jury on the second only of the three counts of the indictment; the demurrer to the third count having been sustained, and a nolle prosequi having been entered as to the first count. The action of the court in overruling the demurrer to the second count is assigned as error. We are not of opinion that that count was subject to the demurrer interposed to it. The grounds of demurrer which have been principally insisted upon by the counsel for the plaintiff in error are the ones which suggest that the count fails to allege that the money mentioned therein was knowingly and fraudulently concealed by the defendant, while a bankrupt, from his trustee, and that said count is indefinite and uncertain, in that it cannot be ascertained whether the defendant is prosecuted for concealing said money from the trustee or from the receiver. These objections are based upon the presence in the count of an averment that:

The defendant "then and there knowingly, willfully, and fraudulently, and while he was a bankrupt as aforesaid, concealed the aforesaid sum of money

from his said receiver, which said sum of money belonged then and there to the bankruptcy estate of the said Morris M. Meyer."

In this connection it is pointed out that the statute (section 29, subd. "b" of the Bankruptcy Act) upon which the prosecution must rest does not make it a criminal offense for a bankrupt knowingly and fraudulently to conceal, while a bankrupt or after his discharge, from his receiver, property belonging to his estate in bankruptcy, and that that statute is directed against such a concealment from the bankrupt's trustee only. The count does not fail to charge such a concealment from the trustee. It commences and concludes with averments to this effect which substantially follow the language of the statute which created the offense. Following the first-mentioned of these averments is a narrative as to how the defendant acquired the money alleged to have been concealed, namely, by getting cashed a described check payable to himself, of the appointment of a receiver of the bankrupt estate, and of the defendant's concealment from such receiver of the money so obtained, the averment of such concealment being the one above quoted. Following this narrative, the count proceeds to allege the selection, appointment, and qualification of a trustee of the bankrupt estate, and concludes with the averment:

"That after the selection, appointment, and qualification of the said Vincent B. McAleer as said trustee, the said Morris M. Meyer did then and there continue to conceal, knowingly, fraudulently, willfully, and unlawfully, from his said trustee, the aforesaid money then and there belonging to his said estate in bankruptcy, and while he, the said Morris M. Meyer, was then and there such bankrupt."

While the count shows that the concealment charged had its commencement while the receivership was in existence, we think that its opening and concluding averments make it sufficiently plain that it was the continuance of that concealment after the appointment and qualification of the trustee, and not what is alleged to have occurred before such appointment and qualification, which is made the basis of the criminal charge preferred, and that the allegation as to a concealment from the receiver could not well have been understood as a charge of a separate offense, or as descriptive of an essential ingredient of the conduct which was relied on to support a conviction. There is nothing in the record to indicate that it was so understood and treated in the trial court. As the count pointedly averred every fact necessary to be proved to constitute the offense denounced by the statute, its sufficiency was not impaired by the unnecessary averment as to a concealment from the receiver. *Hall v. United States*, 168 U. S. 632, 18 Sup. Ct. 237, 42 L. Ed. 607; *In re Lane*, 135 U. S. 443, 10 Sup. Ct. 760, 34 L. Ed. 219. In this connection the counsel for the plaintiff in error refer us to the decision in the case of *Ex parte Bain*, 121 U. S. 1, 7 Sup. Ct. 781, 30 L. Ed. 849. That decision does not support the proposition that a superfluous allegation in an indictment renders it subject to demurrer. What was dealt with in that case was an unauthorized action of a court in striking out part of an indictment.

[2] One of the grounds assigned in the demurrer was the failure of the count to allege that any demand for said money was made

on the defendant by the trustee, or the receiver, or any other person. The statute does not make a demand a prerequisite to the commission of the offense which it denounces. Nothing said in the opinion rendered in the case of *Warren v. United States*, 199 Fed. 753, 118 C. C. A. 191, 43 L. R. A. (N. S.) 278, can be given the effect of requiring an indictment for the statutory offense to allege anything which the statute does not make an ingredient of that offense. The count in question charged the commission of the offense in the language of the statute. This being true, it was not subject to the demurrer. *United States v. Comstock* (C. C.) 161 Fed. 644; *Ackley v. United States*, 200 Fed. 217, 118 C. C. A. 403.

[3] In the trial the prosecution introduced evidence which tended to prove a concealment by the defendant from his trustee of the sum of money which was mentioned in the count on which the trial was had, and that his conduct in regard to that money was part of a scheme or plan which was manifested by that and other somewhat similar transactions, evidence of which was adduced. The evidence as to these matters was conflicting. Vincent B. McAleer, who was, successively, the receiver and the trustee of the defendant's estate in bankruptcy, in the course of his direct examination as a witness for the prosecution, stated that he made a demand on the defendant for the assets of his estate, "and that he made this demand previous to the bringing by him of the suit against Hattye W. Meyer to recover an automobile and diamond ring." On cross-examination of the witness, the defendant's attorney asked him the following question:

"You spoke about a suit—about an auto and ring. This is the suit you dismissed for want of evidence, isn't it?"

The defendant duly excepted to the action of the court in sustaining the prosecution's objection to this question. It is quite apparent that, in its connection with other evidence of incriminating conduct on the part of the defendant, the above-quoted statement of the witness may well have been understood as a suggestion or insinuation, and not a very covert one, that an automobile and a diamond ring also figured among the things which were improperly withheld or concealed from the defendant's creditors or their representative in the bankruptcy proceeding. It readily may be supposed that any unfavorable impression that may have been made upon the jury by evidence of the defendant's concealment of sums of money may have been deepened, and that the probative effect of any explanation advanced by the defendant of other transactions of his which were deposed to by witnesses for the prosecution may, in the estimation of the jury, have been materially impaired by what they regarded as proof of a circumstance from which it was to be inferred that the defendant was responsible for the amount of the assets of his estate in bankruptcy being reduced by the withholding or concealment of such articles of luxury as an automobile and a diamond ring. On the cross-examination of the witness the defendant was entitled to prove by him his inability to adduce any evidence to support the suit of which he had made mention, and the dismissal of it for that reason, and in this way to show to

the jury that an incident upon which, if the evidence of it brought out in the direct examination of the witness had remained unexplained or unrebutted, they may have based an inference unfavorable to the defendant, really furnished no support at all for any such inference.

It is suggested that the proper remedy available to the defendant was a motion to strike out that part of the testimony of the witness which contained the mention of the suit for an automobile and a diamond ring. The defendant is not to be confined to that remedy. We cannot shut our eyes to the fact that a court's withdrawal of evidence from the consideration of jurors frequently is much less effective in removing from their minds an impression made by it than explanatory or rebutting evidence going to prove that the circumstance which the excluded evidence tended to prove was one incapable of supporting an inference unfavorable to the party against whom that evidence was introduced. The conclusion is that the court was in error in the ruling last above mentioned.

[4, 5] The suggestion is made that whatever prejudice this ruling involved is to be regarded as having been removed by the uncontradicted and unrebutted testimony of the defendant himself to the effect that he did not buy the automobile—that it was the property of his wife, having been given to her by her brother. The statement of the defendant to this effect was made in his answer to the following question asked on his cross-examination, after an objection to the question had been overruled, and an exception reserved:

"Didn't you sport in a \$3,000 auto? You sported in an auto two or three days before the adjudication. Didn't you fly around Mobile just a few days after you were adjudicated a bankrupt?"

The evidence called for by this question could not properly have been admitted over the objection made, except in connection with other evidence already introduced, or which was proposed to be offered, having a tendency to prove that the defendant had had some property interest in the automobile inquired about. The fact of his riding in somebody else's automobile could have shed no light on any question involved in the case on trial. But in the circumstances of the transaction which was under investigation it readily can be realized how evidence of that fact may have unduly impressed the jury and created a prejudice against the defendant. There was no suggestion that there was anything other than the bringing of the suit mentioned by the witness McAleer to suggest or indicate that the defendant or his estate in bankruptcy had ever had any interest in that automobile. The prosecution controverted the defendant's version of the circumstances attending his failure in business, and introduced evidence which, if believed, was well calculated to discredit any testimony he might give. In this situation the party seeking to discredit the defendant's testimony cannot with much plausibility or consistency claim that his uncorroborated explanation of an apparently unfavorable incident which had been deposed to must have been accepted by the jury as satisfactorily rebutting or destroying the effect of the evidence of that incident. The conclusion is that the rulings under con-

sideration were erroneous and prejudicial, and call for a reversal of the judgment appealed from.

[6] We find no reversible error in other rulings on evidence. The bill of exceptions does not set out the charge or charges given by the court. It follows that the record fails to make it appear that the refusal of any written charge requested by the defendant which stated a correct proposition applicable to the case was reversible error, as it may be presumed that that proposition was embodied in the charge given by the court.

In another trial the court may readily avoid any ground for such an objection as the one raised to the judgment now under review, based upon the finding of the jury having been returned, not to the court, but to the clerk of the court during a recess, and in the absence of the defendant.

The judgment is reversed, and the cause is remanded.

MAXEY, District Judge (dissenting). I am of the opinion that there is no reversible error in the record, and that the judgment should be affirmed.

THE AMAGANSETT.

(Circuit Court of Appeals, Second Circuit. January 12, 1915.)

No. 104.

1. COLLISION ~~83~~—STEAM VESSELS CROSSING IN FOG—MUTUAL FAULTS.

The fishing steamers Falcon and Amagansett both held in fault for a collision in Nantucket Sound in a dense fog while on crossing courses, the former for giving course signals in violation of article 18, rule 9, of the Inland Rules (Act June 7, 1897, c. 4, § 1, 30 Stat. 100 [Comp. St. 1913, § 7892]), and in not stopping as required by article 16, although she heard the fog signals of the other vessel, and the latter in not stopping as required by such article on hearing the crossing signal of the Falcon.

[Ed. Note.—For other cases, see Collision, Cent. Dig. §§ 156, 167, 175; Dec. Dig. ~~83~~.]

2. COLLISION ~~80~~—STEAM VESSELS IN FOG—CONSTRUCTION OF INLAND RULES.

The provision of article 16 of the Inland Rules (Act June 7, 1897, c. 4, § 1, 30 Stat. 99 [Comp. St. 1913, § 7889]) that "a steam vessel hearing, apparently forward of her beam, the fog signal of a vessel the position of which is not ascertained shall, so far as the circumstances of the case admit, stop her engines, and then navigate with caution until danger of collision is over," is not limited to the hearing of fog signals, although such signals only are authorized in a fog by article 18, rule 9, but applies when a vessel in a fog hears any signal indicating the proximity of another vessel forward of her beam.

[Ed. Note.—For other cases, see Collision, Cent. Dig. §§ 152-155; Dec. Dig. ~~80~~.]

Signals of meeting vessels, see note to The New York, 30 C. C. A. 630.]

Appeal from the District Court of the United States for the Southern District of New York.

~~For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes~~

Following is the opinion of the District Court by Hough, District Judge:

From Handkerchief Lightship to Shovelful Lightship is a straight run of five knots.¹ About three-eighths of a mile south by east of Shovelful Lightship lies the Stone Horse buoy, which marks the easterly limit at that point of a five-fathom channel, there slightly less than half a nautical mile in width, but rapidly widening for a vessel bound to the westward.

About 9 p. m. of August 22, 1912, there were three steam fishing vessels at or approaching the Handkerchief Light vessel, viz., the Murray, the Amagansett, and the Edwards, bound east, while a fourth similar craft (the Falcon) was at or near the Stone Horse buoy, and bound west. This case arises out of a collision which shortly thereafter occurred between the Falcon and the Amagansett, resulting in the total loss of the former.

The place of collision is nearly marked by a wreck buoy still noted on charts and $1\frac{1}{4}$ knots southwest $\frac{1}{4}$ west from the Stone Horse buoy. The time of collision cannot be satisfactorily fixed. The estimates are wholly unreliable. But I do not think that the exact minute of collision is important. The place of collision is important, and it was very nearly the place where the wreck lies; for if, as Captain Grinnell says, the Falcon's fires went out in half a minute, her engines had little influence after collision, so that I am inclined to accept the estimate of Captain Edwards that the wreck "may be 25 to 30 rods from the place of collision." I think that whatever movement the Falcon made after collision was southerly and easterly. The tide set was on her port quarter, and it is argued that the Amagansett's blow tended to throw her bow to her own starboard; but she was seen heading east after collision, and her headway would continue until she was nearly under water.

Concerning the angle of collision, there is almost no controversy (Exhibit 2; Exhibit B). The bow of the Amagansett took the starboard side of the Falcon well abaft amidships and at an angle (between bows) of nearer two than three points. It is demonstrated that the Falcon just before collision was crossing the Amagansett's bows from port to starboard of the latter vessel and at rather an acute angle. The most obvious point regarding the evidence herein is that, if both Amagansett and Falcon were actually pursuing the courses sworn to by their respective officers, there never would have been a collision, because at or near the point where the Falcon's wreck now lies the vessels would have been nearly three-fourths of a knot apart.

The Falcon says that she passed Stone Horse buoy within a few feet on her port side and from that buoy as a departure laid a course southwest by south, which was steadily maintained until collision.² Before she got to the Stone Horse the fog was dense. When the Amagansett passed the Handkerchief Lightship, about an eighth of a mile on her port side, there was no fog, and to reach the Shovelful Light, with the tide setting westerly, a course was laid of northeast by east $\frac{1}{2}$ east, and it is said that this course was steadfastly maintained until collision. Both of these statements cannot be true. Both have been testified to by men apparently intelligent and of good character. Which is nearer the truth must be decided by outside evidence and the probabilities of the matter.

In my opinion the decisive testimony comes from the boat Murray. As the Murray, Amagansett, and Edwards arrived near Handkerchief Lightship, the Murray was in the lead. As the Murray passed the Lightship, the latter was within 200 yards of the Murray's port side; the Amagansett being then a distance variously estimated from 700 to 800 feet to three-quarters of a mile on the Murray's starboard quarter, but nearly astern. The Edwards is said to have been about a mile dead astern of the Amagansett. As each of these three vessels passed Handkerchief Light, she set a compass course for Shovelful. The Murray made her course northeast by east $\frac{1}{4}$ east; the

¹ This is by the official chart; the Eldridge chart, put in evidence, appears to give the distance at $4\frac{1}{8}$ miles. As a matter of fact, this chart scales six knots between the two lightships.

² All courses and directions stated in this opinion are magnetic.

Amagansett (as above noted), northeast by east $\frac{1}{2}$ east; and the Edwards took the same course as did the Amagansett.

These three fishing boats have some business connection, and the masters of the Amagansett and the Edwards are brothers. But I do not think it would be possible for so many witnesses to testify so consistently on points of navigation as the men from these three vessels have done and be all the time telling untruths. I am therefore persuaded that the Murray, while on a course northeast by east $\frac{1}{4}$ east from a point within 200 yards southerly and easterly of Handkerchief Light, encountered the Falcon when about a mile from Stone Horse buoy—the Falcon at the time steering a course which barely avoided a collision with the Murray of the same kind that she did have a few moments later with the Amagansett, except that the angle of collision would have been more acute (Exhibit I).

I likewise see no reason to doubt that very shortly after the Falcon passed the Murray the latter's master heard danger signals, and putting his wheel hard aport he rounded to and steered back southwest by south—by so doing coming "right down on the Amagansett just where I expected to find her." This means that he found the Amagansett just where he thought that she would be if she had steered from Handkerchief Light substantially the same course as did the Murray. The Murray's evidence is further borne out by that from the Edwards, which, maintaining her course, came right on the scene of disaster, of course after the Falcon had gone to the bottom.

It being thus demonstrated (in my opinion) that the Falcon was not steering southwest by south from a point within a few feet of the Stone Horse buoy, it is important to ascertain what she was doing. This is a very difficult question to answer, and the only reply that can be given is hypothesis. It is observable that, assuming the correctness of the courses sworn to from the Murray, Amagansett, and Edwards, the whole story of collision is solved and most of the testimony is reconciled by assuming that the Falcon did steer southwest by south, but not from a point so near Stone Horse buoy as is sworn to. If she took that course, not at the buoy, but when west of Shovelful Light, the matter is plain, and we have the Falcon on a west by south course going across the courses of the other three vessels, barely escaping a sharp angle collision with the Murray and actually having one with the Amagansett. Of course this can only be possible if Captain Grinnell lost his way, or if he is deliberately telling an untruth, which I am very loth to believe, and do not believe.

In my opinion he did lose his way, and the confusion of mind in which he was is illustrated by two things viz., the impossible and incredible heading which he gave to Captains Marran and Edwards immediately after collision, and his utter mistake, contradicted by his own men, in asserting that the Falcon passed within a couple of hundred yards of the Murray, whereas she passed within a very few feet of that vessel, as is overwhelmingly shown. This is the only way I can account for this collision without imputing perjury to several men of excellent character. I am persuaded that it is the reasonable explanation of this disaster, and, if true, it puts the Falcon grossly in fault for crossing the channelway in a fog, instead of staying on the starboard side thereof, where she must have been when she set her course southwest by south.

But, even without this finding, the Falcon admittedly did not obey the steering and sailing rules. The rules here referred to are rule 9 of article 18, which forbids the blowing of passing signals in fog, and article 16, which requires that a steam vessel "hearing, apparently forward of her beam, the fog signal of a vessel the position of which is not ascertained shall, so far as the circumstances of the case admit, stop her engines." The Falcon did blow passing signals in a fog, and when she heard the fog signals of a vessel that turned out to be the Amagansett forward of her beam and on her starboard bow she did not stop her engines at all, but blowing two whistles persisted at a speed of about three knots an hour and so ran into collision.

I feel sure that, had the Falcon stopped her engines, there would have been no collision. She heard the fog signals of both the Murray and the Amagansett; both the Murray and the Amagansett heard the Falcon blowing passing whistles on their port bows. As the event proved, the sound carried true in this fog. The Falcon was going slowly; she was heavy laden, and the tide

set was carrying her to the westward or further away from the Murray and Amagansett. If, therefore, she had obeyed the rule and stopped her engines, she certainly would not have encountered the Amagansett, and I think she would have been clear of the course of the Murray. For these reasons, the Falcon seems to be plainly in fault.

It remains to consider whether the Amagansett is free from fault. The Murray's lights became blurred and disappeared. This was the first warning of fog the Amagansett had, and it was sufficient to cause that vessel to slow her engines before she actually got into the fog. The first thing that the Amagansett heard of the Falcon was a blast of two whistles. This was just at or just before the time the fog closed down on the Amagansett; she was then going slow. Quite naturally those two whistles were taken to be a signal to the Murray, and the evidence shows that such was the Falcon's intent. Shortly thereafter the admitted second blast of the fog whistle was heard, and then the Amagansett stopped; as soon as the Falcon came in sight, she reversed.

It is impossible to say whether all way had been taken off the Amagansett at the moment of collision, but, as the Falcon never varied from her slow speed of an estimated three knots, I am of opinion that the force of the blow was caused more by the speed of the Falcon than by any advancing movement on the part of the Amagansett. I do not think the Amagansett could reasonably have been required to do more than she did do to avoid the collision. The only thing suggested is that she ought to have stopped or reversed at the first signal of two whistles. Having regard to the known position of the Murray, I think she was justified in continuing under a slow bell.

McLain, the pilot of the Amagansett, has been navigating the waters in question for more than a generation; he produced licenses which in terms cover the region around Cape Cod, but I do not think that his license in force at the time of collision did cover those waters. But a license does not always make a good pilot, nor the lack of it a poor one. For the purposes of this case, the question is, not what McLain was authorized to do, but what he did do.

It is said, also, that the Amagansett caused or contributed to the collision by porting her helm just before contact. McLain admits that he gave the order to port, and he evidently was prepared to argue in support of his opinion; but I see no reason to doubt that before his order could be carried into effect the master stopped him and held the Amagansett to a steady course.

The libel is dismissed, with costs.

Herbert Green, of New York City, for appellants.

Frank V. Barns, of New York City, for appellee.

Before LACOMBE, COXE, and WARD, Circuit Judges.

WARD, Circuit Judge. [1] This case arose out of a collision August 22, 1912, at 9:30 p. m., in a dense fog in Nantucket Sound, between the fishing steamer Falcon, bound to the westward for Long Island, N. Y., and the fishing steamer Amagansett, bound to the eastward for Boston Bay. The District Judge found the Falcon solely at fault, and, as we concur in his finding of facts, it will not be necessary to repeat them.

The question we will consider is whether the Amagansett was also at fault. The trial judge found that after the Falcon had rounded Stone Horse buoy and got some way to the westward, she went off on a south-southwest course (printed in the record, no doubt by typographical error, as west by south) across the channel between Shovelful Shoal light vessel and Handkerchief Shoal light vessel. This brought her across the bows of the approaching fishing steamer Murray, which was steering northeast by east $\frac{1}{4}$ east, followed by the Amagansett on her starboard quarter at a distance variously estimated as from 700

feet to three-quarters of a mile, steering northeast by east $\frac{1}{2}$ east. The locality was within the inland rules of 1897, rule 9 of which provides that in fog, when vessels cannot see each other, only fog signals must be given, and article 16 which provides:

"Art. 16. * * * A steam vessel hearing, apparently forward of her beam, the fog signal of a vessel the position of which is not ascertained shall, so far as the circumstances of the case admit, stop her engines, and then navigate with caution until danger of collision is over."

The Falcon, without seeing the Murray, blew her a course signal of two whistles, and some two minutes later a similar signal to the Amagansett, without seeing her. The Murray and Amagansett blew only the statutory fog signals. Upon hearing the first signal of two blasts, the Amagansett slowed her engines to half speed, and upon hearing the second signal stopped, and upon the lights of the Falcon coming in sight went full speed astern. Notwithstanding this, the Amagansett struck the starboard quarter of the Falcon some 35 to 40 feet forward of her stern, sinking her almost immediately. It will be perceived that the Falcon needed only about 40 feet to clear. The two signals of two blasts from a steam vessel approaching on the port bow indicated to the Amagansett that she was starboarding and going in a direction approaching or crossing the Amagansett's course. This was a situation that made stopping unusually important. Taking the speed of the Amagansett after slowing to be as her master testified, three knots over the land, it seems obvious that, if she had stopped her engines after she heard the first signal of two whistles, no collision would have taken place. The burden lay upon the Amagansett to show that this violation of a statutory rule could not have contributed to the collision. *Yank-Tsze Insurance Co. v. Furness*, 132 C. C. A. 201, 215 Fed. 859. This rule is a most salutary one, consistently enforced in this court (*The St. Louis*, 98 Fed. 750, 39 C. C. A. 201; *The Delaware*, 213 Fed. 214, 129 C. C. A. 558; *The Bayonne*, 213 Fed. 216, 129 C. C. A. 560), and we have no hesitation in finding the Amagansett at fault for violating it.

[2] At the hearing counsel for the Amagansett contended that article 16 did not apply, because it mentions only fog signals, whereas the two signals of two blasts were not fog signals, but course signals. No doubt article 16 mentions fog signals only because rule 9 of the act provides that course signals must not be given in a fog when vessels do not see each other. The reason of the rule applies to any signal indicating the proximity of a vessel forward of the beam, and in this case, as we have seen, the course signal gave greater notice of danger than fog signals would have done. To construe article 16 literally would be to stick in the bark and to defeat the obvious intention of Congress.

The decree is modified, and the District Court directed to enter the usual decree of half damages and costs in the District Court, with full costs to the Falcon in this court.

ALAMO CATTLE CO., Sociedad Anonima, v. HALL.

(Circuit Court of Appeals, Ninth Circuit. February 15, 1915.)

No. 2451.

1. APPEAL AND ERROR ~~1064~~—PREJUDICIAL ERROR—INSTRUCTIONS—FORM AND SUFFICIENCY.

The great length of instructions, or the amount of repetition contained in them, was not necessarily reversible error, though such faults should always be avoided.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4219, 4221-4224; Dec. Dig. ~~1064~~.]

2. TRIAL ~~295~~—INSTRUCTIONS—BURDEN OF PROOF.

In a buyer's action for breach of a contract for the sale of cattle, in which the seller counterclaimed for the refusal of the buyer to accept cattle tendered, the court charged that the burden was on defendant, before it could recover judgment against plaintiff, to show that the cattle tendered fully complied with the contract. It further charged that the burden was upon plaintiff to prove every material allegation of his complaint by a preponderance of the evidence, and that if, upon any of the material allegations of the complaint, the evidence was evenly balanced, or preponderated in favor of defendant, plaintiff could not recover, and the jury should find for defendant, and that, if defendant tendered to plaintiff cattle in accordance with the contract, the verdict must be for defendant. *Held* that, taken as a whole, the instructions were not erroneous; the instruction that the burden was upon defendant evidently referring to the affirmative matter set up in defendant's answer, upon which it prayed judgment.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 703-717; Dec. Dig. ~~295~~.]

3. SALES ~~174~~—EXECUTORY CONTRACTS—BREACH BY SELLER.

Under a contract for the sale of cattle, by which the buyer was to furnish cars for shipping them, and was to guarantee payment in a manner satisfactory to a bank, before each shipment was brought from Mexico into Arizona for shipment, if cattle tendered by the seller did not conform to the requirements of the contract, the buyer had a legal right to refuse to accept them, and the seller's insistence upon such acceptance, and refusal to tender or deliver other cattle in lieu of those rejected, constituted a breach of the contract, and it was immaterial whether the buyer furnished cars, and whether he was ready and able to make the required payment.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 434; Dec. Dig. ~~174~~.]

4. APPEAL AND ERROR ~~1048~~—HARMLESS ERROR—EXCLUSION OF EVIDENCE.

In a buyer's action for breach of a contract for the sale of cattle, the error, if any, in excluding a question, asked the buyer on cross-examination, as to whether he did not state to M. that he made a mistake in refusing a tender of cattle, was harmless, where M. testified that the buyer did say that he thought he made a mistake, while the buyer subsequently testified that he told M. that he thought it would have been better to cut out of the herd such of the cattle as complied with the contract, because this would have convinced the seller beyond a doubt that it did not have a train load as required by the contract.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4140-4145, 4151, 4158-4160; Dec. Dig. ~~1048~~.]

In Error to the District Court of the United States for the District of Arizona; William H. Sawtelle, Judge.

Action by John G. Hall against the Alamo Cattle Company, Sociedad Anonima. Judgment for plaintiff, and defendant brings error. Affirmed.

Frank J. Barry, of Nogales, Ariz., and William M. Seabury, of Phoenix, Ariz., for plaintiff in error.

George J. Stoneman and Reese M. Ling, both of Phoenix, Ariz., and Chas. R. Loomis and Fred C. Knollenberg, both of El Paso, Tex., for defendant in error.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

ROSS, Circuit Judge. The plaintiff in error was defendant in the court below to this action, there brought by the present defendant in error to recover damages for the alleged breach of this contract:

"This agreement, made and entered into this 16th day of January, 1913, between the Alamo Cattle Co., S. A., of Magdalena, Sonora, Mexico, hereinafter known as the seller, and Mr. E. W. Myers, of El Paso, Texas, herein-after known as the buyer, witnesseth as follows:

"For and in consideration of the sum of:

"(Twenty-three) dollars U. S. Cy. for two year old steers;

"(Twenty-eight) dollars U. S. Cy. for four year old steers;

"_____ dollars U. S. Cy. for _____;

"_____ dollars U. S. Cy. for _____;

the seller agrees to sell and deliver f. o. b. cars at Nogales, Ariz., station, all duties and expenses paid; buyer to furnish cars four thousand to five thousand head of two year old steers and one thousand head of four year old steers as good or better than the Terassas cattle. Payment of these cattle is to be guaranteed in a manner satisfactory to the First National Bank of Nogales, Ariz., before each shipment crosses the line; all to be of full ages at time of delivery.

"The seller also agrees to allow the buyer the privilege of cutting out and rejecting fifteen per cent. of said cattle after all runts, stags (unless otherwise specified), cripples, lump-jaws, sway-backs, blinds, cattle too thin to ship, or unmerchantable cattle have been cut out by the seller.

"Cattle to be branded .

"The seller hereby acknowledges receipt of (ten thousand) dollars U. S. Cy. in hand paid this day by the buyer, who agrees to pay the balance of the purchase money when said cattle are delivered on board cars, and failing to do so he shall forfeit the amount or amounts advanced on this contract. The seller agrees to pay two dollars, in addition returning the forfeit, on each head he fails to deliver under this contract, which shall constitute entire claim for damages. Cattle to be cut Moraga or Destiladera; buyer to give fifteen days' notice for each delivery in train load lots during April and May, 1913.

"Witness our hands this 16th day of January, 1913.

"Ed. W. Myers.

"Alamo Cattle Co.

"W. Beckford Kibbey, Jr., Prest."

The subsequent assignment of the contract by Myers, and of all of his rights and obligations thereunder, to the plaintiff, is admitted.

In addition to a denial of the alleged breach of the contract on its part, the amended answer of the defendant set up a "separate defense" and also a "counterclaim" against the plaintiff. The separate defense alleged was that at all times during the months of April and May, 1913, the defendant was ready, willing, and able to comply with all of the terms and conditions of the contract on its part, and did so until the

plaintiff failed and refused to perform its part of such terms and conditions; that in the early part of April, 1913, the defendant tendered the plaintiff 1,000 head of cattle of the kind and quality required by the contract, which the plaintiff refused to accept, and that on May 9th of the same year the defendant duly tendered to the plaintiff "from one thousand *twelve* hundred to one thousand five hundred head of cattle," of the kind and quality it agreed to sell and deliver, and that on May 13th it duly tendered to the plaintiff 1,093 head of the kind and quality required by the contract, but that the plaintiff without right failed and refused—

"to select and accept any of the said cattle so offered and tendered by defendant to the said plaintiff, although the said cattle in every respect fulfilled each and all of the terms and conditions of the said contract relating thereto; and that plaintiff further failed to perform said contract, in that the said plaintiff had not then and there, or thereafter, supplied the cars necessary to receive the said cattle at Nogales, Ariz., in accordance with the terms of said contract. And defendant further alleges that plaintiff further failed to perform the said contract, in that plaintiff had made no arrangement satisfactory to the First National Bank of Arizona for the payment of the purchase price of said cattle, in accordance with the terms of the said contract, and that plaintiff has wholly failed and neglected to pay the contract price for said cattle, although payment thereof has been duly demanded, and has wholly failed and neglected to perform the terms and conditions of said contract to be by him performed. Defendant further alleges that, at the time defendant entered into said contract with the said Myers, the subject of said contract, namely, the cattle therein specified, and the business connected therewith, was of a speculative character, and that the value and price of the cattle therein described and agreed to be furnished by the defendant to the said Myers was and still is of a fluctuating character; that the amount of damage which defendant might and could sustain by reason of a breach of said contract on the part of the said plaintiff and of a failure upon his part to perform the terms thereof was uncertain in amount and not readily ascertainable, or ascertainable at all, and that the said sum of ten thousand (\$10,000.00) dollars mentioned in said contract was and is a reasonable and usual sum to be fixed upon and paid to the defendant as liquidated damages, and not as a penalty or forfeiture, for the breach of the said contract upon the part of the said plaintiff."

For its counterclaim against the plaintiff the defendant made in its amended answer various allegations in respect to the purchase by it of a large amount of cattle in order to comply with its said contract, the alleged failure of the plaintiff to accept which cattle resulted in certain specified losses and damage to the defendant in the aggregate amount of \$17,300, and that "defendant has received payment of no part thereof, except the sum of ten thousand (\$10,000.00) dollars," paid by the plaintiff at the time of the execution of the contract. And the prayer of the amended answer was that the plaintiff take nothing by its action, and that the defendant have judgment against the plaintiff on its counterclaim in the sum of \$7,300, with interest and costs.

The clear meaning of the contract is that upon receipt of the required 15 days' notice for each train load lot of the specified cattle the seller was to have gathered at Moraga or Destiladera a band of cattle of sufficient number, from which it had cut all runts, stags, cripples, lump-jaws, sway-backs, blinds, cattle too thin to ship, or otherwise unmerchantable, and from which remainder of the band the buyer was entitled to cut and reject 15 per cent. thereof before accept-

ing the contract cattle. Before such tendered and accepted cattle crossed the line between the two countries, the buyer was required to be prepared to pay the contract price therefor in a manner satisfactory to the First National Bank of Nogales, and the seller was required to deliver, all duties and expenses thereon paid, such cattle on board the cars at Nogales that the buyer was required to have there ready for that purpose.

That the contract was broken is admitted, and the real issue made by the pleadings and by the proof was, Which party broke it? Upon the part of the plaintiff the contention was that the cattle tendered him by the defendant company were not of the grade or class called for by the contract, and that for that reason he would not receive them, which contention was controverted by the defendant company, and the further claim made on its behalf that the plaintiff had not provided the cars for the cattle, nor for the payment therefor, as required by the terms of the contract.

In respect to the character of the cattle tendered by the defendant company to the plaintiff, the testimony was more or less conflicting; but there was certainly much testimony given on behalf of the plaintiff tending to show that the cattle tendered to him by the defendant did not answer the requirements of the contract, and for that reason were rejected. That question having been determined by the jury in favor of the plaintiff, and the defendant company having by its letter of May 13, 1913, notified the plaintiff "that, owing to the fact that a herd of two year old steers was tendered you on May 12th, consisting of 1,093 steers, from which we asked you to cut a train load, but which you refused to cut or receive, after having come down expressly to receive these cattle, after due notice according to contract, we consider that you have forfeited all right in the aforesaid contract, and hereby so advise you," the only questions for our consideration are such of the rulings of the court made on the trial and such of its instructions to the jury as were duly excepted to and assigned as error.

[1] The chief objections we see to the instructions are their great length and the amount of repetition contained in them. While both of those faults should always be avoided, they do not necessarily amount to reversible error. A short and logical statement of the issues the jury are required to determine, and a clear and concise statement of the law applicable to them, with such reference to the evidence as may be appropriate, is usually all that is required, and is far more likely to aid the jury in reaching an intelligent verdict than very long and involved instructions.

[2] In the instant case the first point made on behalf of the plaintiff in error, and apparently the one most relied upon by its counsel, is that the court below erred in giving the jury this instruction:

"You are instructed that the burden of proof is upon the Alamo Cattle Company, before they can recover judgment against plaintiff, to show that cattle alleged to have been tendered on May 9 and 12, 1913, fully complied with the contract in every respect."

It will be observed that the plain effect of that instruction was that *before the cattle company could recover judgment against the plaintiff* the burden would be upon that company to show that the tender

referred to complied with the company's obligation under the contract—referring no doubt to the affirmative matter set up in its answer, upon which it prayed judgment against the plaintiff. But when the court came to instruct the jury in respect to the plaintiff's demand against the defendant it distinctly told them this:

"The jury are instructed that the burden is upon the plaintiff, and it is for him, to prove every material allegation of his complaint by a preponderance of the evidence. If upon any one or more of the material allegations of the plaintiff's complaint the evidence is evenly balanced, or if it preponderates in favor of the defendant, then the plaintiff cannot recover, and the jury should find for the defendant."

And in various places the court told the jury in effect that if they should—

"find that the defendant tendered and offered to the plaintiff the cattle called for in the contract, in the quantity and of the ages specified in the contract, and that such cattle were as good as or better than Terrazas cattle, then the verdict must be for the defendant."

[3] The court also instructed the jury to the effect, and we think properly, that if the cattle tendered by the defendant company did not conform to the requirements of the contract, the plaintiff had the legal right to refuse to accept them, and in that event that the defendant's insistence upon such acceptance and its refusal to tender or deliver other cattle in lieu of them, as manifested by its letter of May 13th, constituted a breach of the contract on its part, in which latter event the furnishing of cars for the transportation of the cattle and the plaintiff's readiness and ability to make the required payment became an immaterial matter, although the plaintiff gave testimony tending to show such ability and readiness on his part.

Taking the instructions as a whole, we are of the opinion that the jury could not have been misled thereby. That view also disposes of the alleged errors respecting the admission and exclusion of evidence regarding the ability and readiness of the plaintiff to make the payments and furnish the cars.

[4] It is also contended on behalf of the plaintiff in error that the court below erred in sustaining the objection to this question asked the plaintiff on cross-examination:

"Q. Did you, or not, state to Mr. Myers, at El Paso, in substance, that you or Mr. Oliver (who was with the plaintiff at the time the tender was made) had made a mistake?"

The objection to the question was that it was not proper cross-examination, and "not competent, unless counsel desire to make this witness their own witness for this purpose." Conceding the competency of the question, and error on the part of the court in sustaining the objection to it, such ruling, in view of the record, was manifestly harmless, for the reason that Myers testified, among other things, that in the latter part of June or the first of July, in discussing this case with Hall:

"I asked him if he didn't think he made a mistake in refusing to cut the cattle, and he said, 'Yes,' that he thought he made a mistake in not cutting them. That is about the extent of the conversation, as I recall."

And the plaintiff, Hall, subsequently testified in regard to the same matter as follows:

"I heard the testimony of Mr. Myers with reference to a conversation in which Mr. Myers stated that I said that I had made a mistake in not cutting the cattle at the time they were offered at the Destiladero Ranch in Mexico. The conversation was this: We were discussing the circumstances as they happened, and I told him that I thought it would have been better if we had gone ahead and cut out of the cattle that there was in the herd, all that did comply with the contract, because we would have convinced the Alamo Cattle Company beyond a doubt that they did not have a train load. He said he could not tell about that; he didn't know whether they did or did not have a train load."

Other objections to the rulings of the court during the trial we do not think require special mention. In none of them do we discover reversible error.

The judgment is affirmed.

STONE & McCARRICK, Inc., v. DUGAN PIANO CO. et al.

(Circuit Court of Appeals, Fifth Circuit. February 8, 1915.)

No. 2665.

COPYRIGHTS  **SUBJECT OF COPYRIGHT—ADVERTISEMENTS.**

Where a so-called manual of instruction in a system of salesmanship consisted of a collection of forms of advertisements to be used by dealers in connection with special sales of pianos and piano-players, and, though they were intended to be used by all dealers licensed by the publisher to use them, they contained representations of fact concerning the sale and the success thereof, which could not possibly be true as to all dealers, and by their extravagant puffing and misrepresentation had a tendency to mislead and deceive the public, such forms were not copyrightable, and the use thereof was not an infringement of a copyright of the manual of instruction, since, if mere advertisements are ever copyrightable, the law should extend its protection to those only that speak the truth, and not to that class of matter the effect of which is to mislead and deceive the public, especially as one applying to a court of equity for relief must come with clean hands.

[Ed. Note.—For other cases, see Copyrights, Cent. Dig. §§ 2, 9, 10; Dec. Dig.  4.

Matter subject to copyright, see note to Cleland v. Thayer, 58 C. C. A. 273.]

Appeal from the District Court of the United States for the Eastern District of Louisiana; Rufus E. Foster, Judge.

Suit by Stone & McCarrick, Incorporated, against the Dugan Piano Company and others. From a decree dismissing the bill (210 Fed. 399), complainant appeals. Affirmed.

The appellant filed its bill in the District Court against the appellees, Dugan Piano Company, the New Orleans Item, and others, to prevent the infringement of the copyright of a book containing forms of advertisements and other matter, interspersed with rather attractive illustrations. The bill prayed an injunction, damages, and an accounting. The questions presented for decision arise upon an order made by the trial court dismissing the bill, which, among other allegations, contains the following:

"That complainant was organized for the purpose, among other things, of carrying on, and since its organization has carried on, and is now carrying on,

the business of writing, making, editing, publishing, and selling, books relating to the sale of pianos and player-pianos. That complainant, its officers and employés, have spent much time, effort, study, and money in devising writing up, editing, publishing, and selling books adapted for instruction in the sale of pianos and player-pianos, aforesaid, and especially intended to be used by its subscribers and its licensees for reprinting in the form of advertisements in newspapers, magazines, periodicals, and other literature.

"Complainant further avers that, for the purposes aforesaid, it has written, or caused to be written, and prepared, published, edited, and copyrighted, a book entitled 'Manual of Instruction in the Use of Stone & McCarrick (Incorporated) System of Salesmanship,' and that its officers, agents, and employés, have spent much thought, skill, time, effort and money in devising, writing, editing, publishing, introducing, and selling the book aforesaid; and that the book aforesaid was especially intended to be used by its subscribers and its licensees for reprinting parts thereof in a series of articles intended for advertising purposes, and was printed in such form as to be specially adapted for use as 'copy' for advertisements in newspapers, magazines, periodicals, and other literature; and that the said book so prepared was proper subject-matter for protection under section 5, Class A, of the Copyright Act of March 4, 1909 (Act March 4, 1909, c. 320, 35 Stat. 1076 [U. S. Comp. St. 1913, § 9521].")

The Manual of Instruction, denominated a book by the appellant, and made an exhibit to the bill, consists of 25 sheets, of approximately the size of a sheet of an ordinary newspaper, 22 of which are devoted to advertising matter, and the three last to what are termed "Prospect and Premium Letters." These sheets are bound together, and in this form they are disposed of by the author. The lower left-hand corner of each of the 22 sheets contains brief directions as to the time of the publication of the advertisement and as to the space required. For example: On page 1 are the following words and figures, "Ad No. 1, Wednesday, 7 cols." Page 2, "Ad No. 2, Thursday, 7 cols." And so on through the entire series. This collection, or book, of advertisements, contains both letterpress and pictorial illustrations. The following excerpts are taken from the letterpress of the book:

First. On page 1 the advertisement begins as follows:

"The pianos for this co-operative sale were personally selected at the factory by Mr. _____ and upon arrival are being tested and inspected by Prof.

"300 New Pianos Worth \$350 Each to be Sold for \$248.75 Each.

"With the opening of our store to-morrow morning, a new plan of selling pianos in _____ will be inaugurated. And a gigantic sale will have begun. The sale will consist of three hundred new pianos. No more. No less. These instruments were contracted for and this sale planned and arranged months ago. (This will be told of fully in another advertisement.) The pianos have been arriving now direct from the factory at the rate of a car load a day. The store is packed."

Second. Page 2:

"300 persons will each save \$101.25 (101 dollars and 25 cents) by obtaining their piano through this co-operative sale."

Third. Page 6:

"When you begin to pay you begin to own your piano and in event of death all unpaid payments are immediately canceled."

Fourth. Page 7:

"Don't get away from the principal fact that first of all you get a piano through this co-operative plan for 248 dollars and 75 cents which will ordinarily cost you 350 dollars."

Fifth. Page 10:

"Saving Millions by Co-operation. A saving of \$30,375 through this one transaction in Pianos."

Sixth. Page 11:

"One-third of these \$248.75 pianos have been sold. Two weeks ago to-day we announced this co-operative sale. To-day—one-third of these pianos (in round figures) have been sold. We told you then that co-operation was power. This has been fully proved by the instantaneous success of this sale."

Seventh. Page 13:

"Once again we tell this whole piano story. This is a story of success—of unprecedented success. It's a story of planning—then of concentrating unlimited power on working out the plan until it's a story of such stupendous success that the telling is spontaneous. We could not help repeating it if we would, or would not if we could. It's inspiring. It runs off the pencil faster than we can write. The reason for it, is the plan itself. Here it is: Don't miss a single syllable."

Eighth. Page 15:

"You are missing the opportunity of your life if you don't get one of these pianos during this co-operative sale.

"The pianos for this co-operative sale were personally selected at the factory by Mr. _____ and upon arrival are being tested and inspected by Prof.

"We knew this sale would be a success. The manufacturers (Kohler & Campbell), who are co-operating with us in this sale, knew it would be a success. We knew our prices were right and that our proposition was right. But we were not expecting such overwhelming success. We expected a shower, but we did not expect a downpour. The plain facts are—we have taken orders for twice as many instruments as we had expected to sell up to this time. And this is told for but one purpose, and one purpose only, and that is—to advise those who have already told us they would buy later during the sale—do not put off too long."

Ninth. On page 16:

"All records of piano selling surpassed. The success of this co-operative sale has been almost electrifying.

"The success of this sale was foretold the day it opened. It started out a success—and has kept it up ever since. The store has been as busy as a department store, where thousands of things are sold instead of a few. Up to this writing we have sold and delivered just sixty-seven instruments more than the largest estimate put upon the probable sales for the given time—which means that the sale will close from a week to two weeks earlier than we had expected. Remember—when three hundred pianos and one hundred player-pianos have been sold—the sale ends. Not another one of these instruments will be sold at these prices, upon these terms, or upon this plan. So come now."

Tenth. Page 17:

"Eighty player-pianos have been sold. But twenty remain to be sold through this co-operative plan.

"Nothing can tell the story of the success of this sale so well as this. Eighty of the one hundred player-pianos intended for this sale have already been sold."

Eleventh. Page 18:

"We are so likely to forget. We are so likely to put off. We get in the habit of thinking that we have plenty of time for this or that.

"This great piano sale is now in mind—when we pencil these thoughts. We have in mind that it was even our own expectation, when this sale opened that it would continue at least three weeks longer.

"Now we know it cannot possibly run for two weeks longer.

"This sale has been electrifying. It has been huge, gigantic, stupendous in its success.

"Like a snowball rolling down hill, it has gathered size and strength as it progressed.

"Yesterday we could scarcely serve our customers. To-day the same thing—and to-morrow, being Saturday, and this reminder to quicken your coming, we no doubt will have the largest single day's orders to fill of any one day since this big movement was announced.

"Is it, therefore, too much to ask that you come in the forenoon, if you can find it convenient to do so?"

Twelfth. Page 19:

"Last week of this great piano sale—positively.

"Verily co-operation is power. We have seen and experienced its power. The success of this sale is the proof. For here we are announcing the close of the sale this week, when we had not expected to announce it for three weeks later.

"Do you know what this announcement means?

"It means that we have practically sold these three hundred pianos and one hundred player-pianos in five weeks.

"For to-day—although this is Monday—we are certain we shall not have enough instruments left to fill all orders throughout the entire week. That is, if customers pour in upon us this week as they did last week. And it is certain that they will.

"For when dozens of persons read the heading of this ad and realize that it is 'now or never,' they will swamp us with applications.

"We know of enough persons, who have told us they would take a piano or player-piano before the sale closed, to book orders for every instrument now remaining unsold."

Thirteenth. Page 20:

"Sale narrows down to hours.

"It is now only a question of hours, when the last of these three hundred pianos and one hundred player-pianos will have been sold. Perhaps by tomorrow evening. Certainly, by the close of business Thursday."

Fourteenth. Page 21:

"Don't delay any longer if you want one of these pianos.

"It's all over. By the time this ad reaches you the last piano originally apportioned to us for this great co-operative sale will have been sold. A few may remain—and possibly three or four of the player-pianos. But these will be snapped up in the morning. After that we will take orders until the close of business on Saturday.

"This is a concession to belated buyers.

"It was the original intention for us to sell three hundred pianos and one hundred player-pianos on this wonderful plan. But the sale simply ran away with us. Large as it was, gigantic as was its scope, its success was so spontaneous that we are practically sold out to-day. In all our estimates we had fully expected the sale to take two weeks longer.

"So we say that 'booking orders' for later delivery is a concession to belated buyers. We, ourselves, know a number of persons who fully intended taking advantage of the sale, and who, for one reason or another have been prevented from doing so. This still gives them the opportunity."

Fifteenth. Page 22:

"Time's up. Saturday the sale ends.

"Sales may come and sales may go—but we doubt if any piano sale has ever been the success of this. Pianos are things you do not buy every day. You buy one in your lifetime; maybe two. Pianos represent a considerable investment. You can furnish a whole house very comfortably for the price of a single piano. So, when we tell you that there were days during this sale when we could not wait on our customers, you can then appreciate the stupendous 'go' to this sale. * * *

"The sale is not closing without every one having a fair opportunity to take advantage of it. If we had restricted the sale strictly to the number originally arranged for, the sale would now be a matter of history."

The appellees in the court below moved to dismiss the bill on the following grounds:

(1) Because advertisements are not copyrightable and hence advertisement copy is not copyrightable.

(2) Because the copyright of a text-book or Manual of Instruction in a useful art, science, or system does not confer upon the author or the proprietor of the text-book, even though copyrightable, a right of property in the art, science, or system explained in the text-book or Manual of Instruction, and hence complainant has not and cannot have an exclusive right to make, sell, print, or use advertisements written in accordance with the forms set forth in such book, and complainant has not and cannot have the right to limit the use thereof to purchasers of said Manual of Instruction or its licensees.

(3) Because the description of an art, science, or system in a book, although said book may be entitled to the benefit of copyright, lays no foundation for an exclusive claim to the art, science, or system, as explained and exemplified in said book."

The motion to dismiss having been sustained, the appellant prosecutes an appeal from the decree of dismissal.

The opinion of Judge Foster, sustaining the motion to dismiss, is reported in 210 Fed. 399.

Ernest Wilkinson, of Washington, D. C., and Jas. Wilkinson, of New Orleans, La., for appellant.

Frank E. Rainold and Robt. H. Marr, both of New Orleans, La., for appellees.

Before PARDEE and WALKER, Circuit Judges, and MAXEY, District Judge.

MAXEY, District Judge (after stating the facts as above). 1. It may be conceded that the "Manual of Instruction" is a book within the meaning of the law of copyright.

2. Since the motion to dismiss the bill, interposed under the new equity rules, admits, as did demurrers under the former system, the allegations of fact well pleaded, it may be further conceded, in view of the positive allegations of the bill, that the appellees have infringed the copyright of the appellant.

3. But the further question remains: Is the manual of instruction a proper subject of copyright? In other words, is it copyrightable under the law and entitled to the protection of a court of equity? In this connection, it may be admitted *ex gratia argumenti*, without being decided, that some form of advertisements, such as characteristic advertisements, come within the protection of the law. But said Judge Jenkins, speaking for the Circuit Court of Appeals in *Mott Iron Works v. Clow*, 82 Fed. at page 321, 27 C. C. A. at page 255:

"So far as the decisions of the Supreme Court have gone, we think they hold to the proposition that mere advertisements, whether by letterpress or by pictures, are not within the protection of the copyright laws."

The question recurs: Is the manual of instruction, the particular book, or collection of advertisements—and it can be nothing else—of which the appellant is the author, subject to copyright? If in any case mere advertisements are copyrightable, the law should extend its protection to those only that speak the truth, and certainly not to that class of advertising matter the effect of which is to mislead and deceive the public. "The deceit of the public," said Judge Shipman in *Celluloid Manufacturing Company v. Read*, 47 Fed. at page 715, "and the consequent injury to it, are as much to be regarded by a court of equity as an injury to a plaintiff's business." See *Wright v. Tallis*, 50 Eng. Com. Law, 893-906; *Hop. Trade-Marks*, p. 370. It is a familiar maxim of equity that one who applies to a court of equity for relief should come in with clean hands, and, it may be added, he should show a clean bill of health to entitle him to its protection. The principle is clearly stated by Mr. Justice Field, as the organ of the court, in *Manhattan Medicine Co. v. Wood*, 108 U. S. at pages 224, 225, 2 Sup. Ct. at pages 440, 441, 27 L. Ed. 706, in a trade-mark case, and no reason is perceived why it is not equally applicable to copyright. The justice first quoted from an opinion of the Lord Chancellor of England, as follows:

"When the owner of the trade-mark applies for an injunction to restrain the defendant from injuring his property by making false representations to the

public, it is essential that the plaintiff should not in his trade-mark, or in the business connected with it, be himself guilty of any false or misleading representations; for, if the plaintiff makes any material false statement in connection with the property he seeks to protect, he loses, and very justly, his right to claim the assistance of a court of equity."

And again:

"Where a symbol or label, claimed as a trade-mark, is so constructed or worded as to make or contain a distinct assertion which is false, I think no property can be claimed in it, or, in other words, the right to the exclusive use of it cannot be maintained."

Proceeding, he employed the following language:

"When the case reached the House of Lords, the correctness of this doctrine was recognized by Lord Cranworth, who said that of the justice of the principle no one could doubt; that it is founded in honesty and good sense, and rests on authority as well as on principle, although the decision of the House was placed on another ground. The soundness of the doctrine declared by the Lord Chancellor has been recognized in numerous cases. Indeed, it is but an application of the common maxim that he who seeks equity must present himself in court with clean hands. If his case discloses fraud or deception or misrepresentation on his part, relief there will be denied."

See, also, *Krauss v. Peebles' Sons Co.* (C. C.) 58 Fed. at pages 594, 595.

And it may be added that, in the public interest, state punitive legislation has been deemed necessary to prohibit the publication of advertisements which "contain any assertion, representation or statement of fact which is untrue, deceptive or misleading." See Acts of La. 1914, pp. 279, 280.

The bill of the appellant alleges that the book "was printed in such form as to be specially adapted for use as "copy" for advertisements in newspapers, magazines, periodicals, and other literature." And counsel for the appellant, in their brief, insist that:

"The book does not teach piano dealers how to advertise their wares, but prepares the advertisements for the dealers, relieving them of the time, trouble, expense," etc.

It thus appears obvious that the advertisements are made to order, and nothing remains to be done by the dealer but to publish them in a newspaper or periodical according to the directions contained in the lower left-hand corner of each advertising sheet. These advertisements are to be used by all licensees, or dealers in pianos and player-pianos who may have acquired the right from appellant to use them, and it is apparent that the representations of fact embodied in the letterpress, excerpts from which are set out in the statement of the case, cannot be true as to all dealers. One dealer may sell 50 instruments and another 250 in a given time, yet in the advertising sheets of the appellant all are made to sell the same number of instruments within the same period of time. It is only necessary to glance at the matter of the advertisements, in that and in other respects, to satisfy the mind that their tendency, by the extravagant puffing of the wares of the dealer and misrepresentation of sales, is to mislead and deceive the public. However honest the intention of the author may have been in the preparation of its manual, it nevertheless remains true that the effect of its work is such as we have stated. Ex-

travaganzas may be indulged by a writer for the purpose of illustration and to accomplish the end in view, as exemplified by Don Quixote and others of a similar nature, and as thus employed they carry conviction to the reader and lend charm and interest to the story. But advertisements by dealers of their wares, in order to insure the protection of the law, should reflect the truth and avoid representations which mislead and deceive the people. If their tendency be misleading and deceptive, they will find the doors of a court of equity barred against their admission.

After a painstaking investigation of the present case, we have reached the conclusion that the particular advertising forms of the appellant, although covered by the copyright of the manual of instruction, are (1) not copyrightable, and (2) they are not entitled to the protection of a court of equity.

The decree of the District Court is therefore affirmed.

POTTER MFG. CO. v. ARTHUR.

In re FIDLER & BROCK.

(Circuit Court of Appeals, Sixth Circuit. March 2, 1915.)

No. 2670.

1. SALES ☞451—CONDITIONAL SALES—NECESSITY OF RECORDING—LAW GOVERNING.

Where a machine sold and delivered f. o. b. Indianapolis, with a reservation of title in the seller until paid for, was simultaneously with the completed delivery shipped by the seller to the buyer in Ohio, where it remained until the buyer became bankrupt, the necessity of recording the contract was not governed by the Indiana Laws, but by Gen. Code Ohio, § 8568, providing that such a reservation of title shall be void as to subsequent purchasers and mortgagees in good faith and creditors, unless the contract is recorded, since, where the parties to such a contract contemplate that the property is to go at once and before any use by the buyer into another state, and there remain quasi permanently, the law of the situs thus given to the property will control, especially as title did not pass, notwithstanding the completed delivery.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 1323; Dec. Dig. ☞451.]

2. BANKRUPTCY ☞140—PROPERTY PASSING TO TRUSTEE—CONDITIONAL SALES.

Though, under Gen. Code Ohio, § 8568, an unrecorded contract of conditional sale is invalid only as against those creditors who, for themselves or by representation, fasten a lien upon the property in aid of their claims, where, when a petition in bankruptcy was filed, creditors had a right to fasten on the property a lien which would prevail against the seller, such right passed to the trustee, under Bankr. Act July 1, 1898, c. 541, § 47a (2), 30 Stat. 557, as amended by Act June 25, 1910, c. 412, § 8, 36 Stat. 840 (Comp. St. 1913, § 9631), providing that the trustee, as to all property in the custody of the bankruptcy court, shall be deemed vested with all the rights, remedies, and powers of a creditor holding a lien by legal or equitable proceedings, and he might assert the rights which any creditor would have had against the property, if such creditor, at the date of the filing of the petition, had been holding an execution levy.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 198, 199, 219, 225; Dec. Dig. ☞140.]

**3. BANKRUPTCY ~~303~~—RECLAIMING POSSESSION OF PROPERTY FROM TRUSTEE
—BURDEN OF PROOF.**

A party seeking to recover from a trustee in bankruptcy the possession of property sold to the bankrupt conditionally by an unrecorded contract, void as to subsequent creditors, had the burden of showing that creditors represented by the trustee became such prior to the purchase of the property and that the claims of subsequent creditors would not exhaust the property.

[Ed. Note.—For other cases, see *Bankruptcy*, Cent. Dig. §§ 458-462; Dec. Dig. ~~303~~.]

4. SALES ~~472~~—CONDITIONAL SALES—FAILURE TO RECORD.

Where a conditional sale contract was by law required to be recorded, a notice, attached to the machine sold, that it remained the property of the seller, was ineffective.

[Ed. Note.—For other cases, see *Sales*, Cent. Dig. §§ 1366-1376; Dec. Dig. ~~472~~.]

What constitutes a contract of conditional sale, see note to *Dunlop v. Mercer*, 86 C. C. A. 448.]

Appeal from the District Court of the United States for the Western Division of the Southern District of Ohio; Howard C. Hollister, Judge.

Petition by the Potter Manufacturing Company to require the delivery of property to it by Edwin L. Arthur, trustee in bankruptcy of Fidler & Brock, bankrupts. From an order in favor of the trustee, the petitioner appeals. Affirmed.

P. V. Connolly, of Cincinnati, Ohio, for appellant.

W. W. Keifer, of Springfield, Ohio, for appellee.

Before KNAPPEN and DENISON, Circuit Judges, and SATTER, District Judge.

DENISON, Circuit Judge. Fidler & Brock, bankrupts, resided in Springfield, Ohio, and as contractors were engaged in construction work at Troy, Ohio. In August, 1913, they went to Indianapolis, Ind., and arranged to purchase from the Potter Company a trench excavating machine. The written contract, signed by both parties, showed that the delivery was to be f. o. b. Indianapolis, and that part of the price was to be paid in five installments each alternate month, as evidenced by five promissory notes, and provided "that full title to said property shall remain in the said Potter Manufacturing Company until payment in full has been made," and that, upon default in payment, the vendor might retake the property. The machine was taken to Troy and there remained. Upon the adjudication in bankruptcy, part of the purchase price remained unpaid, and the Potter Company filed a petition asking that the trustee in bankruptcy be ordered to surrender the machine. From the order of the District Court, holding that the trustee's title was good as against the attempted reclamation, the Potter Company brings this appeal.

The Ohio statute (section 8568, Gen. Code) provides that the reservation of title in such a contract "shall be void as to all subsequent purchasers and mortgagees in good faith and creditors, unless" the contract is recorded in the county of the vendee's residence. There is

no statute in Indiana requiring such recording. This contract was not recorded anywhere.

[1] 1. We think the law of Ohio, not of Indiana, controls as to the necessity for recording. Ordinarily, by reason of the completed delivery in Indiana, title would have passed in that state, and it might be argued that the effect of recording laws, as to contracts passing title in Indiana, would be determined by the rule of that state; but here title did not pass upon delivery, and part, at least, of the basis of this argument disappears. Aside from that consideration, we regard it as the established rule that where the parties to such a contract at the time contemplate that the property is to go at once, and before any use by the vendee, into another state, and there remain quasi permanently, the law of the situs thus given to the property will control the application of a recording statute. This machine was capable of being moved from place to place, and in the natural course of events might sometime or other be taken by the vendees into different states; but it is a stipulated fact that simultaneously with the completed delivery at Indianapolis, the vendor, by direction of the vendees, and acting for them, shipped the machine to the place in Ohio where it remained continuously until the bankruptcy. As against the necessary inference that a present and continuing location in Ohio was contemplated by both parties, there is nothing; and this inference must therefore be treated as a fact. This fact clearly makes a material difference between this case and one where the personal property to be sold was not intended to have more than a casual or temporary abiding place in any particular state.

That under such circumstances, the law of the state where the property is located in this quasi permanent manner furnishes the controlling rule upon the subject of recording, was held by this court, without extended discussion, in *Title Guaranty Co. v. Witmire*, 195 Fed. 41, 43, 115 C. C. A. 43; and if the question were open in this court, it would be ruled, and with the same result, by *Hervey v. Locomotive Works*, 93 U. S. 664, 671, 23 L. Ed. 1003. The contract there involved pertained to a locomotive, and it was made in Rhode Island, where the locomotive was then situated. It contemplated that the property should be taken to Illinois. This was done, and the Supreme Court held that the title reservation in the contract was invalid as against an Illinois levying creditor, and was so invalid for the reason that the Illinois law required recording. It is true that the location of the excavating machine in Ohio was somewhat less likely to be entirely permanent than was the location of the locomotive in Illinois; but this is a difference which we cannot think material. Indeed, appellant's counsel perhaps do not seriously question the applicability of the Ohio law to this case, except as they insist that the *Hervey Case* has been overruled by *Bank v. Bank*, 203 U. S. 296, 27 Sup. Ct. 79, 51 L. Ed. 192. We cannot so interpret the latter decision. The property there involved had been removed from one state to another before the suit was commenced, but the contest was between two mortgagees, and both mortgages had been given, and all the rights involved in the controversy had become fixed, while the property was in the former state.

It was clear that these rights must be determined by that law, as was held; and the applicability of the law of the second state was in no way considered.

It is said that in such a situation the Ohio courts apply the law of the place of the contract, and *Boyer v. Knowlton*, 85 Ohio St. 104, 97 N. E. 137, 38 L. R. A. (N. S.) 224, is cited. We find nothing in this case to support the contention. Goods were sold in New York to be brought to Ohio for retail sale. They were of a much more fugitive character than the machinery here involved, yet the law of Ohio was applied, and the local creditor with an execution lien prevailed over a reservation of title contained in a New York sale contract. There is, in the opinion in that case, nothing to indicate that the property, when the contract was made, had acquired any situs in Ohio, excepting by the contract, which contemplated that it was to be shipped to that state. See, also, cases cited in *Powder Co. v. Jones* (D. C.) 200 Fed. 638, 645, 646.

[2, 3] 2. It is the accepted construction of this statute in Ohio that such an unrecorded contract is not invalid as against creditors generally, but only as against those who, for themselves or by representation, fasten a lien upon the property in aid of their claims. See *York v. Cassell*, 201 U. S. 344, 26 Sup. Ct. 481, 50 L. Ed. 782. So far as the language of the statute goes, the priority which it gives to creditors may well be confined to those who gave credit subsequently to the conditional sale (*Crucible Co. v. Holt* [C. C. A. 6] 174 Fed. 127, 98 C. C. A. 101, affirmed *Holt v. Crucible Steel Co. of America*, 224 U. S. 262, 32 Sup. Ct. 414, 56 L. Ed. 756; *In re Riehl* [D. C.] 200 Fed. 455); though the contrary as to Ohio seems to have been taken for granted by this court (*Foerstner v. Citizens' Co.*, 186 Fed. 1, 108 C. C. A. 267; *Cincinnati Co. v. Degnan*, 184 Fed. 834, 842, 107 C. C. A. 158). However that might be, there is nothing in this record to show that any creditors now represented by the trustee became creditors before the bankrupts procured the machine, and so nothing to raise the question whether such creditors are excluded from the effect of the statute. If this question was material, the burden was on the vendor, under these circumstances, to show that such creditors existed, and to show that the claims of subsequent creditors, if levied, and which would then pass to the trustee for the benefit of all creditors (*In re Martin* [C. C. A. 6] 193 Fed. 841, 848, 113 C. C. A. 627) would not exhaust the property. We therefore assume that creditors, with claims equal to the value of the machine, had, on the date of filing the petition in bankruptcy, the right to fasten on the property a lien which, under the Ohio law, would prevail against the contract vendor.

3. Under the rule of *York v. Cassell*, supra, this superior right did not pass to the trustee in bankruptcy, but he stood in the shoes of the bankrupt. This rule has been changed by the amendment of June 25, 1910, to section 47a (2), providing that as to property "in custody" the trustee "shall be deemed vested with all the rights, remedies and powers of a creditor holding a lien by legal or equitable proceedings"; and, of course, the nature and extent of these "rights, remedies and powers" must be determined by the law of the state, where

not inconsistent with the Bankruptcy Act. There is general agreement that the amendment of 1910 was made with the very purpose of changing the rule declared in York v. Cassell (Remington, vol. 3, §§ 1137 and 1212½; Loveland [4th Ed.] vol. 1, p. 767); and we think it clear that such was the effect, and that the trustee stands in the place of each creditor, and may assert the rights which any creditor would have had against the property "in custody," if that creditor, at the date of filing the petition in bankruptcy had been holding an execution levy. See Massachusetts Co. v. Kemper, 220 Fed. *infra*, 136 C. C. A. 593 (opinion filed to-day). It cannot be said that the intent of the amendment was only to put the trustee in the position of a creditor who had, in fact, obtained a lien, because that was the law before the amendment. See section 67f, and *In re Martin*, *supra*, *Foerstner v. Citizens' Co.*, *supra*, and *In re Rouse*, 208 Fed. 881, 126 C. C. A. 90.

[4] 4. Since the conditional sale contract was, by law, required to be recorded, the notice attached to the machine that it remained the property of the vendor was ineffective against the trustee. *Cincinnati Co. v. Degnan*, *supra*.

The order of the court below is affirmed, with costs.

MASSACHUSETTS BONDING & INS. CO. v. KEMPER.

In re L. P. HAZEN CO.

(Circuit Court of Appeals, Sixth Circuit. March 2, 1915.)

No. 2525.

1. BANKRUPTCY ~~465~~—APPEAL—DISMISSAL—EFFECT.

Where, in a bankruptcy proceeding, an order was made disallowing a creditor's claim of a lien on the proceeds of certain property, and disallowing its general claim for the balance of the alleged indebtedness, the denial of the lien and the disallowance of the general claim were so distinct that there could have been an independent appeal from either part of the order, and the dismissal of the appeal from the disallowance of the general claim, because not taken within 10 days, as required by Bankr. Act July 1, 1898, c. 541, § 25a, 30 Stat. 553 (Comp. St. 1913, § 9609), in the case of appeals from judgments allowing or rejecting debts or claims, did not require the dismissal of the appeal from the disallowance of the claim of lien.

[Ed. Note.—For other cases, see *Bankruptcy*, Cent. Dig. § 927; Dec. Dig. ~~465~~.]

2. BANKRUPTCY ~~461~~—APPEAL—TIME FOR TAKING APPEAL.

In a bankruptcy proceeding against a building contractor, its surety filed a petition, alleging a lien upon and possession of certain machinery, and praying that its right thereto for the purpose of completing a contract might be adjudged, and the trustee enjoined from selling the machinery until the completion of the contract. The property was thereupon exempted from the general sale, but was later sold under an agreement that the proceeds should be held as a separate fund, subject to the determination of the controversy between the surety and the trustee, and a stipulation was filed, showing that the surety claimed a lien upon the net proceeds of such articles and claimed as a general creditor for the balance of its account. *Held* that, while the assertion of a lien eventually took very much the form of an attempt to secure the allowance of a preferred claim, a controversy was presented over the title to or rights in specific property, and an appeal from an order disallowing the claim of

lien should be treated as taken under Bankr. Act, § 24a (Comp. St. 1913, § 9608), giving the Circuit Courts of Appeals appellate jurisdiction of controversies arising in bankruptcy proceedings in courts from which they have appellate jurisdiction in other cases, and hence the appeal was not required to be taken in 10 days under section 25a, relative to appeals from judgments allowing or rejecting debts or claims.

[Ed. Note.—For other cases, see *Bankruptcy*, Cent. Dig. §§ 920-923; Dec. Dig. ☞161.]

3. CHATTEL MORTGAGES ☞196—FILING OR RECORDING—INSTRUMENTS REQUIRED TO BE RECORDED.

A contract between a building contractor and its surety, whereby the contractor assigned and conveyed to the surety for its protection all of the contractor's tools, plant, equipment, and material, was in effect a "chattel mortgage," and invalid as to creditors, where possession was not taken by the surety, and the contract was not filed under Gen. Code Ohio, § 8560, providing that chattel mortgages, not accompanied by an immediate delivery, but followed by an actual and continued change of possession, shall be void as against creditors, subsequent purchasers, and mortgagees in good faith, unless it or a copy shall be filed as directed in the following section.

[Ed. Note.—For other cases, see *Chattel Mortgages*, Cent. Dig. §§ 429, 438-441; Dec. Dig. ☞196.]

For other definitions, see *Words and Phrases*, First and Second Series, *Chattel Mortgages*.]

4. BANKRUPTCY ☞184—LIENS—RIGHTS OF TRUSTEES.

Where an instrument amounting to a chattel mortgage was invalid as against creditors, because not filed as required by Gen. Code Ohio, § 8561, it was invalid as against a trustee in bankruptcy, under Bankr. Act, § 47a (2), as amended by Act June 25, 1910, c. 412, § 8, 36 Stat. 840 (Comp. St. 1913, § 9631), providing that trustees in bankruptcy, as to all property in the custody of the bankruptcy court, shall be deemed vested with all the rights, remedies, and powers of a creditor, holding a lien by legal or equitable proceedings thereon.

[Ed. Note.—For other cases, see *Bankruptcy*, Cent. Dig. §§ 275-277; Dec. Dig. ☞184.]

5. BANKRUPTCY ☞172—LIENS—RIGHTS OF TRUSTEES.

Notwithstanding Bankr. Act § 70a (Comp. St. 1913, § 9654), providing that the trustee shall be vested with the title of the bankrupt, "as of the date he was adjudged a bankrupt," to all of the bankrupt's property, etc., under section 47a (2), as amended by Act June 25, 1910, the trustee acquires the rights of a lien-holding creditor as of the date of the petition; and where an instrument amounting to a chattel mortgage had not been filed, and possession had not been taken, at the date of the petition, the subsequent taking of possession prior to the adjudication did not give the mortgagee a lien superior to the rights of the trustee.

[Ed. Note.—For other cases, see *Bankruptcy*, Cent. Dig. § 220; Dec. Dig. ☞172.]

Appeal from the District Court of the United States for the Western Division of the Southern District of Ohio; Howard C. Hollister, Judge.

In the matter of the L. P. Hazen Company, bankrupt, in which Frank H. Kemper is trustee. From an order disallowing claims of the Massachusetts Bonding & Insurance Company, it appeals. Appeal from so much of the order as disallows a general claim dismissed; and the order, so far as it disallows a claim of lien, affirmed.

The bankrupt corporation, the Hazen Company, in July, 1910, agreed to erect a building in Cincinnati, and the Bonding Company became surety for the Hazen Company upon the usual contractor's bond, conditioned that the

building should be completed free from liens, etc., according to contract. In connection with obtaining the bond, the Hazen Company, called therein the applicant, entered into an agreement with the Bonding Company, including the provisions set out in the margin,¹ to the effect that the Hazen Company's building plans and machinery and the building contract itself were assigned to the Bonding Company by way of indemnity against signing the bond, and so that, in case of default, the Bonding Company might have the use of the plant to complete the building, in order to minimize its own liability. This contract was not recorded. While the erection of the building was in progress, and on September 20th the state court appointed a receiver for the Hazen Company. The receiver decided not to go on with this contract, and thereupon, on October 25th, the Bonding Company, acting under the power conferred or by virtue of the assignment made by the application contract, took possession of the building plant and thereafter carried on the contract to completion, resulting in a loss to the Bonding Company, and creating a corresponding claim in favor of that company against the Hazen Company.

Intermediate the appointment of the receiver by the state court and the taking of possession of the property by the Bonding Company, these bankruptcy proceedings were initiated by the filing of an involuntary petition on September 30th, as the result of which an adjudication occurred November 28th. Later, and in February, 1911, the Bonding Company filed a petition in the bankruptcy court, alleging its lien upon and possession of the building machinery, and praying that its right thereto for the purpose of completing the contract might be adjudged, that the trustee be enjoined from selling this machinery until the contract was completed, and that whatever loss the Bonding Company in the end suffered might be adjudged a secured claim against the proceeds of this property when sold. By an interlocutory order, this property was exempted from the general sale which the trustee was to make, and the determination of the rights of the parties was reserved. Later the property was sold under an agreement that the proceeds were to be held by the trustee as a separate fund and subject to the order of the court to be made in the controversy between the Bonding Company and the trustee. On November 5, 1912, a stipulation of fact was filed, showing that the total loss of the Bonding Company, by carrying out the contract, was \$4,579.61, that the net proceeds of the property in controversy were \$1,452.17, and concluding: "The Massachusetts Bonding & Insurance Company claims a lien upon the

¹ And for the protection of the said company the applicant hereby assigns, transfers, sets over, and conveys to the said company all its right, title, and interest in and to all of the tools, plant, equipment, material of every nature and description, which it now has or may hereafter have located upon or near or appertaining to the work contemplated under the contract for which the company has or is about to become surety, meaning and intending hereby to assign, transfer, set over, and convey to the said company all the tools, plant, and materials of every nature and description now being used, or about to be used, or which may in the future be used, by the applicant in connection with the work contemplated, whether the same are now located in or about the site thereof, or elsewhere, and including hereunder all materials purchased for, or to be purchased for, or chargeable to, said contract, or which may now be in process of construction in connection with said contract, or in storage at or in transit to said site, or elsewhere. The applicant hereby further assigns, transfers, sets over, and conveys to the said company all of its rights in and to subcontracts which have been or may hereafter be entered into by the applicant, together with all materials and stock manufactured or unmanufactured embraced therein; and the applicant hereby further authorizes, empowers, and appoints said company its true and lawful agent or attorney, with full power and authority at any and all times in its name and behalf to enter upon and take possession of any or all the tools, plant, equipment, materials, finished or unfinished, mentioned and referred to in this paragraph, and to use and enjoy the same, and also to enforce, use, and enjoy any or all subcontracts or other rights mentioned in this paragraph, and to do any other act or thing which may at any time be deemed necessary by said company to make effective the terms of this paragraph, with full power to said company to appoint a substitute attorney, or attorneys, to act hereunder."

net proceeds of the articles above referred to, viz., \$1,452.17, and to the allowance of its loss as a general creditor for the difference, viz., \$4,579.61 less \$1,452.17 equals \$3,127.44." The referee, and on review the District Judge, held that the Bonding Company had no lien upon the tools and building machinery, valid as against the trustee, and so was not entitled to the specific fund in controversy, and also held that the general claim for \$4,579.61, not having been filed in due form and in due time, must be disallowed. From the order of the District Court, entered on February 19, 1913, the Bonding Company appealed on April 26th, complaining both of the denial of the lien and the refusal of the general claim.

C. D. Robertson, of Cincinnati, Ohio, for appellant.

Province Pogue and B. B. Tuttle, both of Cincinnati, Ohio, for appellee.

Before KNAPPEN and DENISON, Circuit Judges, and SATTER, District Judge.

DENISON, Circuit Judge (after stating the facts as above). [1, 2] 1. A motion is made to dismiss the appeal because it was not taken within 10 days, as required by section 25a. So far as the appeal seeks a reversal of the order disallowing the general claim, this motion must be granted, upon the authority of the cases cited by us in *Re Martin*, 201 Fed. 31, 34, 119 C. C. A. 363; but this does not dispose of the whole appeal. The denial of the lien and the disallowance of the general claim are so distinct that there could have been an independent appeal from either part of the order; and the appeal from so much of the order as refused the lien must be treated separately. While this assertion of lien eventually took very much the form of an attempt to secure the allowance of a preferred claim, and so appealable only under the 10-day limitation, yet we think that, considering the form in which it arose, it may fairly be regarded as presenting a controversy over the title to or rights in specific property, and that therefore this appeal is, pro tanto, entitled to be considered as taken under section 24a. To that extent, the motion to dismiss is denied. *Southern Co. v. Elliotte* (C. C. A. 6, Nov. 13, 1914) 218 Fed. 567, 134 C. C. A. 295. By granting the motion as to the general claim, we intimate no opinion whether that claim had been so filed that there was anything for the order appealed from to operate upon in that respect as an adjudication.

[3, 4] 2. In *Title Guaranty Co. v. Witmire*, 195 Fed. 41, 43, 115 C. C. A. 43, we held that an instrument substantially like the present application contract was, in real effect, a chattel mortgage, and was governed by chattel mortgage recording statutes. It results that under the Ohio statute² the purported assignment of title to or creation of the lien on this machinery was invalid as against creditors; and, under the amendment of June 25, 1910, to section 47a (2), as interpreted by us in the opinion this day filed in *Potter Mfg. Co. v. Arthur*, 220 Fed.

² Sec. 8560, Gen. Code: "A mortgage, or conveyance intended to operate as a mortgage, of goods and chattels, which is not accompanied by an immediate delivery, and followed by an actual and continued change of possession of the things mortgaged, shall be absolutely void as against the creditors of the mortgagor, subsequent purchasers, and mortgagees in good faith, unless the mortgage, or a true copy thereof, be forthwith deposited as directed in the next succeeding section."

843, 136 C. C. A. 589, it was invalid as against a trustee in bankruptcy. This statute does not suggest whether it intends to speak only of subsequent creditors.

[5] 3. As above recited, after filing the petition in bankruptcy but before the adjudication, the Bonding Company took possession of the property, and, as possession is by statute, a substitute for recording, we have the question whether the amendment of 1910 vests the trustee with the rights of a lien-holding creditor as of the date of the bankruptcy petition or as of the date of the adjudication. Since section 70a in general terms provides that the trustee is vested with the bankrupt's title as of the date of adjudication, it has been natural to assume that the rights of the trustee do not for any purpose reach back to the date of filing the petition; and there are decisions to that effect, or leaving the question open. *In re Rose* (D. C.) 206 Fed. 991, 993; *Big Four Co. v. Wright* (C. C. A. 8) 207 Fed. 535, 537, 125 C. C. A. 577, 47 L. R. A. (N. S.) 1223; *In re Jacobson* (D. C.) 200 Fed. 812, 814.

We can see no escape from applying to this situation the principle of the decision in *Acme Co. v. Beekman Co.*, 222 U. S. 300, 32 Sup. Ct. 96, 56 L. Ed. 208, where it was held that, in spite of the language of section 70a, the trustee's rights extended, by relation, back to the commencement of the proceedings sufficiently to defeat the lien of an intervening attachment. The right of a general creditor to get a superior lien by levying an attachment and the right of the holder of an unrecorded mortgage to get a universally effective lien by recording the mortgage impress us as wholly analogous; and if the trustee's right goes back to the commencement of bankruptcy proceedings in the former case, it must in the latter. To the same general effect as the Acme Case is *Everett v. Judson*, 228 U. S. 474, 33 Sup. Ct. 568, 57 L. Ed. 927, 46 L. R. A. (N. S.) 154, which holds that interest of the trustee in a life insurance policy maturing intermediate petition and adjudication, is to be fixed as of the earlier date.

We have applied the same principle to the right of the bankrupt debtor to discharge his debt by payment to the bankrupt after petition filed. *Toof v. Bank*, 206 Fed. 250, 124 C. C. A. 118. The controlling principle must be that, for the purpose of fixing priority as between the trustee and adversely claiming lienholders, the time of filing the petition is the vital date, and that a lien which, on that date, was invalid as against creditors levying execution, cannot be perfected so as to make it valid against the trustee by action of the lienholder before adjudication. Indeed, to hold the contrary would be to say that, so far as this section is concerned, the mortgagee could with safety withhold his mortgage from the record, relying upon the mortgagor not to file a voluntary petition and to delay an adjudication upon an involuntary petition long enough to give the mortgagee an opportunity to file his mortgage.

This conclusion makes it unnecessary to consider whether the ultimate effect of taking possession and enforcing the security could be thought to create a preference as of that date, and so make the security invalid under the sections which relate to preferences and recording.

For the reasons stated, so far as the appeal relates to the general claim, it is dismissed, and so far as it relates to the lien claimed, the order below is affirmed. Appellee will recover costs.

ST. BERNARD v. SHANE et al.

(Circuit Court of Appeals, Sixth Circuit. March 6, 1915.)

No. 2547.

1. PLEADING ☞360—AMENDMENT AFTER STRIKING OUT—TIME—“INSTANTER.”
The term “instanter,” when used with reference to legal proceedings, as in an order striking an amended petition from the files and giving leave to file instanter a second amended petition, usually means within 24 hours.
[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1129–1146; Dec. Dig. ☞360.
For other definitions, see Words and Phrases, Instanter.]
2. COURTS ☞295—UNITED STATES COURTS—JURISDICTION—ACTIONS AGAINST RECEIVERS.
Regardless of the citizenship of the parties, a federal court had jurisdiction of an action against receivers of its own appointment, based upon an alleged negligent performance of the duties of the receivership.
[Ed. Note.—For other cases, see Courts, Cent. Dig. § 837; Dec. Dig. ☞295.]
3. DEATH ☞35—ACTIONS FOR CAUSING DEATH—WHERE ACTION MAY BE MAINTAINED.
Actions of tort upon death statutes, being transitory, may be brought in the courts, state or federal, of a state other than that in which the right of action accrued, unless the statute of the state in which the cause of action arose is in substance inconsistent with the statute or public policy of the state in which the right of action is sought to be enforced.
[Ed. Note.—For other cases, see Death, Cent. Dig. § 50; Dec. Dig. ☞35.]
4. DEATH ☞35—ACTIONS FOR CAUSING DEATH—WHERE ACTION MAY BE MAINTAINED.
An action for death, under the death statute of Illinois (Jones & A. Ann. St. par. 6184), was maintainable in a federal court for Ohio, though the Illinois statutes do not permit actions in that state for a death occurring outside the state, and though Gen. Code Ohio, § 10770, as amended by Act April 30, 1910 (101 Ohio Laws, p. 198), provides that a right of action for death in another state may be enforced in Ohio in all cases where such other state allows the enforcement in its courts of the Ohio statute, as the right of action under the Illinois statute is unaffected by the laws of Ohio, the Ohio statute, if intended to apply to actions in the federal courts, is beyond the power of the Legislature, and the enforcement of the Illinois statute is not contrary to good morals or natural justice nor prejudicial to the proper interests of the citizens of Ohio.
[Ed. Note.—For other cases, see Death, Cent. Dig. § 50; Dec. Dig. ☞35.]
5. COURTS ☞371—TRANSITORY ACTIONS—WHERE ACTION MAY BE MAINTAINED.
A transitory right of action is enforceable in the federal courts having jurisdiction of the subject-matter and the parties, whether given by the common law or a state statute not penal.
[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 907, 972–976; Dec. Dig. ☞371.]

In Error to the District Court of the United States for the Northern District of Ohio; Wm. L. Day, Judge.

Action by Lillian St. Bernard, administratrix of Bion St. Bernard, deceased, against S. P. Shane and another, receivers of the Gilchrist Transportation Company. A demurrer was sustained to the original petition (201 Fed. 453), and amended petitions were stricken from the files, and plaintiff brings error. Reversed and remanded, with directions.

H. W. Ewing, of Cleveland, Ohio, for plaintiff in error.

I. L. Evans, of Cleveland, Ohio, for defendants in error.

Before KNAPPEN and DENISON, Circuit Judges, and SATTER, District Judge.

KNAPPEN, Circuit Judge. Plaintiff, an administrator appointed by a probate court of Michigan, sued the defendants for negligent injuries causing decedent's death, the injuries and death occurring in the state of Illinois, while decedent was in the employ of defendants, acting as receivers under appointment of the court below in the operation of a steamboat in Illinois. The original petition was demurred to, first, because of plaintiff's alleged incapacity to sue; and, second, for lack of statement of cause of action. The demurrer was sustained as to the second ground ([D. C.] 201 Fed. 453), and an amended petition filed, which was stricken from the files and leave given to file *instanter* a second amended petition. On the next day, the second amended petition was filed, a rehearing of the demurrer to the original petition was granted and hearing had thereon, as well as on motion to strike the second amended petition from the files. The petition to strike was sustained as was also the demurrer to the original petition, which was thereupon dismissed. Hence this writ of error.

[1] We may pass by defendants' objection that the second amended petition was not filed *instanter*, because not filed until the next day after order therefore, because, first, the term "*instanter*" when used with reference to legal proceedings, usually means within 24 hours, and we are cited to no contrary rule in Ohio; and, second, hearing was actually had upon the demurrer, the sustaining of which and the dismissal of the petition thereon constitute plaintiff's fundamental grievance. The reference in the second amended petition to the Ohio amendatory statute of 1913 (not then effective) did not authorize striking the petition from the files. In this opinion, we shall disregard that statutory amendment.

[2] We may also disregard the lack of diversity of citizenship, for the court below had unquestioned jurisdiction over an action against receivers of its own appointment, based upon an alleged negligent performance of the duties of the receivership, and regardless of the citizenship of the parties. See decision of this court in Cobb v. Sertic, 218 Fed. 320, and cases there cited.

[3, 4] Turning, then, to the demurrer: The sufficiency of the allegations of negligence, as stating a right of action in Illinois, is not challenged; the grounds of demurrer are related, and concern only the plaintiff's right to maintain her suit in the courts of Ohio.

The pertinent situation is this: In the absence of statute, a foreign administrator could not maintain suit upon a cause of action of this nature, or indeed upon any right of action accruing to the deceased. *Noonan v. Bradley*, 9 Wall. 394, 400, 19 L. Ed. 757; *Maysville, etc., Co. v. Marvin* (C. C. A. 6) 59 Fed. 91, 8 C. C. A. 21. And see *Courtney v. Pradt* (C. C. A. 6) 160 Fed. 561, 87 C. C. A. 463, and cases there cited. But, by section 10769 of the Ohio Code, a foreign executor or administrator is empowered to prosecute suits "in any court in this state, in his capacity as such, in like manner and under like restriction as a nonresident is permitted to sue."

At the common law, however, no civil action lies for negligent injuries resulting in death. *Insurance Co. v. Brame*, 95 U. S. 754, 756, 24 L. Ed. 580; *Dennick v. Railroad Co.*, 103 U. S. 11, 21, 26 L. Ed. 439. But Illinois has a death statute, which is substantially Lord Campbell's Act, giving the same right of action where death ensues as would exist if death had not ensued. *Jones & A. Ill. Stat. Ann.* (1913) c. 70, § 1, par. 6184. And the rule is well settled that actions of tort upon death statutes of this nature, being transitory, may be brought in the courts, state or federal, of a state other than that in which the right of action accrued (*Dennick v. Railroad Co.*, 103 U. S. 11, 18, 26 L. Ed. 439), unless, at least, the statute of the state in which the cause of action arose is in substance inconsistent with the statutes or public policy of the state in which the right of action is sought to be enforced (*Texas Pac. R. R. Co. v. Cox*, 145 U. S. 593, 605, 12 Sup. Ct. 905, 36 L. Ed. 829; *Huntington v. Attrill*, 146 U. S. 657, 13 Sup. Ct. 224, 36 L. Ed. 1123; *No. Pac. R. R. Co. v. Babcock*, 154 U. S. 190, 14 Sup. Ct. 978, 38 L. Ed. 958; *Stewart v. B. & O. R. R. Co.*, 168 U. S. 445, 448, 18 Sup. Ct. 105, 42 L. Ed. 537). Such statutes have been enforced, not only in actions at law, but in suits in admiralty. Several decisions of the Supreme Court and of this court (of the latter class) are cited in the margin.¹ Ohio, likewise, has a death statute, which also is substantially Lord Campbell's Act, and gives in broad terms a right of recovery wherever it would have existed had death ensued. The Ohio statute, however, contains a provision that the right of action for death by wrongful act arising under the statute of another state may be enforced in Ohio "in all cases where such other state * * * allows the enforcement in its courts of the statute of this state of a like character" (G. C. Ohio, § 10770, as amended by Ohio Laws 1910, p. 198); and it was said by the Supreme Court of that state, under a similar statute, that the courts of Ohio have not jurisdiction over a suit brought on account of a death occurring in a state which did not give right of action for death occurring outside of such state. *Railroad Co. v. Fox*, 64 Ohio St. 133, 142, 59 N. E. 888.

The Illinois statute referred to forbids action in that state to recover damages for a death occurring outside the state, and the provision

¹ *The Hamilton*, 207 U. S. 398, 28 Sup. Ct. 133, 52 L. Ed. 264; *La Bourgogne*, 210 U. S. 95, 138, 139, 28 Sup. Ct. 664, 52 L. Ed. 973; *Robinson v. D. & C. Navigation Co.*, 73 Fed. 883, 20 C. C. A. 86; *Monongahela River, etc., Co. v. Schinnerer*, 196 Fed. 375, 378, 117 C. C. A. 193; *Thompson Towing, etc., Co. v. McGregor*, 207 Fed. 209, 218, 124 C. C. A. 479.

has been literally enforced by the Supreme Court of that state. Dougherty v. American, etc., Co., 255 Ill. 369, 371, 99 N. E. 619, Ann. Cas. 1913D, 568.

As an independent proposition, plaintiff's right to maintain this suit in her capacity of foreign administrator may be laid out of account, for it is clear that she has the same right to sue as if she had been appointed by the courts of Ohio. The question is narrowed to this: Whether any one in any representative capacity has the right to maintain this suit in the court below upon the cause of action given by the Illinois statute?

[5] We think this question demands an affirmative answer. The suit is not brought upon the Ohio statute, but solely upon the statute of Illinois. The existence of and limitations on this right of action are unaffected by the laws of Ohio, and are governed solely by the laws of Illinois. No. Pac. R. R. Co. v. Babcock, *supra*, 154 U. S. 199, 14 Sup. Ct. 978, 38 L. Ed. 958; *The Harrisburg*, 119 U. S. 199, 214, 7 Sup. Ct. 140, 30 L. Ed. 358. The right of action in that state was perfect. So far as concerns that right of action, there is no conflict whatever between the Illinois statute and the statutes or public policy of Ohio. Had the injuries and death in question occurred in the latter state, the right of action under the statutes of that state would be complete; and, as we have already seen, the plaintiff, as a Michigan administrator, could have maintained such action in Ohio. What is said in the opinion of this court in *Maysville Co. v. Marvin*, 59 Fed. 96, 8 C. C. A. 21, as to plaintiff's status in the federal court depending upon the statute creating the right, plainly relates only to capacity to sue. The objection we are considering comes to this: That the Legislature of Ohio has denied resort to the courts of that state for the enforcement of remedy under the death statute of another state, unless that other state opens its courts to actions upon the Ohio death act. The question is thus merely one of state reciprocity. It may well be open to doubt whether the Legislature had in mind an extension of this limitation to actions in the federal courts, but were we to assume such intention, the power was, we think, lacking. The rule that a transitory right of action is enforceable in the federal courts having jurisdiction of the subject-matter and the parties, whether given by the common law or a state statute not penal, is a rule of general law. See the *Dennick*, *Huntington*, *Cox*, and *Stewart Cases*, *supra*; also *Strait v. Yazoo & M. V. R. R. Co.* (C. C. A. 6) 209 Fed. 157, 160, 126 C. C. A. 105, 49 L. R. A. (N. S.) 1068. A negligent act causing death is and always was a tort; and death acts, like that of Illinois, merely take away the common-law obstacle to recovery. *Stewart v. B. & O. R. R. Co.*, *supra*, 168 U. S. 448, 18 Sup. Ct. 106, 42 L. Ed. 537. As there said:

"It may well be that, where a purely statutory right is created, the special remedy provided by the statute for the enforcement of that right must be pursued, but where the statute simply takes away a common-law obstacle to a recovery for an admitted tort, it would seem not unreasonable to hold that an action for that tort can be maintained in any state in which that common-law obstacle has been removed."

In *David Lupton's Sons v. Auto Club*, 225 U. S. 489, 500, 32 Sup. Ct. 711, 714 (56 L. Ed. 1177, Ann. Cas. 1914A, 699), it is said that:

"The state could not prescribe the qualifications of suitors in the courts of the United States, and could not deprive of their privileges those who were entitled under the Constitution and laws of the United States to resort to the federal courts for the enforcement of a valid contract."

This principle equally applies, in our judgment, to actions of tort under a statute like the death act here sued on. The limitation as to nonconflict with statute or public policy of the state of the forum has, so far as we have seen, been applied only to substantive matters affecting right of action.

In *No. Pac. Co. v. Babcock*, *supra*, 154 U. S. 198, 14 Sup. Ct. 981, 38 L. Ed. 958, there was quoted with apparent approval an extract from the opinion of the Supreme Court of Minnesota, which included the statement that:

"To justify a court in refusing to enforce a right of action which accrued under the law of another state, because against the policy of our laws, it must appear that it is against good morals or natural justice, or that, for some other such reason, the enforcement of it would be prejudicial to the general interests of our own citizens."

Surely the enforcement of the Illinois death act is not contrary to good morals or natural justice, nor would it be prejudicial to the proper interests of the citizens of Ohio. If it be said that refusal to so enforce would indirectly tend to the benefit of the citizens of Ohio by compelling favorable reciprocal legislation in Illinois, it would seem a sufficient answer that the limitations in question are too remote for consideration, that they work no discrimination between residents and nonresidents in either state, and that in no event could the consideration stated affect the federal courts.

We are confirmed in the conclusion we have reached by the persuasive opinion of Judge Seaman in *Missouri Pacific R. R. Co. v. Larussi* (C. C. A. 7) 161 Fed. 66, 88 C. C. A. 230.

The order sustaining the demurrer and dismissing the original and second amended petitions is reversed, with costs, and the cause remanded to the District Court, with directions to take further proceedings not inconsistent with this opinion.

CUSHMAN et al. v. WARREN-SCHARF ASPHALT PAVING CO.

(Circuit Court of Appeals, Seventh Circuit. January 5, 1915.)

No. 2063.

1. JUDGMENT ☞675—PERSONS CONCLUDED—PRIVIES—DEFENDING SUIT IN NAME OF ANOTHER.

One who, openly and to the knowledge of the opposing party, defends a suit in the name of another to protect his own right or interest, is as much bound by the judgment as he would be if he had been a party to the record.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1190, 1191, 1194; Dec. Dig. ☞675.]

2. MANDAMUS ☞114—LEVY OF TAXES—JURISDICTION OF FEDERAL COURT—ACTION AGAINST MUNICIPAL CORPORATION.

A federal court has jurisdiction of an action against a municipal corporation on an obligation payable from the proceeds of a special assessment, which the defendant has failed or refused to levy, although it was its duty to do so, and may award a writ of mandamus to compel the levy, even though the defendant is not itself liable for the debt for which plaintiff prays judgment against it.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. §§ 241, 244–246, 248; Dec. Dig. ☞114.]

3. JUDGMENT ☞675—CONCLUSIVENESS OF ADJUDICATION.

Complainant, which had performed contracts for paving made with a city, brought an action at law in a federal court against the city to recover damages because of its failure and refusal to perform its statutory duty by levying a special assessment on property to pay for the improvement. The action was defended by the owners of the property subject to the assessment, who had given bond to save the city harmless, and who set up in defense that the paving contracts were illegal. Under the state statute the city was exempt from liability for the contract price of the work done; the proceeds of the special assessment being the sole fund from which it was payable. The court rendered a judgment awarding a mandamus against the city requiring it to levy the special assessment, which was done, and, the assessment not having been paid, complainant brought the present suit to enforce the statutory lien therefor. *Held*, that the judgment in the prior action in the form in which it was rendered was within the recognized jurisdiction of the federal court, and was binding on defendants, and conclusive against them of the validity of contracts under which the assessment was made.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1190, 1191, 1194; Dec. Dig. ☞675.]

4. CORPORATIONS ☞630—VOLUNTARY DISSOLUTION—CAPACITY TO SUE AFTER DISSOLUTION.

Under a state statute providing that a corporation, although dissolved by proceedings in court for that purpose, may nevertheless sue and be sued until its business affairs are fully wound up, such a corporation may maintain an action in a federal court in another state to collect a debt due it therein.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2482–2486; Dec. Dig. ☞630.]

5. COURTS ☞264—JURISDICTION OF FEDERAL COURTS—ANCILLARY SUITS.

Where, pursuant to a mandamus awarded by a federal court, a city has levied a special assessment to pay a debt due the plaintiff, a subsequent suit to enforce payment of the assessment by property owners is

ancillary to the prior action, based on the judgment therein, and is within the jurisdiction of the court, without regard to the amount involved.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 801; Dec. Dig. 264.]

6. JUDGMENT 519—PROCEEDINGS TO ENFORCE—ISSUES.

In an ancillary suit, the purpose of which is to enforce a prior judgment at law jurisdictionally valid and free from fraud, the court cannot review such judgment for errors.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 963; Dec. Dig. 519.]

7. MUNICIPAL CORPORATIONS 456—IMPROVEMENT OF STREETS—SPECIAL ASSESSMENT.

In making a special assessment for the cost of paving a street, a single assessment against one lot owned by two persons in common does not violate the rule that each tract or lot must be assessed separately.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1094–1099; Dec. Dig. 456.]

Appeal from the District Court of the United States for the District of Indiana; Albert B. Anderson, Judge.

Suit in equity by the Warren-Scharf Asphalt Paving Company against Carrie Cushman, Offley W. Leeds, Eva Leeds Cole, Alfred W. Leeds, Kate Leeds, Julia A. Taylor, Samuel J. Taylor and Frank R. Leeds, as executors of Minnie Leeds, deceased, Harriet Huffman, Robert R. Zoon, Flora Zoon, Charles P. Zoon, Emily Kuhn, Louise Kuhn, John H. Kuhn, John C. Dabbert, the Root Manufacturing Company, Frank Vreeland, Alice M. Lock, Gilbert L. Lock, Arthur L. Leeds, and Sophia Johnson. Decree for complainant, and defendants appeal. Affirmed.

In 1899 appellee, a New York corporation, contracted with the city of Michigan City, Ind., to pave three certain streets. The work was finished and accepted in 1900. In 1901 the city levied a special assessment to pay for it. Appellants or their predecessors in title having refused to pay, appellee sought foreclosure of its alleged liens in the state court. In 1908, on final appeal, the paving contracts were held void for lack of proper advertisement and the assessments were annulled.

In 1901 the law then in force governing such improvements was repealed, and in 1905 the entire subject-matter was regulated by a new enactment. In 1909 an act purporting to amend the law of 1905 was adopted, which permitted cities to remedy irregularities when assessments should have been held void on account of defects or irregularities in the preliminary steps. This amendment was not in express terms limited to assessments made under the act of 1905. Thereafter, on appellee's petition, the city proceeded regularly as if a new improvement were to be made, contracted with appellee to do the work at the old price, and at once accepted the work long theretofore finished as a compliance with the new contracts. New assessments identical with the old were spread, and due notice of a hearing was given to the property owners. Appellants protested that the proceedings were without legal authority, and, on their agreement to indemnify and save harmless the city from any costs or damages which might result from a refusal to levy the assessments, the board of public works, despite appellee's demand, declined to take any further steps.

Thereupon, in 1910, appellee sued the city of Michigan City in the United States Circuit Court for the District of Indiana. The total amount demanded was \$6,043.33, the amount of the original unpaid assessments, with interest from the date of levy thereof. The complaint in three counts, one as to each street and contract, set up the history of the transactions in detail, conclud-

ing each count (except as to the amount of damages) as follows: "Plaintiff further says that, by reason of the failure and refusal of the defendant to act in the premises, no fund has been raised by defendant wherewith to pay plaintiff the contract price of said improvement, and the plaintiff has thereby been deprived of the use of the money representing such contract price. Plaintiff further says that by reason of the failure and refusal of defendant to cause assessments to be levied, thereby creating a fund wherewith to pay this plaintiff the contract price of said improvement, defendant has failed to discharge a duty owing to this plaintiff, and has become liable to this plaintiff in damages; that plaintiff has been damaged to the extent of a sum equal to the assessments which defendant should have levied for plaintiff's benefit, together with interest thereon. Whereupon plaintiff prays for damages against defendant in the sum of \$4,000, and for such further and additional relief in the premises as to the court may seem proper."

The demurrer, later overruled by the court, and then the answer of the city, were filed by attorneys who were employed by appellants, and who, with the city's consent, had complete control and management of the defense. The answer set up: First, that the later contracts differed from the originals in certain specified particulars, and were therefore void; second, that, because the work had long before been completed, the curative proceedings and the contracts based thereon were invalid; third, that the state court decisions adjudging the original proceedings void, and the enactment, while those suits were pending, of the act of 1905, rendered the later proceedings void and of no effect.

A demurrer to this answer was sustained, and thereupon, the defendants therein declining to answer further, on motion of the plaintiff therein for judgment for the amount of the original unpaid assessments, with interest from January 17, 1901, the date of the levy thereof, the court, in February, 1911, entered a judgment which, after reciting defendant's election to stand upon its answer, proceeds as follows: "And the plaintiff having moved for judgment for defendant's failure so to plead or answer further, said motion of the plaintiff is now sustained in part as follows: 'The court, being duly advised in the premises, does hereby finally order and adjudge that plaintiff have and recover from the defendant the sum of \$6,043.33, being the amount for which special assessments should be levied by the defendant without interest; said judgment to be enforceable only by a writ of mandamus against the defendant to compel the defendant to levy said assessments, and to pay over to the plaintiff the amount collected thereon. With respect to so much of plaintiff's motion for judgment as prays for interest upon the amount above named, the same is overruled. It is further ordered and adjudged that plaintiff have and recover from the defendant its costs in this proceeding, all of which is finally ordered and adjudged.'"

No attempt has ever been made to have this judgment reversed. Thereafter, on due notice of a hearing, at which none of appellants appeared, final assessments were levied, and, as they remained unpaid after due notice given by appellee, a bill in equity was filed in 1913, in the District Court of the United States for the District of Indiana, by appellees against appellants and two other property owners, who have not joined in this appeal.

The bill recited that appellee took steps in 1904 to effect a voluntary dissolution, became dissolved, but under the laws of New York continued its corporate existence to transact incomplete business and to wind up. It then sets up the history of the transactions as hereinabove set forth, alleged its ownership of the several unpaid assessments, and prayed for such relief as it might be entitled to, and, for the purpose of giving complete effect to the judgment of February, 1911, that defendants be decreed to pay the assessments to the city for appellee, or to appellee, and, upon failure, that the liens of the assessments be foreclosed. After a motion to dismiss had been overruled, answers were filed practically admitting most of the allegations of the bill, but denying knowledge as to some of them. It appeared from the answer that the amount involved in the assessment of each piece of property and of the property of each defendant was less than \$3,000. A decree was entered in accordance with the prayer of the bill. The cause is before us on an appeal from this decree.

William A. McVey, of La Porte, Ind., and George T. Buckingham, of Chicago, Ill., for appellants.

Morris M. Townley, of Chicago, Ill., for appellee.

Before BAKER, SEAMAN, and MACK, Circuit Judges.

MACK, Circuit Judge (after stating the facts as above). It is unnecessary for us to consider either the applicability of the act of 1909 to special assessment proceedings begun under acts other than that of 1905, its constitutionality, if given retroactive effect, or the unconstitutionality of the foreign corporation act of 1879 (Burns' R. S. 1908, § 4105), in view of the conclusion reached, that the judgment of the United States Circuit Court, affirming the right and duty of the city to levy assessments, was, under the pleadings in the case, within its jurisdictional power, and that it is therefore res adjudicata as to those questions, all of which were necessarily litigated in and determined thereby in favor of appellee, both as against the city, the party defendant therein, and as against appellants as privies thereto. *Bradley Co. v. Eagle Co.*, 57 Fed. 980, 6 C. C. A. 661.

[1] First. While appellants assert that they were neither parties nor privies to the case in the Circuit Court, the conceded facts demonstrate that they were privies thereto, inasmuch as the entire defense was conducted by them, with the city's consent, at their own request, and in their sole interest, as the parties eventually and directly obligated to pay any judgment that might be rendered against the city.

"The case is within the principle that one who prosecutes or defends a suit in the name of another to establish and protect his own right, or who assists in the prosecution or defense of an action in aid of some interest of his own, and who does this openly to the knowledge of the opposing party, is as much bound by the judgment and as fully entitled to avail himself of it as an estoppel against an adverse party, as he would be if he had been a party to the record. *Lovejoy v. Murray*, 3 Wall. 1 [18 L. Ed. 129]." Per White, C. J., in *Souffront v. Compagnie des Sucreries*, 217 U. S. 475, 487, 30 Sup. Ct. 608, 612 (54 L. Ed. 846).

[2] Second. Since the case of *Jordan v. Cass County*, 3 Dill. 185, Fed. Cas. No. 7,517, and for reasons fully stated by Judge Taft in *Fuller v. Aylesworth*, 75 Fed. 694, 21 C. C. A. 505 (C. C. A., 6th Circuit), it is settled law that, though the federal courts are without jurisdiction to entertain an original mandamus suit, they have jurisdiction in an action at law against a public corporation to render a judgment in the very form followed by the Circuit Court, on bonds and drainage orders issued by or on behalf of a county, but payable, under the law of the state, solely from taxes or special assessments to be levied against a limited district within the county, and that, too, though by statute a mandamus proceeding is the only remedy available in the state courts.

While, in the reported cases, such actions have been formally based upon a debt evidenced by a written contractual obligation under which the county, usually, but not always, appears as the nominal, though never as the real, obligor, in substance, as the opinions expressly state, they are merely substitutes for original mandamus, devised and sanctioned to enable the federal courts to exercise a proper jurisdiction,

and, as such, they are based upon the failure of the defendant to perform its statutory obligation of levying the taxes or assessments and paying over the fund to the creditor. Indeed, in Aylesworth v. Gratiot County (C. C.) 43 Fed. 350, in which the action was, in form, on orders issued for drain work payable, like the work of appellee, only through special assessment, Mr. Justice (then Judge) Brown said:

"My only doubt in this connection is whether the declaration should not count upon the failure of the board of supervisors to take the proper proceedings for the levy and collection of this tax. The state courts have repeatedly held that no action as for a debt will lie against the municipality upon these warrants."

[3] The complaint on which the instant judgment was rendered was expressly based upon the obligation of the city to levy the special assessment and pay over the fund; if it had concluded with the allegation that the defendant thereby became indebted to the plaintiff to the amount of such unpaid assessments and had prayed a judgment therefor, then clearly, within the precedents, no judgment other than in the form adopted by the Circuit Court would have been valid and proper.

That the plaintiff asserted in his complaint a failure of the defendant to discharge a duty owing to the plaintiff, and its liability in damages because of the neglect of its statutory obligations, and in the prayer asked for damages, does not limit the jurisdictional power of the court to render such a judgment as the facts recited in the complaint would justify. Especially is this so when, as in this case, because of the statutory provisions exempting the city from liability and declaring the special assessment fund the sole source of payment, a general judgment against the city either in debt or in damages would have been erroneous (*City of Pontiac v. Talbot Paving Co.*, 94 Fed. 65, 36 C. C. A. 88, 48 L. R. A. 326; *Id.*, 96 Fed. 679, 37 C. C. A. 556), and when, in addition to the specific prayer for damages, the plaintiff asked for "such other and further relief in the premises as to the court may seem proper."

Whether regarded as an action in tort or as an action in contract, the federal court clearly had jurisdiction of the subject-matter. A general judgment against the city, though erroneous, would have been within its jurisdictional power. And while a judgment or decree which is beyond the power of the court to render in any case, or so much thereof as is entirely without the scope, not merely of the specific prayer, but of the substance, of the pleadings, is void, even on collateral attack (*King v. Doerr*, 145 App. Div. 177, 129 N. Y. Supp. 986, affirmed *Same v. Beers*, 203 N. Y. 559, 96 N. E. 1117), the instant judgment, with its limitation based upon the facts of the case pleaded, though departing from the specific relief prayed for, was clearly within the jurisdictional power of the court, and is therefore binding upon the parties in this case (*Insley v. United States*, 150 U. S. 512, 14 Sup. Ct. 158, 37 L. Ed. 1163). In the very case in which such a limited judgment was first upheld (*County of Cass v. Johnston*, 95 U. S. 360, 24 L. Ed. 416), the plaintiff seems to have demanded a general judgment.

[4] Third. The New York statute, pursuant to which appellee's dissolution proceedings were instituted, provides that after dissolution

"said corporation shall nevertheless continue in existence for the purpose of collecting its assets and may sue and be sued until its business and affairs are fully adjusted and wound up." In other words, despite the proceedings, its corporate existence is not fully extinguished; its capacity to sue and be sued is preserved. It remains a citizen of the state of its creation; it may sue therein (*City of New York v. Warren-Scharf Asphalt Paving Co.*, 149 App. Div. 633, 134 N. Y. Supp. 439), and no reason is apparent why it may not also sue, as a foreign corporation, in the federal courts. *Sinnott v. Hanan*, 156 App. Div. 323, 141 N. Y. Supp. 505, involving the construction of the New Jersey statute, is not in point.

[5] Fourth. The present proceeding in equity was purely ancillary, for the purpose of effectuating the judgment at law through foreclosure of the liens on appellants' property unless payments were made. The question of jurisdictional amount is therefore not involved.

H. C. Cook Co. v. Beecher, 217 U. S. 497, 30 Sup. Ct. 601, 54 L. Ed. 855, is in no way in conflict with *Preston v. Calloway*, 183 Fed. 19, 105 C. C. A. 311 (C. C. A., 6th Circuit). In the former case a suit against directors of a corporation to enforce their liability created by state statute for certain debts of the corporation was held not to be ancillary to a judgment against the corporation. In no proper sense was this a suit to enforce the judgment merely because a judgment against the corporation was a condition precedent to the creation of the directors' independent statutory obligation.

In the present case, however, as in the *Calloway Case*, "the object of the suit was to enforce payment of the tax in order to obtain satisfaction to that extent of the judgment theretofore rendered on the law side," not to enforce an entirely independent liability. The assessments and liens thereby created constituted the sole fund to which the city or contractor could resort for the payment of the judgment which, while it was in form the debt of the city, in substance was the obligation of these appellants as owners of the assessed property.

[6] Fifth. The ancillary proceeding was based upon the judgment itself and the obligation thereby declared and created. The recital in the bill of complaint of the facts leading up to the judgment does not make it an original suit in equity based upon the alleged pre-existing obligation, as in *Brownsville v. Loague*, 129 U. S. 493, 9 Sup. Ct. 327, 32 L. Ed. 780. And while a court of equity, when called upon to aid in executing its own former consent decree, may decline to treat it as *res adjudicata*, and may therefore refuse to deem it binding in respect to the relief to be granted on the new bill (*Lawrence Mfg. Co. v. Janesville Cotton Mills*, 138 U. S. 553, 11 Sup. Ct. 402, 34 L. Ed. 1005), it has no power, either in an original or ancillary proceeding, to go behind a judgment at law, jurisdictionally valid and free from fraud, in search of errors, however gross. *Tilton v. Cofield*, 93 U. S. 163, 167, 23 L. Ed. 858; *New Orleans v. Fisher*, 180 U. S. 185, 21 Sup. Ct. 347, 45 L. Ed. 485.

[7] Sixth. While defenses against the specific assessments on the several properties of the appellants, based on defects in the proceedings subsequent to the entry of the judgment in the Circuit Court, are

not concluded by the judgment itself, nevertheless only jurisdictional defects can be urged in this suit. Appellants defaulted in the opportunity to attack mere errors by their failure to appear at the hearing at which the preliminary assessment roll was confirmed.

Moreover, a single assessment against one lot owned by two persons in common does not violate the rule that each tract or lot must be assessed separately. And by the express provisions of the statute a mistake in the name of the owner of the land does not vitiate the assessment. In this case, each owner had due notice of all proceedings.

Decree affirmed.

LEE v. KANSAS CITY SOUTHERN RY. CO.

(Circuit Court of Appeals, Eighth Circuit. February 25, 1915.)

No. 4107.

1. CARRIERS ~~280~~—LIABILITY FOR INJURIES TO PASSENGERS.

It is the duty and the contract of a carrier to carry a passenger without unnecessary injury, and if he suffers injury to his person, that is not the natural and probable effect of transporting him with reasonable care, he may recover the damages sustained.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1085–1092, 1098–1103, 1105, 1106, 1109, 1117; Dec. Dig. ~~280~~.]

2. CARRIERS ~~318~~—PASSENGER'S ACTION FOR INJURIES—QUESTIONS FOR JURY.

Proof of the running of a passenger train at a speed of 10 to 25 miles an hour through an open switch and into collision with stationary cars on a side track, in the absence of any evidence denying or excusing it, justifies the jury in finding a breach of the carrier's duty and contract to a passenger on such train.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1270, 1307–1314; Dec. Dig. ~~318~~.]

3. CARRIERS ~~320~~—PERSONAL INJURIES—QUESTIONS FOR JURY—EVIDENCE.

Where, in an action for personal injuries, there is such substantial evidence that plaintiff suffered injury that the court, in the discharge of its judicial duty, would sustain a verdict for plaintiff, the case should be submitted to the jury, though there is evidence to the contrary.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1118, 1126, 1149, 1153, 1160, 1167, 1179, 1190, 1217, 1233, 1244, 1248, 1315–1325; Dec. Dig. ~~320~~.]

4. DAMAGES ~~208~~—PASSENGER'S ACTION FOR INJURIES—QUESTIONS FOR JURY.

In a passenger's action for injuries, evidence *held* sufficient to make a question for the jury as to whether he suffered injuries from a collision between the train on which he was riding and standing cars, notwithstanding a great preponderance of evidence tending to show that whatever he suffered was the result of diseases with which he was afflicted prior to the collision.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 54, 64, 68, 132, 144, 145, 205, 220, 533, 534; Dec. Dig. ~~208~~.]

5. EXCEPTIONS, BILL OF ~~13~~—INCORPORATING EVIDENCE—FORM.

While the defeated party should have the reporter's shorthand notes, or such portion of them as is material in the settlement of the bill of exceptions, transcribed into longhand, to enable the court and the opposing counsel to determine by a comparison therewith whether the narrative of

the evidence in the bill of exceptions is correct and sufficient, and while the court should require that part of the evidence relating to the crucial issue to be reviewed on appeal, and which the successful party points out and requests to be presented in longhand to be transcribed and presented in that form, and should require such parts of the evidence to be set forth in the bill of exceptions as is necessary to enable the successful party to present with full force the evidence in its favor, where defendant's counsel, in objecting to the bill of exceptions because it was in narrative form and prepared by the official reporter from his shorthand notes without transcribing them into longhand, did not specify the testimony of what witnesses or upon what specific issues they thought should be presented by question and answer, the court did not err in refusing to require all the evidence to be transcribed in the form of question and answer and inserted in the bill of exceptions.

[Ed. Note.—For other cases, see Exceptions, Bill of, Cent. Dig. § 13; Dec. Dig. 13.]

In Error to the District Court of the United States for the Western District of Arkansas; Frank A. Youmans, Judge.

Action by R. M. Lee against the Kansas City Southern Railway Company. Judgment on a directed verdict for defendant, and plaintiff brings error. Reversed and remanded, with directions.

See, also, 206 Fed. 765.

David B. Sain, of Nashville, Ark. (William H. Arnold, of Texarkana, Ark., on the brief), for plaintiff in error.

James B. McDonough, of Ft. Smith, Ark. (S. W. Moore, of Kansas City, Mo., on the brief), for defendant in error.

Before SANBORN, ADAMS, and SMITH, Circuit Judges.

SANBORN, Circuit Judge. In this case the plaintiff sued the railway company for damages because, while he was a passenger on one of its trains, it ran it through an open switch into collision with some cars on a side track and shocked, bruised, and injured his neck and head and his nervous system, so that thereafter he suffered and continues to suffer pain, his neck and shoulder became stiff, and his arm partially paralyzed. By its answer the defendant denied the material averments of the plaintiff and averred that at the time of the accident, and ever since, the plaintiff was suffering from rheumatism and Bright's disease, that these diseases were not aggravated and he was not injured by the collision, and that, if he has suffered, all his sufferings were caused by his rheumatism and Bright's disease. A large amount of evidence was introduced at the trial upon the issue whether his condition and sufferings after the accident were the effect of traumatic neurasthenia, as claimed by the plaintiff, or of rheumatism or Bright's disease, as insisted by the defendant, and at the close of the trial the court instructed the jury that the evidence was so conclusive that the plaintiff was suffering from Bright's disease that it could not permit a verdict for the plaintiff to stand, and they must return a verdict for the defendant. This instruction is specified as error.

[1-3] The evidence in narrative form fills 324 printed pages of the transcript, and it is useless to attempt to state it in detail. Conceding that the proof was conclusive, as the court below found, that the plaintiff was suffering from Bright's disease, it does not necessarily

follow that he sustained no injury from the collision. He was a passenger, and the duty and the contract of the defendant was to carry him without unnecessary injury. If he suffered injury to his person that was not the natural and probable effect of transporting him with reasonable care, he was entitled to recover whatever damages he sustained from that injury. Proof of the running of a passenger train at a speed of 10 to 25 miles an hour through an open switch and into collision with stationary cars on a side track, in the absence of evidence denying or excusing it (and this was the operation indicated by the testimony in this case), presents evidence from which a jury may lawfully find breach of duty and of contract by a carrier in an action for injury to a passenger caused by the collision. It does not follow, from the fact that the plaintiff had Bright's disease, that he could not have been or was not injured by the accident. A sick man is not more exempt from injury, from bruises and shocks, than a well man. Hence the real question at the close of the evidence was whether or not there was such substantial evidence before the jury that the plaintiff had suffered injury from the collision that the court in the discharge of its judicial duty would sustain a verdict to the effect that the collision was the cause of any pain, suffering, or injury to the plaintiff. If there was such evidence, the case should have been submitted to the jury, although there was evidence to the contrary.

[4] The plaintiff had testified that at the time of the accident he was lying in the seat of the car, with his neck twisted below the head rest and against the wall, with his foot on the seat in front of him; that the stoppage of the train caused him to strike his knees against the seat in front of him, to rebound and strike his head against some object; that the stoppage skinned two places on his left arm, each about as large as a dime, wrenched his neck, caused "something to slip or pop and give way," and produced severe pain in his neck at the time; that immediately thereafter he felt dazed and as though a heavy weight was attached to his feet; that the pain was at the top and in the back of his neck, where it joins onto the head; that he had never experienced any such heaviness or pains before; that the accident occurred in the night of September 22, 1909; that he continued about his business, but felt tired, worn out, and nervous; that on the third day after the collision, upon turning his head, he suffered a recurrence for 15 or 20 minutes of the pain which he first experienced just after the accident; that subsequently this pain recurred more frequently and became more severe, until a few weeks afterwards it became continuous, and during the first part of October he consulted his family physician, Dr. J. S. Hopkins, who examined and treated him; that he consulted this doctor during the remainder of the year 1909, and in subsequent years; that his health declined and his pain increased, but he continued at work until about March, 1910, when his head had become drawn to one side, and he was at times unable to support and move it with the muscles of the neck without the use of his hands; that in July, 1910, his right arm became partially paralyzed; that his strength and vitality continued to decrease until October, 1912, when they began to improve; that on September 26, 1909, he weighed 150 pounds; that his weight decreased

until in November, 1911, he weighed 119 pounds, and then it again increased until before the last trial it had reached 142 pounds, and his general health and comfort had improved, especially since February, 1913.

Dr. Hopkins testified that the plaintiff had suffered from, and he had treated him for, rheumatism in July and August, 1909; that he had recovered from that attack in September, 1909, before the accident; that he treated and repeatedly examined him after the accident, and that in his opinion the severe pains and other ills he suffered after September 22, 1909, were caused by the shock and bruise of the collision; and that he was suffering from traumatic neurasthenia caused by the accident.

There was some other testimony tending to sustain the evidence of the plaintiff and his physician, and a vast mass, a great preponderance, of evidence, consisting of testimony of his admissions that he was not injured by the accident, his actions after the accident, the testimony of physicians who had repeatedly examined him, and of other witnesses, to the effect that he was not injured by the collision, and that whatever he suffered was the result of Bright's disease and of rheumatism. A review of the entire evidence, however, has convinced that the theory of the plaintiff was supported by evidence so positive and substantial that the question whether or not his sufferings were caused by the accident or by his diseases fell within the province of the jury, and that if they had found that they resulted wholly or in part from the collision their verdict upon that question would have been sustained by the court, and for that reason the judgment below must be reversed.

[5] Counsel for the defendant in error, however, insist that the bill of exceptions is in such condition that it does not warrant our consideration of the error which has been discussed, because they objected to the bill at the time of its settlement by the court on the grounds that it was in narrative form, that it had been prepared by the official reporter from his shorthand notes without transcribing them into long-hand, and that counsel for the defendant could not read the shorthand notes.

It is undoubtedly the duty of the defeated party to have the shorthand notes of the reporter, or at least such portion of them as is material in the settlement of the bill of exceptions, transcribed into long-hand in order to enable the court and the opposing counsel to learn, from a comparison of the transcribed evidence with the narrative of the evidence relating to the questions still in controversy, whether or not the narrative is correct and sufficient. When, however, a trial has been completed, and the errors assigned in it are about to be reviewed by the court above, many portions of the evidence generally become practically immaterial. It is seldom that it is necessary that all the evidence should be presented, as it was given, to either court or counsel. It is stated that there were 133 witnesses who testified in this case. Defendant's counsel did not specify, in its objections to the settlement of the bill, the specific issues upon which, nor the testimony of what witnesses, they thought it necessary to the protection of the rights of their client that the bill of exceptions should contain by question and answer in the form in which it was given at the trial of the case. It is

not probable that it was necessary to present all of the evidence in that form.

The result is that but two questions are presented here. Was it error for the court below to refuse to require all the testimony to be inserted in the bill of exceptions in the form of question and answer? And was it error for that court to refuse to require the defeated party to present all the testimony taken by the reporter in the form in which it was given transcribed into longhand? To these questions the answer is that the court should have required that part of the evidence which related to the crucial issue remaining in the case to be reviewed by the court above, and which the defendant pointed out and requested to be presented in longhand, to be transcribed and presented in that form, and then, upon a comparison of the evidence so transcribed with the proposed bill of exceptions, it should have required such parts of the evidence set forth therein by question and answer as was necessary to enable the successful party to present with full force the evidence in its favor. As, however, the only question the court decided was that it was unnecessary to have all the evidence in the case transcribed in the form of question and answer and to insert it in the bill of exceptions, this court is unable to find that there was any error in the ruling of the court below, especially as it has expressly certified that the bill of exceptions contains all the evidence introduced in the case. The conclusion is that the bill of exceptions in this case is sufficient to present for review the question whether or not there was so much and such substantial evidence at the trial as would have sustained a verdict for the plaintiff.

There are other questions in this case, but none the decision of which would change the result, and the judgment below is accordingly reversed, and the case is remanded to the court below, with directions to grant a new trial.

COOPER v. UNITED STATES.

(Circuit Court of Appeals, Ninth Circuit. February 15, 1915. Rehearing
Denied March 18, 1915.)

No. 2460.

1. PUBLIC LANDS ~~119~~—CANCELLATION OF PATENT—FRAUD.

Where prior to final proof there was no plowing, cultivation, or fencing on land acquired by homestead entry, and the only improvement was a house 12 feet by 16 feet, two sides of which had been put up with rafters at each end to hold them in place, the patentee perpetrated a fraud upon the government by making and procuring affidavits showing compliance with the law and obtaining the final certificate and patent.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 331-340; Dec. Dig. ~~119~~.]

2. PUBLIC LANDS ~~120~~—CANCELLATION OF PATENT—BONA FIDE PURCHASERS.

Where a patentee of land, who procured a patent by false affidavits as to compliance with the law respecting improvements, settlement, and residence, was in defendant's employ at the time, and deeded the land to defendant on the day final proof was made, the land was inclosed with

~~119~~ For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

a much larger area by defendant's fences, and defendant did not complete a house on the land, so as to render it habitable, a finding that he bought with knowledge of the patentee's fraud was supported by the evidence.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 332-335; Dec. Dig. ☞120.]

3. PUBLIC LANDS ☞125—CANCELLATION OF PATENT—JUDGMENT—CONFORMITY TO PLEADINGS.

In a suit against a purchaser of land from a patentee to annul the patent and set aside the deed to defendant as a cloud upon the title, it appeared that defendant had contracted to sell to H., whereupon the bill was amended to allege that H.'s interest was acquired with knowledge of the patentee's fraud and to pray that his contract be canceled. The bill further prayed for such other and further relief as might seem meet in equity. Held that, where it appeared that by reason of H.'s bona fides and the running of limitations as to him the land was beyond recovery by the government, a money judgment against the original defendant, with a lien on the land therefor, and a provision that if it was not paid H. should pay it out of the purchase money owing to defendant, was warranted by the prayer for general relief.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. § 341; Dec. Dig. ☞125.]

Appeal from the District Court of the United States for the District of Montana; George M. Bourquin, Judge.

Suit by the United States against Frank D. Cooper and another. From a decree (217 Fed. 846) in favor of the United States, the defendant named appeals. Affirmed.

See, also, 220 Fed. 871.

This suit was instituted by the United States against Frank D. Cooper to annul and set aside the patent of the government to the lands described in the complaint. The lands were acquired by one Jay C. Freeman through homestead entry and commutation, and Cooper is the grantee of Freeman. Freeman made filing on the land June 19, 1902. He made final proof August 18, 1904, and on the same day deeded to Cooper. Final receipt was issued August 23, 1904, and the patent February 10, 1905. It is alleged that the patent was acquired from the government through fraud practiced upon it by Freeman in claiming to have settled upon the land by homestead entry, and to have made improvements thereon of the value of \$400, and to have lived thereon until final proof was made, when in fact he did none of these things, and in making and procuring to be made false affidavits touching such settlement, residence, and improvements, to show compliance with the law and obtain the final certificate and patent. It is further alleged that Cooper was a purchaser from Freeman with full knowledge of the fraud committed by Freeman in procuring the patent.

Cooper answered, and, the cause having been brought on for trial, it developed that Cooper, on December 13, 1909, six days after the bill was filed, but five days before service was had, entered into a contract for the sale of the land in question, together with a large amount of other land, with one George Heaton, whereupon the bill was allowed to be amended, by interlineation, so as to show the fact. In that relation, it was further alleged that Heaton, by reason of the contract, claimed some right or interest in the premises, but that such interest, whatever it is, was acquired with full knowledge of the fraud perpetrated in the procurement of the patent. Heaton was made a party, and answered to the bill December 2, 1912, showing purchase from Cooper in good faith, and that the cause did not accrue within six years prior to the filing of the bill and service of subpoena upon him. The prayer of the bill is for an annulment of the patent, that the deed to Cooper be declared a cloud upon the title and set aside, that the agreement with Heaton be canceled and held for naught, and for such other and further relief as may seem meet in equity.

On the final hearing, the court rendered a decree in favor of the government and against Cooper in the sum of \$912, and interest at the rate of 8 per cent. per annum from December 13, 1909, amounting in the aggregate, with interest, to \$1,212.96, and further decreeing that, unless said amount were paid by Cooper, defendant Heaton should pay the same out of the purchase money owing from him to Cooper; that the payment, if made by Heaton, shall be a discharge upon his contract to that extent, and complainant shall have a lien upon the land for the amount of the decree and for its costs. Heaton declined to appeal, and Cooper, having severed, prosecutes the appeal alone.

James A. Walsh, of Helena, Mont., for appellant.
B. K. Wheeler, U. S. Atty., of Butte, Mont., for the United States.

Before GILBERT and ROSS, Circuit Judges, and WOLVERTON, District Judge.

WOLVERTON, District Judge (after stating the facts as above). Three contentions are made on the appeal: First, that the evidence is insufficient to establish fraud on the part of Freeman in procuring the patent from the government; second, that Cooper was an innocent purchaser for value; and, third, that the decree is not within the issues, nor supported by the pleadings and the evidence.

[1] The evidence very clearly shows that Freeman made no sort of settlement upon the land, nor did he make the improvements thereon claimed, if he made any whatever. Prior to final proof some one had started the building of a house upon the premises, a board structure, with dimensions about 12 feet by 16 feet. Two sides had been put up, with rafters at each end to hold them in place. Further work was done on it, at the instance of Cooper, about the time final proof was made. This was all the improvement of any kind that was ever made upon the premises prior to final proof. There was no plowing or cultivation, nor any fencing. It is unnecessary to pursue the subject further, as it is very apparent that Freeman perpetrated a fraud upon the government in procuring his patent.

[2] As to Cooper, it has been seen that further work was done on the house at his instance, but it was not even then completed. A door frame was put in, but no door. The house contained no windows, nor was there a hole in the roof for a stovepipe, so that it was not rendered habitable. The inference is that Cooper did not do the further work for habitation by his men; he being in the stock business, and having in his employ many sheep herders. Freeman was in his employ during the year 1904. This land was inclosed with a much larger area by the fencing of Cooper, and it appears that the very day final proof was made Cooper obtained a deed from Freeman. We think the trial court's finding that Cooper bought with knowledge of Freeman's fraud was amply supported by the evidence.

[3] The third contention presents more nearly a question of law than of fact. Was the relief granted within the issues and scope of the pleadings? In considering this question, the answers of Cooper and Heaton must be taken note of. It was in view of such answers that the complaint was amended by interlineation. The amendment sets forth the fact of the execution of the agreement between Cooper and Heaton, and that by reason thereof Heaton claimed some right or

interest in the land, but that such interest was subordinate to the interest of the government. The prayer for relief was changed only in so far as it asked that the contract between Cooper and Heaton be canceled. It turned out, under the evidence, that this contract was bona fide, but that its conditions had not yet been fulfilled, so as to entitle Heaton to a deed. It was decreed, therefore, in effect, that Cooper pay to the government the amount of such purchase price to be received by him from Heaton, and that it be declared a lien on the land in Heaton's hands.

There were presented by the pleadings the issue as to the fraud on the part of Freeman in procuring the patent, the issue as to good faith on the part of Cooper in his purchase from Freeman, the question whether an agreement of sale had been entered into between Cooper and Heaton, and the good faith of that agreement, which involved the value of the land, and naturally there arose out of the situation the inquiry as to what decree should be made to best subserve the ends of justice and equity. It was deemed that, by reason of the bona fides of Heaton's purchase, and the running of the statute of limitations as to him, the land was beyond recovery by the government; but it was found that Cooper still had a present equity in it, and quite naturally so under the evidence, and so the land was impressed with the demand of the government.

Now, under the facts distinctly stated in the bill and the answers of the defendants, and the issues naturally growing out of such facts, the relief accorded the government was plainly within the prayer for general relief, although not within any specific demand. This, under the authorities, will support the decree. A fair illustration of the principle is found in *Lockhart v. Leeds*, 195 U. S. 427, 436, 25 Sup. Ct. 76, 79 (49 L. Ed. 263), where the court says:

"There is nothing in the intricacy of equity pleading that prevents the plaintiff from obtaining the relief under the general prayer to which he may be entitled upon the facts plainly stated in the bill. There is no reason for denying his right to relief, if the plaintiff is otherwise entitled to it, simply because it is asked under the prayer for general relief and upon a somewhat different theory from that which is advanced under one of the special prayers."

See, also, *Walden v. Bodley*, 14 Pet. 156, 10 L. Ed. 398; *Tayloe v. Merchants' Fire Insurance Co.*, 9 How. 390, 13 L. Ed. 187; *Stevens v. Gladding & Proud*, 17 How. 447, 15 L. Ed. 155; *Tyler v. Savage*, 143 U. S. 79, 98, 12 Sup. Ct. 340, 36 L. Ed. 82; *Patrick v. Isenhart et al. (C. C.)* 20 Fed. 339.

These considerations lead to an affirmance of the decree; and it is so ordered.

COOPER v. UNITED STATES.

(Circuit Court of Appeals, Ninth Circuit. February 15, 1915. Rehearing Denied March 18, 1915.)

No. 2461.

1. PUBLIC LANDS ~~120~~—**CANCELLATION OF PATENT—SUFFICIENCY OF EVIDENCE.**

In a suit by the United States to cancel a patent to land for fraud, evidence *held* insufficient to show that defendant was a bona fide purchaser for a valuable consideration without notice.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 332-335; Dec. Dig. ~~120~~.]

2. PUBLIC LANDS ~~120~~—**CANCELLATION OF PATENT—BURDEN OF PROOF.**

In a suit by the United States to cancel a patent to land for fraud, the burden was upon a purchaser from the patentee to produce satisfactory proof that he purchased in good faith and for value.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 332-335; Dec. Dig. ~~120~~.]

Appeal from the District Court of the United States for the District of Montana; George M. Bourquin, Judge.

Suit by the United States against Frank D. Cooper and another. From a decree (217 Fed. 846) in favor of the United States, the defendant named appeals. Affirmed.

See, also, 220 Fed. 867, 136 C. C. A. 497.

James A. Walsh, of Helena, Mont., for appellant.

B. K. Wheeler, U. S. Atty., and Frank H. Woody, Jr., Asst. U. S. Atty., both of Butte, Mont., for the United States.

Before GILBERT and ROSS, Circuit Judges, and WOLVERTON, District Judge.

GILBERT, Circuit Judge. [1] This case differs in no essential feature from the case of the same title (220 Fed. 867, 136 C. C. A. 497) which has just been decided by this court, except in the degree of the proof that the appellant purchased the land with knowledge of the homestead entryman's failure to comply with the law. The trial court found that, for 18 months immediately preceding final proof, the entryman of the land involved had no house, fence, or other improvements on the land, and did not reside thereon, or cultivate the same, and that finding is fully sustained by the evidence. The court also found that the appellant knew those facts when he purchased the land, that he did not pay a valuable consideration therefor, and was not a bona fide purchaser.

The appellant was the owner of a large tract of land, consisting of some 20,000 acres, surrounding, and some of it adjoining, the land in controversy herein. The homestead entry was made in 1899, and the entryman obtained his final receipt on June 18, 1904. On July 15, 1904, he conveyed the land to the appellant. The entryman was a sheep herder in the appellant's employment during the years 1902, 1903, and 1904, and during a large part of that time he was away from his home-

~~1~~ For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

stead, as his employer must have known. The appellant's own testimony falls short of showing that he was a bona fide purchaser for value without notice. It is true that he testified that he purchased the land in good faith, but he did not testify that he was without knowledge of the condition of the homestead and the improvements or lack of improvements thereon, or that he had not been over the premises. What he did testify was this:

"At the time I purchased the land I did not have any knowledge that it was claimed that he had not complied with the law with reference to residence and improvements."

That is a very different thing from saying that the appellant was without knowledge that the law had not been complied with. As to his actual presence on the land, all that he testified was:

"I think I was over the land a long time before the final proof was made."

He did not say that he was not there at other times. There was testimony that in the spring of 1904 he was "a good many times" in the neighborhood of the land, and that he was seen crossing the same on a road which he had caused to be constructed. It is to be observed, also, that the appellant's testimony is to some extent discredited by the testimony of witnesses to the effect that he had been engaged in employing others to take up land claims for him, and had furnished the fees and expenses for the entries. This testimony is not entirely denied by the appellant.

[2] The burden was upon him to produce satisfactory proof that he purchased in good faith and paid value. His testimony that he "purchased that land in good faith" and paid a "money consideration" does not constitute such proof. Nor is the recital in his deed of the payment of a money consideration sufficient proof. In *Boone v. Chiles*, 10 Pet. 177, 9 L. Ed. 388, it is said:

"The consideration must be stated, with a distinct averment that it was bona fide and truly paid, independently of the recital in the deed. Notice must be denied previous to and down to the time of paying the money, and the delivery of the deed."

Cases applying these principles are *Simmons Creek Coal Co. v. Doran*, 142 U. S. 437, 12 Sup. Ct. 239, 35 L. Ed. 1063, *Nickerson v. Meacham* (C. C.) 14 Fed. 881, *Lakin v. Sierra Buttes Gold Min. Co.* (C. C.) 25 Fed. 337, *Johnson v. Georgia Loan & Trust Co.*, 141 Fed. 593, 72 C. C. A. 639, *United States v. Hill* (D. C.) 217 Fed. 841, and *United States v. Brannan*, 217 Fed. 849, 133 C. C. A. 559.

The defense is clearly not supported by the evidence.

The judgment is affirmed.

HIGBEE v. CHADWICK.

(Circuit Court of Appeals, Sixth Circuit. March 12, 1915.)

No. 2544.

1. APPEAL AND ERROR ☞792—DISMISSAL ON COURT'S OWN MOTION.

Where there is a lack of jurisdiction over an appeal by one defendant because of the nonjoinder of another defendant, as to whom there was no severance, the court will not proceed, though there is no motion to dismiss.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3137-3141; Dec. Dig. ☞792.]

2. APPEAL AND ERROR ☞325—NECESSARY PARTIES—PARTIES HAVING NOMINAL INTEREST.

If a party who does not join in an appeal has only a nominal, and not a substantial, interest affected by the decree, his nonjoinder is not fatal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1810-1813; Dec. Dig. ☞325.]

3. APPEAL AND ERROR ☞907—NECESSARY PARTIES—PARTIES HAVING NOMINAL INTEREST.

At a sale under a deed of trust, the property was bid in by T., who sold his bid to H. The mortgagor sued H. and T. to vacate the sale, and the court, treating H. as the assignee of the secured debt, made a decree permitting the mortgagor to redeem, and providing for a judicial foreclosure sale in default of such redemption. The property was concededly ample to cover the amount of the foreclosure decree awarded to H. Held that, assuming that the omission, from the amount for which H. was given a lien, of the amount paid by him to T. above the sum due on the security, would impose such a liability on T. as would require his joinder as a party to an appeal by H., where the transcript did not show whether such amount was included, such a defect would not be presumed for the purpose of defeating jurisdiction.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2899, 2911-2916, 3673, 3674, 3676, 3678; Dec. Dig. ☞907.]

4. APPEAL AND ERROR ☞325—NECESSARY PARTIES—PARTY AGAINST WHOM COSTS ARE AWARDED.

That a decree makes a party jointly liable for the costs does not require him to join in an appeal or to be severed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1810-1813; Dec. Dig. ☞325.]

5. MORTGAGES ☞378—FORECLOSURE UNDER POWER OF SALE—NECESSITY OF STRICT COMPLIANCE.

As a general rule, the foreclosure of a deed of trust by a nonjudicial public sale, there being no provision for personal notice and no redemption being permitted, is valid only if fully supported by every specified condition.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 1137, 1138, 1140; Dec. Dig. ☞378.]

6. MORTGAGES ☞301—TENDER—NECESSITY OF DEMAND BEFORE FORECLOSURE.

Where, after the maturity of an interest coupon attached to a deed of trust, which coupon was made payable to a trust company, or bearer, at the trust company's office, the mortgagor's agent tendered the trust company his check, but the check was not taken, only because the coupon could not be found and the agent rightfully insisted upon its production, there was a tender, which, if it did not discharge the lien as to the coupon, at least suspended the lien and placed upon the holder the burden of demanding payment whenever prepared to surrender or account for the coupon, and where the only subsequent demands were a request to the agent to pay after his authority to do so had ceased, and the mailing of

a letter to the mortgagor at a place where she did not live, which letter never reached her, a foreclosure for nonpayment of the interest was properly vacated.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 876-881, 885, 887, 888; Dec. Dig. ☞301.]

Appeal from the District Court of the United States for the Western District of Tennessee; John E. McCall, Judge.

Suit by Mrs. Kate Bell Koser Chadwick against H. H. Higbee and another. From the decree, the defendant named appeals. Affirmed.

G. J. McSpadden, of Memphis, Tenn., for appellant.

W. A. Collier, of Memphis, Tenn., for appellee.

Before KNAPPEN and DENISON, Circuit Judges, and SATER, District Judge.

DENISON, Circuit Judge. The trustees, under a trust deed given by Mrs. Chadwick, declared default and advertised and sold the property. It was bid in by Thompson, he sold his bid to Higbee, and to him the trustees deeded. Mrs. Chadwick, as a citizen of Arkansas, filed a bill in the court below against Higbee and Thompson, citizens of Tennessee, to vacate the sale. The District Court held it invalid; and, treating Higbee as the assignee of the secured debt, made a decree permitting Mrs. Chadwick to redeem on conditions stated, and providing for a judicial foreclosure sale in default of such redemption. Higbee appeals.

[1-4] The record shows that there was no severance as to Thompson. There is no motion to dismiss; but this court will not proceed, if it sees a lack of jurisdiction. If the party who does not join in the appeal has only a nominal, and not a substantial, interest affected by the decree, his nonjoinder is not fatal (*Ayres v. Polsdorfer* [C. C. A. 6] 105 Fed. 739, 45 C. C. A. 24; *Alsop v. Conway* [C. C. A. 6] 188 Fed. 572, 110 C. C. A. 366, and cases cited); and so the character of Thompson's interest in the matter adjudicated must determine the effect of his absence from this appeal record. So far as we are informed thereby, whether he has a substantial interest depends upon whether he may be required to repay the consideration received by him from Higbee; and, since the property is concededly ample to cover the amount of the foreclosure decree awarded to Higbee below, there can apparently be no such liability over, unless the \$250 paid by Higbee to Thompson above the sum due on the security was omitted from the amount for which Higbee was given a lien; nor do we intend to say whether or not, even then, the liability would exist. From the transcript which has been made up, and without objection sent to this court as the record, it is impossible to determine whether this \$250 was or was not so included. It follows that the record does not make clear such a substantial interest existing in Thompson as required him to join in the appeal, and we think we should not presume such a defect for the purpose of defeating jurisdiction otherwise complete. The decree also made Thompson jointly liable for the costs, but this alone does not require him to join or to be severed. *Forgay v. Conrad*, 6 How. 201, 203 [12 L. Ed. 404].

[5] The foreclosure which the bill sought to vacate was not a judicial proceeding, but was the customary Tennessee execution of the trust by newspaper advertising and a nonjudicial public sale. The deed requires only 3 weeks' advertising, and the statute, only 20, or perhaps 30, days'. Shannon's Code, §§ 3838, 6249. There is no provision for personal notice, and no redemption is permitted. We assume it to be the rule in Tennessee, as generally, that such strict foreclosures are valid only if fully supported by every specified condition. *Shillaber v. Robinson*, 97 U. S. 68, 78, 24 L. Ed. 967.

[6] The bill urged several objections; but, if any one is well taken, the others need not be considered. The loan had been made to Mrs. Chadwick by a trust company in Memphis, and was evidenced by a bond for the principal, having attached thereto coupons for the semi-annual interest—both principal and coupons being payable to the trust company or bearer, at its office. The trust company sold the mortgage to Mrs. Ensley, but guaranteed payment of the coupons, and assumed to keep charge of the collection of the interest. About March 28, 1909, it notified Mrs. Chadwick by mail that a \$39 coupon would be due on that day; and thereupon she requested her agent, Mr. Armistead, to pay the same. Shortly after that date, he went to the trust company, stating that he had been so instructed, and that he desired to make such payment, and would give his check therefor, and take up the coupon. His offer was regarded as an offer of money; but the trust company did not find the coupon. Either it had not been sent in for collection, or it had been mislaid. Mr. Armistead rightfully required the production of the coupon (payable, as it was, to bearer); and this transaction was equivalent to a tender, which, if it did not discharge the lien of the trust deed as to this coupon, ought at least to suspend the lien, and put on the holder the burden of demanding payment whenever the holder was prepared to surrender or account for the coupon. There was no such subsequent demand. When, some weeks later, the coupon was found by or sent to the trust company, it requested Mr. Armistead to pay, but his authority to do so had then ceased; and no further effort to demand payment from Mrs. Chadwick was made, except by mailing her a letter on the 13th of September, telling her that, unless paid, foreclosure would be commenced on the 15th. This letter was addressed to her at some place in Arkansas where she did not live, and it is not shown to have reached her; and while she and her attorney, after they were put on inquiry, were not diligent in learning that a notice of sale was being published, yet they did not know of the proceeding till after the sale. It is clear that the nonpayment of the coupon at the place where and substantially at the time when its terms provided was due to the fault either of the owner of the security in not sending the coupon at the proper time to the proper place, or of the trust company in not being able to produce it when payment was tendered; there was no other basis for the foreclosure; and it is certain that a court of equity cannot tolerate a forfeiture resting on so unjust a foundation.

The decree below is affirmed, with costs.

BELLAMY et al. v. ST. LOUIS, I. M. & S. RY. CO.[†]
(Circuit Court of Appeals, Eighth Circuit. March 8, 1915.)

No. 4284.

1. COURTS ~~508~~—JURISDICTION OF FEDERAL COURT—INJUNCTION.

Where an injunction had been issued by the federal court, restraining the enforcement of a statute regulating railroad rates, which was subsequently restrained by the Supreme Court, the court can appoint a master, before whom all claims of shippers on the injunction bond must be prosecuted; but it cannot prevent those shippers from recovering by separate action under the statute.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 1418-1423, 1425-1430; Dec. Dig. ~~508~~.

Enjoining proceedings in state courts, see notes to *Garner v. Second Nat. Bank*, 16 C. C. A. 90; *Central Trust Co. v. Grantham*, 27 C. C. A. 575; *Copeland v. Bruning*, 63 C. C. A. 437.]

2. INJUNCTION ~~26~~—JURISDICTION—MULTIPLICITY OF SUITS.

An order enjoining the prosecution of actions by shippers against a carrier under a state statute regulating rates, the enforcement of which had been suspended by injunction, cannot be sustained on the ground of preventing a multiplicity of suits, since there is no community of right or interest between the shippers.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 24-49, 54-61; Dec. Dig. ~~26~~.]

Appeal from the District Court of the United States for the Eastern District of Arkansas; Jacob Trieber, Judge.

Suit by the St. Louis, Iron Mountain & Southern Railway Company against George W. Bellamy and others. From an order granting an injunction on a supplemental bill (211 Fed. 172), certain defendants appeal. Modified and affirmed.

Allyn Smith, of Cotter, Ark., and J. F. Loughborough, of Little Rock, Ark., for appellants.

J. M. Moore, W. B. Smith, and J. Merrick Moore, all of Little Rock, Ark., for appellee.

Before ADAMS and CARLAND, Circuit Judges, and AMIDON, District Judge.

AMIDON, District Judge. The present appeal presents a subordinate matter arising out of the Arkansas Rate Cases (C. C.) 187 Fed. 290, and 230 U. S. 553, 33 Sup. Ct. 1030, 57 L. Ed. 1625. A schedule of freight and passenger rates was prescribed under the authority of that state. The St. Louis, Iron Mountain & Southern Railway Company filed in the federal court its bill against the railroad commissioners and individual defendants as passengers and shippers, charging that the rates were confiscatory. A preliminary injunction was issued, restraining the defendants and the public generally from instituting any proceeding against the carrier on account of its charging rates in excess of those fixed by law or the commissioners. For the protection of passengers and shippers, the order required the complainant to give a bond to the United States in the sum of \$200,000 "conditioned that said complainant shall keep a correct account showing, as respects the

~~508~~ For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes.
† Rehearing denied May 17, 1915.

carriage of passengers and freight, the difference between the tariff actually charged, and that which would have been charged had the rates inhibited hereby been applied, showing the particular carriage in question, and the stations between which the same occurred, and the name of the person affected, so far as may be practicable, which record shall be made and kept subject to the further order of this court, and further conditioned that if it shall eventually be decided that so much of this order as inhibits the enforcement of the existing rates should not have been made, that said complainant shall, within a reasonable time, to be fixed by the court, refund in every instance to the party entitled thereto the excess in charge over what would have been charged, had the inhibited rate been applied, together with lawful interest and damages." A bond thus conditioned was given. Subsequently an additional bond in the penal sum of \$800,000 was required and given. At the final hearing of the cause, a perpetual injunction was granted, and further liability under the bonds was released. On appeal the Supreme Court reversed this decision, and directed that the bill be dismissed without prejudice. The trial court, in entering judgment upon the mandate of the Supreme Court, not only entered a judgment in conformity with its provisions, but proceeded in the same decree to enter judgment appointing a special master "for the purpose of determining the damages sustained by the defendants by reason of the granting of the temporary and permanent injunctions."

Before the making of this order the defendant Metcalf had instituted a suit in the state chancery court to recover \$6,000 excessive freight charges exacted of him by the railway company while the primary suit was pending. This action was based, not on the bond, but on the statutory liability arising out of the exaction of the excessive rates.

Soon after the trial court made its order appointing the master, the railway company filed a supplemental bill, setting forth that a large number of claims existed against it by reason of the excessive rates collected during the pendency of the litigation; that many actions were threatened in the state courts for the enforcement of these claims; that conflicting claims were made in respect of the same shipment; and that complainant would be subject to a multiplicity of suits, and great damage and expense, unless the court should take exclusive jurisdiction of these claims, and restrain independent actions for their collection. Metcalf was made a party to this supplemental bill, and the other defendant, Gallup, was also made a party, with an averment that he was about to institute an independent suit. The bill further alleged that the parties were so numerous as to make it impractical to bring all of them before the court, and asked that Metcalf and Gallup be treated as representatives of the class. These defendants appeared and challenged the jurisdiction of the court and the equity of the bill, both by motion to dismiss and answer. A hearing was had, and the court rendered its decision as follows:

"A perpetual injunction is granted restraining these defendants, and all other persons similarly situated, from instituting or maintaining any suits for excess charges collected by the complainant during the pendency of this injunction."

The defendants Metcalf and Gallup appeal from that order.

[1] The order is too broad. The court had jurisdiction of all liabilities arising out of the bonds made pursuant to its orders. It could appoint a master, before whom all claims based on those bonds should be heard, and restrain actions in other jurisdictions to collect such claims. The bonds were judicial. The orders requiring them to be given retained the jurisdiction of the court to ascertain and enforce liabilities arising under them. That power probably existed independently of such reservation. *Russell v. Farley*, 105 U. S. 433, 26 L. Ed. 1060; *In re Louisville*, 231 U. S. 639, 34 Sup. Ct. 255, 58 L. Ed. 413; *In re Engelhard*, 231 U. S. 646, 34 Sup. Ct. 258, 58 L. Ed. 416; *Louisville v. Cumberland Telephone Co.*, 231 U. S. 652, 34 Sup. Ct. 260, 58 L. Ed. 419. This, however, was the measure of the court's jurisdiction. Parties from whom excessive rates had been exacted were not confined to suing on the bonds. They also had the right given them by law to recover the overcharges. That right was not destroyed by the injunction, but was simply suspended. As soon as the injunction was out of the way, the right and remedy for its enforcement stood the same as if the injunction had never been issued.

[2] Neither can the order be sustained on the ground of preventing multiplicity of suits. The rights of each shipper or passenger, in case he relies, not on the bond, but on the statute, arise out of an independent contract, and there is no community of right or interest, such as is necessary to support jurisdiction in equity for the purpose of preventing a multiplicity of suits. *Hale v. Allinson*, 188 U. S. 56, 72, et seq., 23 Sup. Ct. 244, 47 L. Ed. 380; *United States v. Bitter Root Development Co.*, 200 U. S. 451, 26 Sup. Ct. 318, 50 L. Ed. 550.

The order of the trial court is modified, so as to restrain only such actions as are brought on one or both of the bonds, and, as so modified, is affirmed.

Appellants will recover their costs.

MITCHELL et ux. v. McSHANE LUMBER CO. et al.

(Circuit Court of Appeals, Fifth Circuit. February 8, 1915. Rehearing Denied March 8, 1915.)

No. 2585.

1. ADVERSE POSSESSION ~~50~~—ESTOPPEL BY TAKING LEASE—PERSONS TO WHOM ESTOPPEL IS AVAILABLE.

The acceptance by a person, claiming title to land by adverse possession, of a lease of a league of land embracing that so claimed, though an admission that he did not hold the land as his own, was not conclusive against him in favor of a stranger to the lease, and did not prevent him from proving his adverse possession, as the parol evidence rule applies only to the parties and their privies, and has no operation with respect to third persons, nor even upon the parties themselves in controversies with third persons.

[Ed. Note.—For other cases, see *Adverse Possession*, Cent. Dig. §§ 255-261; Dec. Dig. ~~50~~.]

2. ADVERSE POSSESSION ~~115~~—EVIDENCE—QUESTIONS FOR JURY.

Where, in an action involving the title to land, the evidence was conflicting whether plaintiffs' adverse possession was interrupted, the ques-

tion was for the jury, and the court erred in ruling that there was no evidence to support a finding for plaintiffs.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 314, 691-701; Dec. Dig. ☞115.]

In Error to the District Court of the United States for the Eastern District of Texas; Gordon Russell, Judge.

Action by B. D. Mitchell and wife against the McShane Lumber Company and others. Judgment for defendants, and plaintiffs bring error. Reversed and remanded.

John L. Little, of Kountze, Tex., and W. D. Gordon and Thos. J. Baten, both of Beaumont, Tex., for plaintiffs in error.

Stuart R. Smith, of Beaumont, Tex., and Leon Sonfield, of Houston, Tex. (Smith & Crawford, of Beaumont, Tex., and Campbell, Sonfield, Sewall & Myer, of Houston, Tex., on the brief), for defendants in error.

Before PARDEE and WALKER, Circuit Judges, and MAXEY, District Judge.

WALKER, Circuit Judge. [1] The testimony of the plaintiff B. D. Mitchell was to the effect that he had lived on the land in question since 1889 and had been asserting claim to it since that time. He did not deny the making of the contract with the Beaumont Lumber Company, which showed a lease by that company to him of the league of land which embraces the 160 acres sued for, but explicitly stated that he never relinquished his claim to the 160 acres, but claimed it all the time. The tendency of this evidence to prove adverse possession of the land in question by the plaintiffs for the length of time required to confer upon them the legal title was not as a matter of law destroyed by the proof of the execution by one of them of the lease contract above mentioned. That contract evidenced an admission by B. D. Mitchell that he held the land, not as his own, but as the tenant of another; but that admission was not conclusive against him in favor of the defendant in this suit. In this suit it was permissible for the plaintiff B. D. Mitchell to contradict or explain away the statement or admission shown by his signing the lease contract, which embraced a league of land, and to prove that he in fact claimed the land sued for as his own all the time. That instrument did not give rise to an estoppel upon him in favor of the defendant to the suit, which is a stranger to that instrument, or debar him from proving that the fact was other than what the instrument indicated that it was.

"The rule against varying or contradicting writings by parol obtains only in suits between, and is confined to parties to the writings and their privies, and has no operation with respect to third persons, nor even upon the parties themselves in controversies with third persons. * * * But this rule is confined in its operation to the parties to the written instrument. When it comes in question collaterally, in a suit to which a third party, a stranger to the writings, is a party, neither party is estopped from contradicting it, or from proving facts inconsistent with it." Robinson v. Moseley, 93 Ala. 70, 9 South. 372; Myrick v. Wallace, 5 Ala. App. 398, 59 South. 704; Johnson v. Portwood, 89 Tex. 235, 34 S. W. 596, 787; Barreda v. Silsbee, 21 How. 146, 169, 16 L. Ed. 86; Sigua Iron Co. v. Greene, 88 Fed. 207, 31 C. C. A. 477; 17 Cyc. 750; Jones on Evidence, § 296.

The case of *Robinson v. Bazoon*, 79 Tex. 524, 15 S. W. 585, which is much relied on by the counsel for the defendants in error, was one between the parties to a written contract relating to the land which was the subject of the suit. The rule there applied was the familiar one which forbids either party to such a contract in a suit between him and another party to it by parol evidence to contradict or vary the terms or effect of the contract. In the opinion rendered in that case it was recognized that that rule would not have applied in favor of the plaintiff if he had been a stranger to the contract made by the defendants; the court saying of the case with which it was dealing:

"It is not like the case of *Portis v. Hill*, 14 Tex. 69 [65 Am. Dec. 99], in which it was held that the mere acknowledgment of title in a third party did not preclude the defendants from claiming that their possession was adverse to the plaintiff."

[2] The situation developed by the evidence was that some of it—that showing the making of the lease contract—tended to prove that the plaintiffs' adverse holding was interrupted on the 4th day of May, 1898, while some of it tended to prove that the plaintiffs' adverse holding was not terminated or interrupted by that incident. This state of the evidence made the question in issue one for the jury; and the court erred in its ruling to the effect that there was no evidence to support a finding in favor of the plaintiffs.

The judgment of the court below is reversed, and the cause is remanded.

UNDERWOOD TYPEWRITER CO. v. FOX TYPEWRITER CO.

FOX TYPEWRITER CO. v. UNDERWOOD TYPEWRITER CO.

(Circuit Court of Appeals, Sixth Circuit. February 8, 1915.)

Nos. 2454, 2455.

1. PATENTS ~~328~~—VALIDITY AND INFRINGEMENT.

The Gathright patents, No. 436,916, for a tabulating mechanism for typewriters, and No. 452,268, for improvements thereon, *held* valid, and claims 4 and 6 of the former *held* infringed, and the latter not infringed.

2. PATENTS ~~318~~—INFRINGEMENT—ACCOUNTING FOR PROFITS.

An infringer cannot set off against profits made by the sale of an infringing article a loss incurred in the sale of another article by giving away as a part of it another infringing device to stimulate sales.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 566-576; Dec. Dig. ~~318~~.]

3. PATENTS ~~322~~—INFRINGEMENT—ACCOUNTING FOR PROFITS—PATENT FOR IMPROVEMENT.

The Gathright patents, Nos. 436,916 and 452,268, are not for tabulating typewriters, but for an independent tabulating mechanism adapted to be attached to the usual form of typewriter by the exercise of ordinary mechanical skill; and in a suit against an infringer, which made and sold at a profit typewriters both with and without the infringing feature, showing that the marketability of the infringing machines was not entirely due to that feature, in the absence of proof of its bad faith, or of such conduct as rendered the separation of profits impossible, the burden

rested on complainant to prove what part of the entire profits from sales of the infringing machines was due to the tabulators.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 590-595; Dec. Dig. ~~c-~~322.

Accounting by infringer of patent for profits, see notes to Brickell v. City of New York, 50 C. C. A. 8; Clark v. Johnson, 120 C. C. A. 389.]

Appeals from the District Court of the United States for the Southern Division of the Western District of Michigan; Knappen and Sessions, Judges.

Suit in equity by the Underwood Typewriter Company against the Fox Typewriter Company. Decree for complainant, from which defendant appeals; and complainant appeals from final decree awarding only nominal damages. Affirmed on defendant's appeal, and reversed and remanded on complainant's appeal, to permit the introduction of further proof.

For opinion below, see 181 Fed. 530.

A. von Briesen, of New York City, for Underwood Typewriter Co.
F. L. Chappell, of Kalamazoo, Mich., for Fox Typewriter Co.

Before WARRINGTON, Circuit Judge, and SATER and SANFORD, District Judges.

SATER, District Judge. [1] In the first of these cases the plaintiff appeals on account of the alleged insufficiency of the recovery decreed it below on an accounting for profits and damages; in the second the appellant (defendant below) appeals from the same decree, and also from that adjudging it an infringer. The primary question is: Did the defendant infringe claims 4 and 6 of patent No. 436,916, granted September 23, 1890, and claims 6 and 8 of patent No. 452,268, granted May 12, 1891, both of which were issued to Gathright and are owned by the plaintiff.

The object of Gathright's first invention is to provide means for accurately and automatically locating with a typewriter in vertical alignment one or more columns of figures, as is required in the preparation of bills, invoices, statements of account, and the like, and for mechanically skipping any intervening spaces which it may be desired to leave blank. To accomplish his purpose he devised a tabulating mechanism embracing a supplemental spacing key and the use of one or more stops entirely distinct from the usual spacing mechanism of a typewriter and adapted to engage with the carriage on which the paper to receive the writing is mounted. The sole duty of the supplemental spacing key is to disengage the carriage rack from the usual detent of a typewriter and to hold such carriage rack disengaged until, traveling in its usual path, it has passed over the predetermined space which it is desirable to skip, to a stop whose location is adjustable and has been fixed at the end of such space, and also to remove such stop by the act of releasing the key, thus permitting the carriage to resume service at the usual letter spaces. When the supplemental key is pressed downward, it releases the carriage detent and places an adjusted stop in the path of the carriage to arrest it at the predetermined point. When the supplemental

~~c-~~ For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes
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key is permitted to rise, it withdraws the adjusted stop from the path of the carriage, leaving it free to resume its usual work. His second patent is for an improvement of the skipping device covered by his first.

The validity of his patents was first involved in Wagner Typewriter Co. v. Wyckoff, Seamans & Benedict, 151 Fed. 585, 81 C. C. A. 129 (C. C. A. 2) in which Judge Coxe, speaking for the court, sustained them both. In the present case, in an exhaustive and well-considered opinion, reported in 181 Fed. 530, Judge Knappen, then sitting as a District Judge, upheld the patents and found infringement as to the fourth and sixth claims of the first and noninfringement as to those of the second. His decision was followed by Judge Hazel in Underwood Typewriter Co. v. Fox Typewriter Co., Limited, et al. (C. C.) 181 Fed. 541. The patents were again sustained by Judge Ray in Underwood Typewriter Co. v. Elliott-Fisher Co. (C. C.) 165 Fed. 927. The decision of Judge Holt, rendered in the contempt proceedings arising out of Underwood Typewriter Co. v. Elliott-Fisher Co. (C. C.) and found in 156 Fed. 588, and the unreported opinion handed down by Judge Coxe in granting a temporary injunction in Underwood Typewriter Co. v. Graves Typewriter Co. and Fox Typewriter Co., Limited, are both bottomed on the conclusions reached by the Appellate Court of the Second Circuit. The prior art is so fully discussed in the reported opinions of Judges Knappen, Coxe, and Ray, and in American Writing Machine Co. v. Wagner Typewriter Co., 151 Fed. 576, 81 C. C. A. 120, that a further review of it would be but a restatement of what has been well said. Our study of the question of infringement leaves us in entire accord with the views of Judge Knappen, and his opinion is therefore adopted as that of this court.

[2] Following the finding of infringement, a master was appointed to ascertain and report the number of infringing tabulating devices or attachments for typewriting machines made, used, leased, or sold by the defendant, the profits made by it from its infringements, and the damages suffered by the plaintiff on account of the same. The accounting side of the case is here solely on the evidence offered by the plaintiff in chief, as the defendant elected to offer none. At the instance of the master, the defendant submitted a statement of its business transactions for the infringing period, which showed the cost of 530 ten-stop tabulators, the receipts arising from their sale, and a net profit on them of \$1,750.36. The allowance of this sum to the plaintiff forms the basis of the defendant's appeal from the decree on the accounting.

These tabulators were listed at \$20 each, and were sold separately, excepting that in some instances special prices appear to have been given to purchasers. The plaintiff's tabulator has a single stop for its single key, which, as manufactured by the defendant, costs 89 cents. A ten-stop tabulator made according to the Gathright invention would therefore cost \$8.90. The defendant's ten-stop tabulator accomplishes the ten stops by means of three stop bars, whose cost is but \$5.17. To advertise and create a demand for its ten-stop tabulators, it claims to have sold its machines having a single stop tabulator without adding anything to their price on account of the presence of that improvement; but the large sales of such machines failed to create the desired demand. It asserts that a loss largely in excess of the above-named profits con-

sequently resulted from what was in effect the giving away of the tabulators attached to machines. It therefore asks that the saving of \$3.73 in the production of each of its ten-stop tabulators be set off against the loss sustained by its donation of those of the other kind. Its position on the facts claimed is untenable. The ten-stop tabulators were an infringing device. The profits made on sales of them cannot be retained, because in other transactions involving the sale of another article it incurred a loss by giving away another infringing device to stimulate the sale of such other article. Canda Bros. v. Michigan Malleable Iron Co., 152 Fed. 178, 180, 81 C. C. A. 420 (C. C. A. 6).

[3] The statement above mentioned, along with others submitted by defendant, gave a list of the infringing machines sold by it, the amount received for each, the cost of 12,744 typewriters sold by it within the infringing period, of which number but 4,754 embodied Gathright's invention, the number of typewriters of both kinds made within such period, viz., 13,429, and the total number of single-stop tabulators or infringing machines that were made and sold, including those whose sale was effected after the expiration of the patent, which total number was 5,606. The statements did not show the profits, if any, on tabulators, as distinguished from the typewriter proper, or apportion the profits attributable to the patented and the unpatented features respectively. The plaintiff also offered evidence tending to show that the defendant could not have marketed its machines at a profit but for the presence of Gathright's device, but this evidence cannot be accepted as controlling for the reason that it is sufficiently shown that noninfringing machines were sold at a profit and that there had long been and was still an active demand for typewriters without tabulators, such, for instance, as defendant's, the Oliver, the Monarch, the Royal, and the Remington \$100 machine. All of these machines were still extensively manufactured and freely sold on the market, but, with the exception of the Remington, at a price from \$20 to \$35 less than those having tabulators.

As determined by the master, the cost of manufacturing and selling defendant's machines varied in different years from \$53.69 to \$62.45, the profit on each machine for the month of June, 1906, being 62½ cents, for the year succeeding that month \$11.85, and for the next following year \$5.70. He rightfully concluded that the entire value of defendant's infringing typewriter as a marketable article was not attributable to the tabulators. If the record did not necessarily warrant the inference that nontabulating typewriters were sold at a profit, it would not be presumed that their manufacture and sale would have been so long continued at a loss. The master further found that the tabulating attachment was a valuable feature and added much to the machine's salability, but that not all of the salability at a profit was due to the tabulator; that, the defendant having failed to prove that any other feature of its infringing typewriter than the plaintiff's tabulator had contributed to its profits therefrom, the burden of segregating the profits directly arising from the manufacture and sale of such tabulators was not on the plaintiff; and that the plaintiff, having shown no damages, but only the profits made by defendant which arose from the manufacture and sale of typewriters containing such tabulator, was

entitled to recover without diminution the whole of such profits which he fixed at \$55,901.03. The defendant excepted on the ground that the facts found did not warrant a recovery. The trial court, accepting the master's finding of facts as correct, sustained the defendant's exceptions and restricted the recovery to nominal damages in the sum of \$1.

The plaintiff's appeal is from the decree entered in accordance with such ruling. Its position, which is controverted by the defendant, is that Gathright patented, not an improvement on tabulators, but a machine specially adapted to tabulating work, and that consequently it is entitled to the entire profits made on the infringing machines; that the duty rested upon the defendant to show that some of its profits had been derived from the typewriter proper, manufactured and sold by it; that until the defendant performed that duty the plaintiff was not required to prove how much of the defendant's profits were due to the presence of the infringing device in such machines; and that the court erred in holding that under the circumstances of the case the burden of making proof of the profits traceable to the tabulating device rested on plaintiff.

The plaintiff's insistence that the patentee produced a typewriting machine, and that its visible typewriters are each "a tabulating machine embodying the invention of the patents in suit," is erroneous. His device is but an improvement on prior tabulators. It was the first commercially successful tabulator, and is such an improvement "that it may be said that the art, when considered from a practical and commercial point of view, began with him." *Wagner Typewriter Co. v. Wyckoff, Seamans & Benedict*, supra. But his first patent shows, and the courts, whenever they have had occasion to express themselves on the subject, have uniformly and rightfully held, that his tabulating apparatus was designed to be and is wholly independent of the typewriter proper. By the exercise of ordinary mechanical skill it may be adapted to any kind of a self-feeding typewriter, without dispensing with any other spacing appliance or other element, or it may be removed therefrom, subsequent to its attachment, without interfering with the use of the machine for any of the usual purposes for which the machine may be employed. Gathright patented, not a typewriter, but a tabulator, which enables the operator to do about 10 per cent. more work in a given time and to do his work more conveniently, and which costs, as made by the defendant, less than \$1. As the patented device was not of such importance that the entire market value of the defendant's machine was attributable to the addition of such patented improvement, the rule cannot be invoked which was applied against the infringer in the following and kindred cases: *Elizabeth v. Pavement Co.*, 97 U. S. 126, 24 L. Ed. 1000; *Hurlbut v. Schillinger*, 130 U. S. 456, 9 Sup. Ct. 584, 32 L. Ed. 1011; *Philip v. Nock*, 17 Wall. 460, 21 L. Ed. 679; *Brennan & Co. v. Dowagiac Mfg. Co.*, 162 Fed. 472, 89 C. C. A. 392 (C. C. A. 6); *Yesbera v. Hardesty Mfg. Co.*, 166 Fed. 120, 92 C. C. A. 46 (C. C. A. 6).

It having been developed by plaintiff's own evidence that the profits derived from the infringing machines were not all due to the tabulator, the burden devolved on it to prove what part of the entire profits arose from the use of its invention. *Canda Bros. v. Mich. Malleable Iron Co.*,

supra, page 181. If in fact such proof does not appear in the record, and if plaintiff has failed to show some exempting circumstance preventing the apportionment of profits, the same result must follow here as was attained in such cases as Westinghouse Co. v. Wagner Mfg. Co., 225 U. S. 604, 32 Sup. Ct. 691, 56 L. Ed. 1222, 41 L. R. A. (N. S.) 653; Dowagiac Mfg. Co. v. Minnesota Moline Plow Co., 235 U. S. —, 35 Sup. Ct. 221, 59 L. Ed. —, decided January 11, 1915; Garretson v. Clark, 111 U. S. 120, 4 Sup. Ct. 291, 28 L. Ed. 371; Seymour v. McCormick, 16 How. 480, 14 L. Ed. 1024; McCreary v. Penn. Canal Co., 141 U. S. 459, 12 Sup. Ct. 40, 35 L. Ed. 817; Mowry v. Whitney, 81 U. S. (14 Wall.) 620, 20 L. Ed. 860; Sessions v. Romadka, 145 U. S. 29, 12 Sup. Ct. 799, 36 L. Ed. 609; Tilghman v. Proctor, 125 U. S. 136, 8 Sup. Ct. 894, 31 L. Ed. 664; Keystone Mfg. Co. v. Adams, 151 U. S. 139, 147, 14 Sup. Ct. 295, 38 L. Ed. 103; Westinghouse v. N. Y. Air Brake Co., 140 Fed. 545, 72 C. C. A. 61 (C. C. A. 2); and McSherry Mfg. Co. v. Dowagiac Mfg. Co., 160 Fed. 948, 89 C. C. A. 26 (C. C. A. 6). In the Garretson Case, at page 121 of 111 U. S., at page 291 of 4 Sup. Ct., 28 L. Ed. 371, it was said:

"When a patent is for an improvement, and not for an entirely new machine or contrivance, the patentee must show in what particulars his improvement has added to the usefulness of the machine or contrivance. He must separate its results distinctly from those of other parts, so that the benefits derived from it may be distinctly seen and appreciated. The rule on this head is aptly stated by Mr. Justice Blatchford in the court below: 'The patentee,' he says, 'must in every case give evidence tending to separate or apportion the defendant's profits and the patentee's damages between the patented feature and the unpatented features, and such evidence must be reliable and tangible, and not conjectural or speculative; or he must show, by equally reliable and satisfactory evidence, that the profits and damages are to be calculated on the whole machine, for the reason that the entire value of the whole machine, as a marketable article, is properly and legally attributable to the patented feature.'"

The principle which dominated that case has been recognized by this court in several instances, some of which are Brennan & Co. v. Dowagiac Mfg. Co., supra (page 477); Yesbera v. Hardesty Mfg. Co., supra (page 125); McSherry Mfg. Co. v. Dowagiac Mfg. Co., supra; Dunn Mfg. Co. v. Standard Computing Scale Co., 204 Fed. 617, 619, 123 C. C. A. 111; and Herman v. Youngstown Car. Mfg. Co., 216 Fed. 604, 132 C. C. A. 608.

The case as presented to the trial court was this: The plaintiff did not comply with either of the rules stated in the latter portion of the quotation from the Garretson Case. It produced no evidence to apportion the profits between the improvement constituting the patented feature and the typewriter itself, as under the state of the evidence it should have done. It did not challenge the truthfulness of any of its witnesses or dispute the accuracy of the defendant's statements regarding its business transactions, or ask for the inspection and use of the defendant's books in its examination of defendant's president and bookkeeper, both of whom testified freely and apparently without evasion; nor did it request a segregation of the profits as between the tabulators and the typewriters proper. The tabulators were confessedly installed in the defendant's machines, because, as a good talking point, they facilitated sales and were demanded by dealers and their customers. Sales at a profit were doubtless made on account of them, which

would otherwise have been lost; but the amount of such profits, and the damages, if any, thereby occasioned cannot be inferred without proof. *Maier v. Brown* (C. C.) 17 Fed. 736, 738; *Seeger Refrigerator Co. v. American Car & Foundry Co.* (D. C.) 212 Fed. 742, 748, et seq.; *Fay v. Allen* (C. C.) 30 Fed. 446, 448.

No effort, however, was made to ascertain what profits, if any, resulted from them. The infringement was, in a sense, deliberate and intentional, in that defendant, on consideration, adopted and persisted in the use of tabulators and through circulars encouraged their purchase; but it installed them on the mistaken representation that the patents on tabulators had expired. The record, however, does not warrant the inference that it acted in bad faith. It was not shown or claimed that the defendant's accounts and other evidences of its business transactions were either designedly or otherwise so commingled and confused as to render it impossible, or even difficult, to ascertain the amount of profits derived from the patented and the unpatented features of the machines sold, or as not to disclose the cost of producing and marketing the defendant's two kinds of machines, and the difference, if there was any, in the receipts from their sale. For aught that appears, such evidence could have been extracted from witnesses or the defendant's books, or both. The case does not therefore fall within the rule in *Westinghouse Co. v. Wagner Mfg. Co.*, 225 U. S. 604, 32 Sup. Ct. 691, 56 L. Ed. 1222, 41 L. R. A. (N. S.) 653; *Brennan & Co. v. Dowagiac Mfg. Co.*, supra; *Dowagiac Mfg. Co. v. Superior Drill Co.*, 162 Fed. 479, 89 C. C. A. 399 (C. C. A. 6), or other similar cases in which the infringement was willful, and, on account of the infringer's conduct, an apportionment of profits could not be made. After the opinion in *Westinghouse Co. v. Wagner Mfg. Co.* was announced, which was subsequent to that of the trial judge in this case, but before his control over it had been lost, he proposed in the exercise of a sound discretion to reopen it, that the plaintiff might offer additional evidence, if it desired so to do. His proposal was declined.

The decision of this case has been delayed in a vain effort to award a reasonable and defensible sum to the plaintiff on account of the profits made by the defendant by reason of its use of the infringing device, and thus to end the case without a miscarriage of justice. The state of the record forbids the determination of the profits traceable to the use of the plaintiff's tabulators. The establishment of infringement would be a barren victory, if the defendant is to be permitted to retain the fruits of its wrongdoing. Had we concurred in the rule applied by the master that the plaintiff is entitled to recover the entire profits on each infringing machine, we doubt whether we could agree with him as to the sum awarded. For the first of the infringing years, he fixed the profit on each machine containing the infringing device at 62½ cents. For the same period the profit on each machine sold without a tabulator was \$3. For the second of such years he awarded as profits a sum in excess of the total profits for such year. This necessarily implies that the sales of noninfringing machines within that period resulted in a considerable loss. It is difficult to believe that this was so, in view of the fact that in both the preceding and succeeding years the defendant made a profit on its noninfringing machines; the succeeding year being

of a depressing character on account of the widespread financial disturbance which visited the country.

These inconsistencies in the master's report, whether they be real or apparent, may be cleared up by the rehearing which, in the interests of justice, we feel should be had, notwithstanding the failure of plaintiff to avail itself of the very reasonable offer of the trial court to open up the case for further evidence. If the difference between the average profit on each tabulating and on each nontabulating machine made or sold in a given year be multiplied by the number of tabulating machines made or sold within such year, the result ought to represent the profit which plaintiff is entitled to recover for such period. As the defendant was accustomed to making annual statements, compliance with the method above suggested should impose no hardship on it. Such method is not to be understood as exclusive; if it should be found not applicable, and the certainty which it would afford be not attainable, the parties may have occasion to resort to some other way of determining the amount of recovery, as was done in *Herman v. Youngstown Mfg. Co.*, 216 Fed. 604, 132 C. C. A. 608, or, as suggested in *U. S. Frumentum Co. v. Lauhoff*, 216 Fed. 610, 132 C. C. A. 614, both of which were decided by this court. Note, also, the suggestions contained in *Dowagiac Mfg. Co. v. Minnesota Moline Plow Co.*, *supra*.

In view of the probability that plaintiff may show that the profits due to the tabulators is separable from those made on the entire machines and may make proof sufficient on which reasonably to base the recovery of a definite sum as profits, and, perhaps, as damages, we are constrained, as in the *Frumentum Case*, to reverse and remand, but for the purpose only of permitting it to make such showing and proof.

The plaintiff will pay the costs of this proceeding.

AMERICAN BALLAST CO. v. DAVY BURNT CLAY BALLAST CO.

(Circuit Court of Appeals, Seventh Circuit. January 5, 1915.)

No. 2005.

1. PATENTS ~~328~~—VALIDITY—PRIOR USE—COAL CONVEYING APPARATUS.
The Simmons, Forgham & Bennett patent, No. 633,848, for a coal unloading and distributing apparatus for use in ballast burning, held void for prior commercial use of the apparatus in substantially its patented form for more than two years prior to the application.

2. PATENTS ~~81~~—PRIOR USE—EXPERIMENTAL USE.

Where a patented machine was publicly and commercially used for more than two years before the filing of the application, experiments made during that time for the purpose of strengthening and otherwise improving the machine as an operative device must be deemed merely incidental, and not as dominating the character of the use.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 104; Dec. Dig. ~~81~~.]

Reduction of invention to practical use or operation as affecting patentability, see note to *Excelsior Supply Co. v. Weed Chain Tire Grip Co.*, 113 C. C. A. 7.]

Appeal from the District Court of the United States for the Northern Division of the Northern District of Illinois; Kenesaw M. Landis, Judge.

Suit in equity by the Davy Burnt Clay Ballast Company against the American Ballast Company. Decree for complainant, and defendant appeals. Reversed.

Glenn S. Noble, of Chicago, Ill., for appellant.

Frank L. Belknap and Charles K. Offield, both of Chicago, Ill., for appellee.

Before BAKER, SEAMAN, and MACK, Circuit Judges.

MACK, Circuit Judge. [1] This is an appeal from a decree holding letters patent No. 633,348 valid and infringed. The patent is for a "coal unloading and distributing apparatus for use in ballast burning," issued to Simmons, Forgham & Bennett, September 19, 1899, on an application filed December 23, 1898. The specifications and claims thereof in suit, numbered 1, 2, 3, 4, 7, and 9, do not require particular mention for the purposes of this opinion, inasmuch as the main question in controversy and the one on which our decision rests is whether or not the use made of certain machines from 1894 to 1897, more than two years before the filing of the application, was public or experimental, within R. S. § 4886 (Comp. St. 1913, § 9430).

The purpose of this slacking device was to transfer coal from a coal car to a hopper on a transfer car, and thence by a conveyer to a platform attached to the latter car. From the platform the coal would be shoveled by hand onto the fire. The process of making ballast from clay, of which this is one step, is more fully described in the opinion filed this day in case No. 2006 between the same parties. 220 Fed. 890.

The specific improvement was the substitution of machinery for the wheelbarrow in getting the coal from the coal car to the shoveling platform. The invention was in no sense pioneer. The inventors were officers or employés of plaintiff, which had long been engaged in the business of manufacturing ballast from clay. The conception of this apparatus was not the result of long or laborious experiments. As Simmons testified:

"The machine was conceived and planned at one sitting or one interview. * * * The machine was so obvious, being groupings of methods, mechanical methods, which we had already made use of, that the thought to turn it into a slacking device was spontaneous."

This meeting or interview of the inventors took place early in 1894. In the spring of that year one machine was built at railroad shops in Missouri in accordance with rough sketches and instructions from the inventors. After it had been tested out for a month in the yards, on tracks level and in good condition, it was sent out to be used on the temporary uneven tracks, where ballast burning was going on. A month later, two more machines were built at the same place and sent out in the fall of 1894 to be similarly used by plaintiff's predecessor.

While there is some conflict in the testimony as to the length of time the three machines were in actual operation, the patentees' own testimony establishes that all of them were used for from two to six months in each of the years 1894 and 1895, and in each case until the completion of the particular job in hand; that one of them was also at work in 1896 for several months, and another for many months both in 1896 and 1897; that, despite interruptions from time to time, this use

was continuous, open, and commercial; and that in every respect it was identical with plaintiff's use of the later machines in the regular course of their business of making ballast from clay.

The interruptions were due both to defects in the material, poor construction, or faulty relation of the parts, and also to entirely extraneous causes. The actual commercial use on the rough temporary tracks demonstrated weaknesses; these were readily overcome; breakages because of defects and strain were repaired; changes of various kinds were made; but it is apparent, even from the patentees' testimony, that none of the changes made, either in any of these original machines or in the later machines, as a result of the use to which the alleged experimental machines were put, had any relation to the invention itself. In other words, these first three machines, at the time they were sent out, were complete and commercially successful operative embodiments of the invention as set forth in each of the claims in suit, except that perhaps in two of them one element of two claims, the flexible bridge piece, was missing. This, however, was in the third machine from the time of its construction.

The three original machines were taken apart after the season of 1897; the parts were sent to plaintiff's factory at Kenosha, Wis.; some of them were used for other purposes, and others scrapped. This disposition of them was due, not to any impossibility of their further commercial use, but because plaintiff found it more advisable and advantageous to build larger and stronger apparatus. In so far as the use of the 1894 machines can properly be called experimental, it was for the purpose of determining, not the practicability of the invention, but the best device for its embodiment as to materials to be used, their arrangement, and construction. The only purpose of experimenting was to ascertain what material, wood, iron, or steel, for example, should be used in some of the elements, how the structure could best be braced and held in place, and by what relation of the parts the highest efficiency could be attained.

As the carpenter in charge of the manufacturing of these machines testified, it was only after they had found out that the very first machine would work that it was shipped out to be used. While he called this a "purely experimental" machine, and said that all three of them were built "to see if we could get a successful slacker," the evidence, far from supporting the contention that this use, extending over a period of from two to four years, was primarily experimental, is overwhelming that it was public and commercial in every sense; that in so far as it was experimental the testing was merely incidental, and, moreover, was directed solely to matters forming no part of the invention or the claims.

[2] The law is well established. The fact that the use was open and not secret would not of itself make the use public, if, as in this case, a real test could be made only in connection with the actual open commercial work. And if the experiments had been directed primarily to a testing out of the very thing invented to ascertain whether a machine embodying the conception would be commercially workable, such experiments might extend over more than two years, if additional time were really essential for this purpose. *Elizabeth v. Paving Co.*, 97 U. S. 126, 24 L. Ed. 1000. But after an open use for more

than two years is shown, the burden of proving that it was purely or primarily experimental "by full, clear, unequivocal, and convincing evidence" is on the patentee. *Smith & Griggs Mfg. Co. v. Sprague*, 123 U. S. 249, 8 Sup. Ct. 122, 31 L. Ed. 141.

As the court says in the Sprague Case:

"A use by the inventor, for the purpose of testing the machine, in order by experiment to devise additional means for perfecting the success of its operation, is admissible; and where, as incident to such use, the product of its operation is disposed of by sale, such profit from its use does not change its character; but where the use is mainly for the purposes of trade and profit, and the experiment is merely incidental to that, the principal and not the incident must give character to the use. The thing implied as excepted out of the prohibition of the statute is a use which may be properly characterized as substantially for purposes of experiment. Where the substantial use is not for that purpose, but is otherwise public, and for more than two years prior to the application, it comes within the prohibition."

Inasmuch as the invention embodied in each of the claims in suit was completely formulated, disclosed, and reduced to practice by the machines of 1894, and as these machines were publicly and commercially used more than two years before the application was filed, any experiments made during this time for the purpose of strengthening and otherwise improving the machine as an operative device must be deemed merely incidental and cannot save the claims in issue. *Star Mfg. Co. v. Crescent Forge & Shovel Co.*, 179 Fed. 856, 103 C. C. A. 342.

The decree must be reversed, with directions to dismiss the bill for want of equity.

AMERICAN BALLAST CO. v. DAVY BURNT CLAY BALLAST CO.

(Circuit Court of Appeals, Seventh Circuit. January 5, 1915.)

No. 2006.

PATENTS ☞328—INFRINGEMENT—APPARATUS FOR PRODUCING BURNT CLAY BALLAST.

The Bennett & Forgham patent, No. 686,964, for apparatus for use in producing burnt clay ballast, construed, and, in view of the limitations imposed on the claims in the Patent Office, held not infringed.

Appeal from the District Court of the United States for the Northern District of Illinois; Kenesaw M. Landis, Judge.

Suit in equity by the Davy Burnt Clay Ballast Company against the American Ballast Company. Decree for complainant, and defendant appeals. Reversed.

Glenn S. Noble, of Chicago, Ill., for appellant.

Frank L. Belknap, of Chicago, Ill., for appellee.

Before BAKER, SEAMAN, and MACK, Circuit Judges.

MACK, Circuit Judge. Claims 1, 2 and 6 of the patent in suit, No. 686,964, issued to G. M. Bennett and T. Forgham, November 19, 1901, for "apparatus for use in producing burnt clay ballast," were adjudged valid and infringed. On this appeal we deem it necessary to examine but one of the defenses, that of noninfringement.

The specifications contain the following recitals, descriptions, and drawings:

"Our invention relates particularly to apparatus for use in the production of burnt clay ballast for mixing fresh fuel with that portion of the forming ballast which has not become thoroughly burned in the firing operation and for further use in other necessary handling of the heated mass. Our primary object is to provide means for accomplishing this part of the process of producing burnt clay ballast more cheaply, easily, and efficiently than heretofore.

"In the production of burnt clay ballast it is common to establish a bank of any desired length where the firing operation is carried on. It is usual to spread first a layer of fuel upon the ground and then to take clay from one side thereof and spread the same over the fuel, after which the mass is fired—as described, for instance, in patent to Butler & Simmons, No. 447,460, March 3, 1891. After firing there remains a crust of considerable depth, throughout which the clay is dried (kiln-dried) but not burned. It is necessary to break up this crust and mix fresh fuel with the same, after which other additional fuel and a fresh supply of clay are added. After a bank is established, one of whose sloping sides is in the same plane as one side of the adjacent ditch, the fresh supplies of fuel and clay are sprinkled over the top of the bank and the sloping surface, which extends from said top to the bottom of the ditch. In practice it is necessary to draw the unburned material at the top over onto the sloping bank, for the reason that it is impossible to develop sufficient heat near the surface to thoroughly burn the top layer of clay. Machines for distributing coal to the bank and supplying clay as required are now in common use.

"In the accompanying drawings is shown our improved apparatus for breaking up the surface layer at the bank, mixing fresh coal therewith, and moving the outer layer of the top of the bank, and by means of this apparatus what has heretofore been a laborious and expensive portion of the process of producing ballast of this nature is rendered very easy and comparatively inexpensive. In the drawings, Figure 1 is a view representing a cross-section of a bank for producing burnt clay ballast and apparatus for harrowing the bank, moving certain portions thereof, and mixing coal with the surface layer of the bank; Fig. 2, a broken view, showing another position of the harrowing device; Fig. 3, an enlarged view, in front elevation, of the harrowing device detached from its cables; Fig. 4, a plan view of said harrowing device; Fig. 5, a view in side elevation of the same; and Fig. 6, an illustration of a modification.

"A represents a combined harrowing device or drag and scraper, and *B* a mounted car of common construction, equipped in the usual manner with a mast *B'*, a boom *B²*, and drums *B³* and *B⁴*. From the drum *B³* a cable *a* passes to the device *A*, and from the drum *B⁴* a cable *b* passes about a sheave *b'* at the top of the mast *B'*, thence about a sheave *b²* at the end of the boom *B²*, and thence to the device *A*. The car is equipped with a suitable motor for rotating the drums *B³* and *B⁴*. The device *A* comprises a central tongue or pole *c*, brace members *c'*, formed integral with a back section *c²*, a companion back section *c³*, curved teeth *c⁴*, clamped between the sections *c²* and *c³*, a curved metallic scraper plate *c⁵*, connected with the pole *c* and the braces *c'*, a strengthening angle *c⁶* at the upper margin of said plate *c⁵*, side braces *c⁷*, joining the braces *c'* and the extremities of the plate *c⁵*, intermediate braces *c⁸*, joining the back sections to the plate *c⁵*, eyes *c⁹*, connected with the braces *c'* in the rear of the plate *c⁵*, chain sections *c¹⁰*, connected therewith, a ring *c¹¹*, connecting said chain sections, and a clevis *c¹²*, connected with the front end of the pole *c* and the adjacent ends of the braces *c'*.

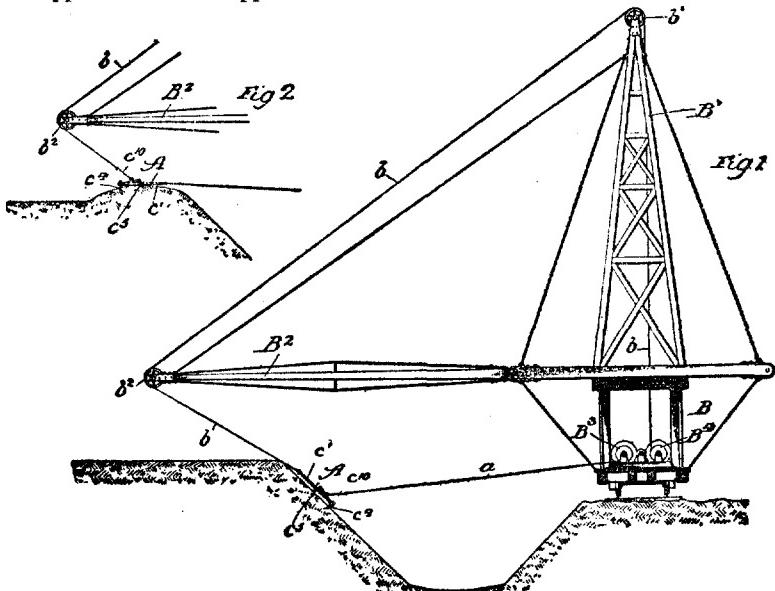
"When it is desired to harrow the sloping side of the bank, the cable *a* is connected with the ring *c¹¹* of the device *A* and the cable *b* is connected with the clevis *c¹²* thereon. This is illustrated in Fig. 1, from whence it will be seen that the cable *b* at this time serves as a draft cable and the cable *a* serves as a depth-regulating cable and also to return the harrowing device to the foot of the incline after it has been pulled up the incline by the cable *b*. When it is desired to draw the surface layer of the top of the bank over onto the inclined surface, the cable *a* is connected with the clevis *c¹²* and the cable *b* is connected with the ring *c¹¹*. When thus connected, the cable *a* becomes the draft cable and the cable *b* serves to regulate the depth and to

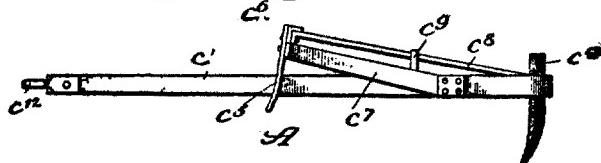
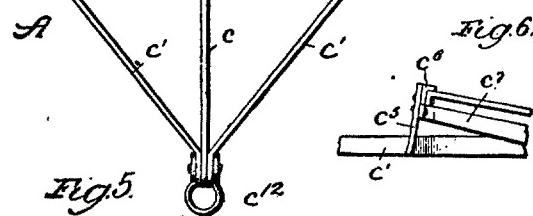
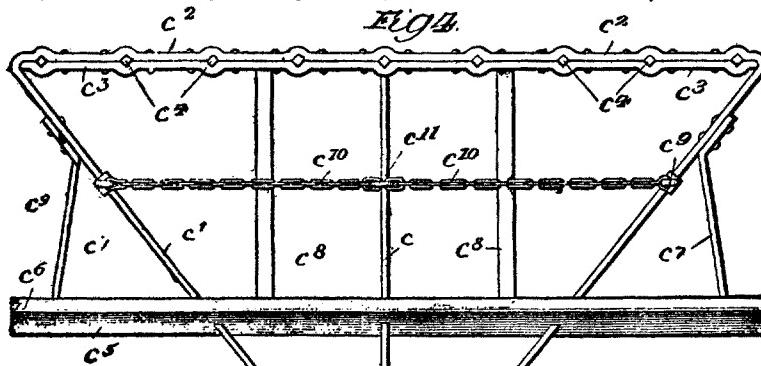
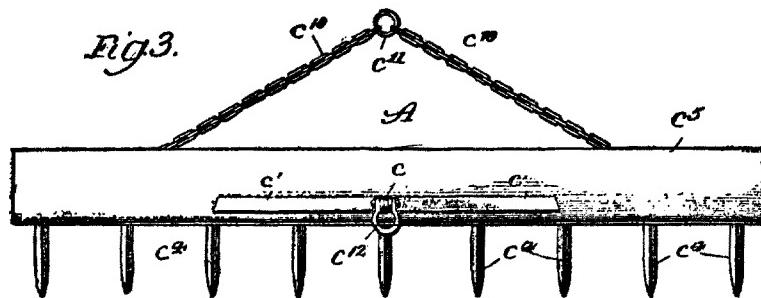
retract the harrowing device. The pole and various members of the frame also serve to limit the depth of cut.

"The curved teeth c^4 serve to hold the device down and cause the scraper to fill properly during the operation. (Illustrated Fig. 2.) From a view of Fig. 1 it will be understood that it is possible to thoroughly harrow the sloping surface of the bank from the base to the top. In practice, after a bank of fuel and clay is properly formed and the mass has been ignited, it is left to burn until the lower strata of clay are properly burned, after which there will remain a surface layer of dry, hard material which has not been properly burned. After the mass has burned the required length of time, coal is distributed over the top and sloping surface of the bank, after which the sloping surface is harrowed, as illustrated in Fig. 1. The surface layer of the top of the bank is then dragged over onto the sloping surface, as illustrated in Fig. 2. A layer of coal is then distributed to the sloping surface of the bank and to the top of the bank adjacent to the sloping surface, after which a layer of clay of the desired depth is added and the mass left to continue burning until the proper time to repeat the operation just described. It is preferable to drag the surface layer off the top of the bank over onto the sloping surface after each harrowing and mixing operation performed on the sloping surface.

"The car B is movable parallel to the bank in a manner now well understood, and the equipment of the car itself is now in common use for operating a shovel for supplying clay to the bank. By means of our improved device A , connected to cables disposed as described, it is possible to produce a thorough burning or firing clear down to the base of the incline, thereby rendering it possible to preserve an even base-surface for the ballast to rest upon; also, an easy means for mechanically removing the surface layer at the top of the bank is provided. Moreover, by reason of the improved manner of handling the mass, it is possible to make the operations succeed each other in more rapid succession; it being now unnecessary to allow so long a period for the mass to burn as formerly.

"It is believed to be wholly novel to provide a device for harrowing the inclined surface of the bank from the base to the top in combination with means for mechanically moving said harrowing device in the manner described. The harrowing device itself is believed to be wholly novel. Accordingly no limitation is intended by the foregoing detailed description, except as shall appear from the appended claims."





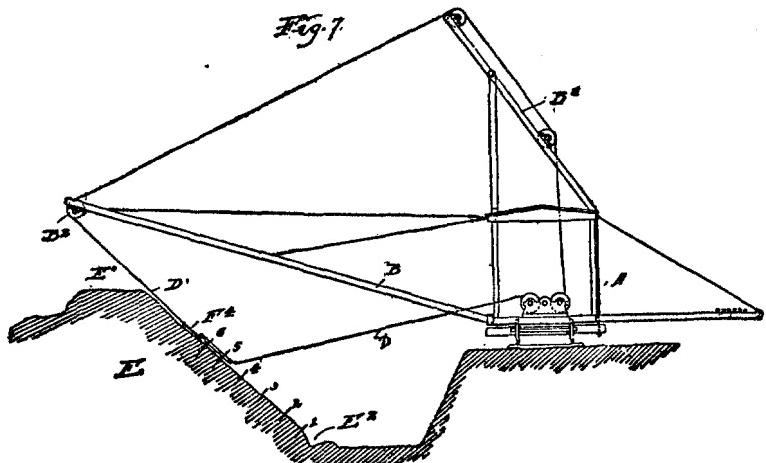
The claims in issue read as follows:

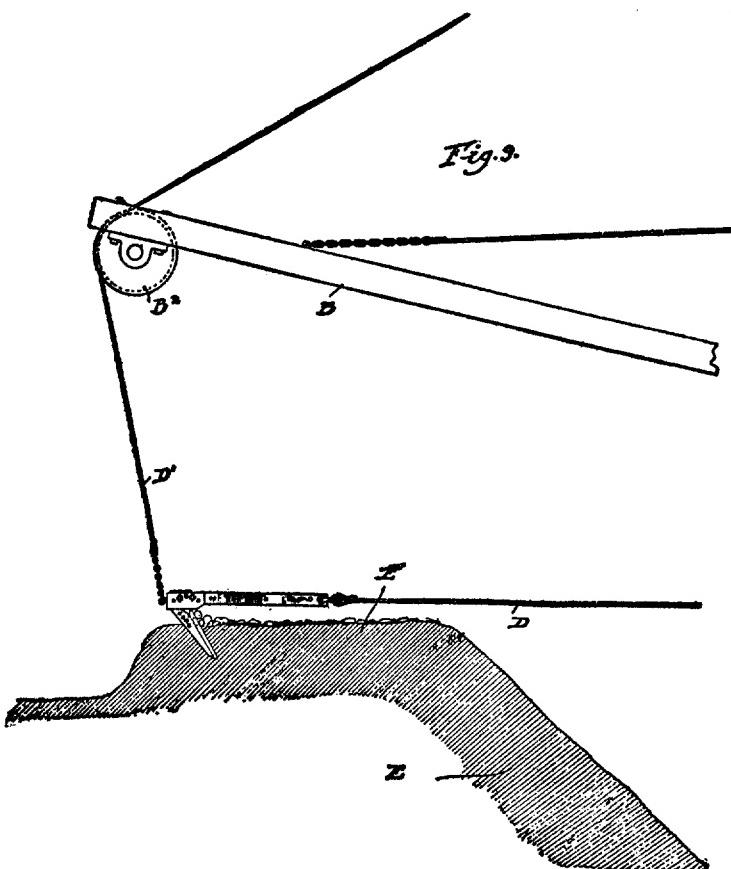
"1. In apparatus of the character described, the combination of a harrowing device, having harrowing teeth substantially perpendicular to the surface engaged but inclined slightly forward and means for advancing said device from the base of the incline of a bank to the top of said bank while said device is in operative engagement with said inclined surface, said device operating to stir, but not to collect, the material engaged, substantially as described.

"2. In apparatus of the character described, the combination of a harrowing device disposed so as to permit it to be drawn up the inclined surface of a bank having harrowing teeth substantially perpendicular to the surface engaged and inclined slightly forward, a pulley located in advance of said device, a draft cable passing about said pulley, and disposed and equipped to draw said harrowing device up said inclined surface and a retracting cable connected with the device, said device operating to stir but not to collect the material engaged, substantially as described."

"6. In apparatus of the character described, the combination of a car supplied with a boom, a pulley connected with said boom, a cable passing about said pulley, a combined scraper and harrowing device connected some distance from the advance end with said cable, said device comprising a transversely extending forwardly and downwardly inclined scraper and teeth in the harrow of said scraper and projecting a considerable distance beneath the level of the same, and a draft cable connected with the front end of said device and leading to winding mechanism on said car, substantially as and for the purpose set forth."

The construction and operation of the alleged infringing devices appear from stipulated drawings and descriptions, which are in part, and so far as material to the consideration of the defense of noninfringement, as follows:





Digging "shovels are removed from [digging] machines and temporarily replaced by certain devices commonly called drags. * * * The drag first used in actual operation is constructed like the other one, except that the inclination of the teeth is less, and the teeth do not have transversely extending rods passing through the back web of the teeth, nor do they have, of course, pipe sections on these said rods. Figure 7 is a side elevation showing substantially defendant's digger machine with the shovels removed and the drag attached. Figure 9 is a fragmentary side view showing the manner of pulling over the top of the bank. The drags used by the defendant are always used in pairs on the machine. These drags consist of a suitable framework, made up principally of bars of steel or iron, which bars are substantially parallel, and which are bound together by means of rear bars and side bars. The central bar and the side bars are joined together to form a tongue by means of which the drag may be drawn forwardly. Chains F^4 are attached at the rear part of the drag for making connection with a cable D^1 as will presently be described. The teeth are made of cast metal and are provided with sockets in the upper ends thereof which fit over the respective bars. The downwardly projecting portions of the teeth are slanted forwardly in each drag and are made with a sharpened front portion and rear bracing portion. The front drag which is the first one used digs out the toe or bottom of the fire bank. The only difference between the front drag and the rear drag is that the teeth on the rear drag are pitched forward at a greater angle

and are provided throughout their upper rear web portion with several cross rods which extend through the rear bracing web or flange of the teeth and which are provided with spacing pipe which fit over the rods extended between the teeth. These drags are about five feet long and about six feet wide, and the teeth extend downward about twenty inches below the frame, and each drag weighs several hundred pounds.

"When these drags are to be used the cable *D* is connected to a ring in the tongue and the cable *D*¹ is passed around the sheave *B*² at the outer end of the boom *B* and is connected with a chain *F*⁴. The front drag is operated so as to first dig out the toe of the fire bank as indicated at *E*², thereby making a slight ditch, as it were, along the bottom of the bank, and dragging the material out a little forward of the bank. This drag is then successively raised and dropped on the face of the fire working from the bottom of the bank to the top by a series of operations as indicated from 1 to 2, 2 to 3, 3 to 4, etc., on the drawings; that is, the drag is first raised up and dropped onto the face of the fire for instance, at the point indicated at 1. The teeth will be driven deeply into the face of the fire tending to break up the crust or hard covering formed thereon and then by giving the cable a slight pull the drag will be drawn *downwardly* a short distance, thereby tending to further break up the fire. The drag is then raised and dropped in a position indicated by the numeral 2 and again given a slight forward movement, this operation being continued by successive steps until the top of the fire is reached. There is no continuous or lengthy movement given to this drag which causes it to move upward or downward across the full face of the fire at one time.

"After the first drag has completed the operation just described, the second drag, which is attached in a similar manner in the place of the rear shovel, is then used for pulling over the top *E*¹ of the fire. In doing this the drag is lowered so that the teeth come behind the top, and is then drawn forward by the cable *D* until the principal part of the material forming the top is drawn or spread over the face of the fire. On account of the different angle at which the drag stands when pulling over the top, the teeth are given a greater forward pitch than the teeth of the first or head drag. The cross rods serve to prevent the teeth from entering into the material at the top too great a distance, and also to allow the fine material to remain substantially in position while dragging the large lumps over onto the face of the fire. A considerable portion of such lumps will eventually lodge in the shallow ditch *H*² formed at the toe of the fire by the first drag. On account of leaving the fine material at the top and drawing the large lumps over onto the face of the fire and down to the bottom thereof, the operator will be assured of having a good fire at all times at the toe of the bank, as these large hot lumps roll down to the toe of the bank and tend to replenish the fire. Furthermore, as these large lumps are usually well burned, the operator is assured of having good ballast at the bottom of the pile, which is, of course, left in position until the burning operation is completed. The material dug out at the toe will eventually be replaced by the digging shovels higher up on the face of the fire."

The patent in suit is concededly not a pioneer invention. Power-driven machinery, which had supplanted hand labor in other steps of the manufacture of ballast from clay, hand implements theretofore used for harrowing the incline and pulling over the top, and power-driven harrows adapted primarily for use in other lines of work, contained all of the elements, the combination of which is covered by the claims in suit. And the history of the application in the Patent Office, as disclosed by the file wrapper and contents, demonstrates that while, as plaintiff's expert says, the patent is for a machine, and not for a process, it is for a device specifically described, not only as to its construction, but also as to the method of its operation, and that the claims are not to be construed broadly, so as to dominate every machine power method of harrowing an inclined bank of kiln-dried bal-

last clay, but are to be limited to the construction and method specifically set forth.

Claims 1 and 2 cover the device for harrowing the inclined surface; claim 6 includes also the scraper designed to cut, collect, and pull over the top of the bank. Defendant's front drag is alleged to infringe claims 1 and 2; the rear drag, claim 6. It is apparent from the drawings and descriptions that defendant's front drag is designed and in practice operates to harrow the inclined surface, not by upward movements of the harrow teeth, whether in one continuous sweep or intermittently, but by a series of movements, each of which involves a short downward cutting of the kiln-dried surface clay, though the series as a whole begins near the bottom and ends at the top.

If the patentees had succeeded in obtaining the allowance of the claim which included the element of "means for advancing the harrowing device" without any limitation whatsoever, the difference in the method of operation would have been of no moment. Not only, however, was such a broad claim on numerous references rejected, and thereupon canceled, but claims 1 and 2 as originally filed were also limited and narrowed to meet the objections of the Patent Office. In claim 1, the words "to the top of said bank," and in claim 2, "disposed and equipped to draw said harrowing device up said inclined surface," were thus inserted. Claims 1 and 2 differ, in that the former expressly states that the device shall be advanced from base to top while in operative engagement with the surface; that is, that the advancing movement shall be both continuous from base to top and shall take place during the process of harrowing the surface. Claim 2 does not specify a continuous movement from base to top; but though it does not in express words provide that the upward movement, whether continuous or intermittent, shall be "while the device is in operative engagement with the surface," clearly this is necessarily implied in a harrowing machine "disposed so as to permit it to be drawn up the inclined surface of a bank having harrowing teeth substantially perpendicular to the surface engaged and inclined slightly forward" and with a draft cable "disposed and equipped to draw said harrowing device up said inclined surface."

Neither of these claims, therefore, is to be construed to include means for harrowing the inclined surface by whatever method, but only such means and so arranged and disposed as will produce an upward harrowing movement, and, at least as to claim 1, continuously from base to top. So construed, they cannot be held to be infringed by defendant's front drag.

In claim 6, differing therein from other claims not now in issue, the scraper and the harrow teeth, while specifically described, are not expressly stated to be two distinct elements located at different parts of the frame. The file wrapper and contents, as well as the specifications and drawings, demonstrate, however, that if this be not the only reasonable construction of the claim, its scope is nevertheless to be so limited. The words "below the level of" were inserted to meet the specific objection "that the teeth do not extend *beneath* the scraper."

(The word "beneath" is underscored by the examiner.) The teeth, then, are admittedly not beneath the scraper, but at some other part of the frame. In the device covered by the patent in suit, the scraper is not in operative contact with the dry crust while the inclined surface of the bank is being harrowed. The harrow teeth perform this function. When, however, the top of the bank is to be pulled, the scraper is brought into action. It cuts and collects the top layer; the teeth serve only "to hold the device down and cause the scraper to fill properly during the operation."

In defendant's rear drag, however, there is no scraper. The harrow teeth do the cutting and collecting. And even if the so-called grid formed by the cross rods and spacing pipe, but having no cutting edge, aids in collecting parts of the top layer cut by the teeth, this incidental service of an element designed for and performing another and different function, described in the stipulation, would not make it the equivalent of the scraper. If, however, the grid could be deemed such an equivalent, there would still be no infringement, inasmuch as the harrow teeth of defendant's rear drag are not separated from, but form a part of, this alleged scraper, and are located directly beneath the rods and pipe.

The decree must therefore be reversed, with directions to dismiss the bill for want of equity.

ASHLEY et al. v. WEEKS-NUMAN CO.

(Circuit Court of Appeals, Second Circuit. January 12, 1915.)

No. 117.

1. PATENTS ~~15~~—DESIGNS—SUBJECT-MATTER.

Appearance is the subject-matter of a design patent, and that is none the less patentable because a mechanical function is involved.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 13; Dec. Dig. ~~15~~.]

2. PATENTS ~~28~~—DESIGNS—NEW ASSEMBLING OF OLD ELEMENTS.

The fact that each separate element in a patented design was old does not negative invention, which may reside in the manner in which they are assembled.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 33; Dec. Dig. ~~28~~.]

3. PATENTS ~~328~~—VALIDITY AND INFRINGEMENT—DESIGN FOR INKSTAND.

The Ashley design patent, No. 42,077, for a design for an inkstand, held not anticipated, valid, and infringed.

4. PATENTS ~~252~~—INFRINGEMENT—PATENT FOR DESIGN.

Infringement of a design patent is not to be determined by a close comparison of the two articles; but the test is whether the ordinary observer would purchase one, believing it to be the other.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 394-396; Dec. Dig. ~~252~~.]

5. PATENTS ~~252~~—DESIGNS—SCOPE.

A patentee, having a design patent with a written specification relating to an entirely new form of article, is entitled, not only to the exact design shown in his drawing, but also to protection against the making and marketing of articles which contain the dominant features of the design described in the specification.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 394-396; Dec. Dig. ~~252~~.]

6. PATENTS ~~222~~—DAMAGES FOR INFRINGEMENT—FAILURE TO MARK ARTICLE.

The owner of a patent, who has not marked the thing patented as required by statute, cannot recover damages for infringement, except on proof that defendant was duly notified of the infringement and continued it after notice.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 352; Dec. Dig. ~~222~~.]

Appeal from the District Court of the United States for the Southern District of New York.

This cause comes here on appeal from a decree entered in the District Court of the United States for the Southern District of New York on April 17, 1914, sustaining design letters patent No. 42,077, granted January 9, 1912, to Frank M. Ashley for a design for an inkstand, finding that defendant had infringed said patent and awarding an injunction and an accounting, with costs.

On January 10, 1912, Frank M. Ashley granted, for an agreed royalty, to the Cushman & Denison Manufacturing Company, one of the complainants, the exclusive right and license to manufacture and sell throughout the entire United States and the territories thereof, during the full term of said letters patent, inkstands made in accordance with said design letters patent.

Frank M. Ashley is, and ever since the issue of the patent has been, the owner of the patent in suit.

The complainants allege that the defendant is, within the county and state of New York, and without license from complainants, unlawfully engaged in making, constructing, using, or vending to others to be used, inkstands made according to the said design letters patent. The defendant denies the validity of the patent and infringement.

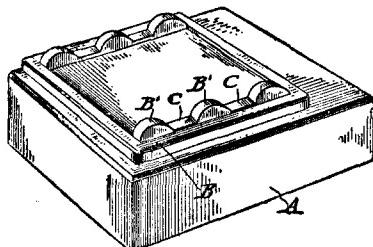
Charles C. Gill, of New York City, for appellant.

Albert T. Schamps, of New York City, for appellees.

Before LACOMBE, WARD, and ROGERS, Circuit Judges.

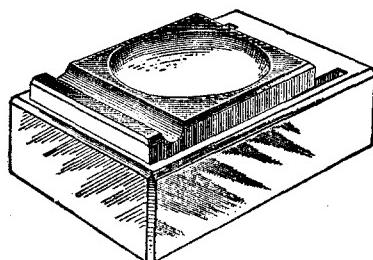
ROGERS, Circuit Judge. The patent in suit in the specification states that the essence of the invention resides in the general form and relative proportions of the base and cover which presents to the eye an appearance of a low, comparatively wide construction, having a very neat and artistic effect. The claim is for "the ornamental design for an inkstand as shown and described."

The drawing as explained in the specification is as follows:



"A indicates the body portion of the inkstand containing the reservoir for the ink. This body portion is of rectangular form and having a greater length than width and a considerably less height than width. A thin cover *B* is provided, which is of less length than body portion *A*, and is disposed adjacent one edge of the body, so as to expose a portion of the top of the body portion when the cover is in a position to close the reservoir. Raised curved portions *B'* may be provided on the cover forming recesses *C-C* to serve as a pen rack."

The defendant's patent is design patent No. 41,846, issued on October, 17, 1911. It contains no written description of the invention, but merely states that reference is had to the accompanying drawing, in which is presented a perspective view of an inkstand embodying his design. His claim is for "the ornamental design for an inkstand as shown." The accompanying drawing, which forms a part of the specification, is here reproduced:



The specifications for the above patent are simply a reference to the drawing of the patent showing the inkstand in perspective.

The first question to be considered is as to the validity of the Ashley patent. The defendant denies its validity on several grounds:

1. That it does not constitute a new, original, and ornamental design, as required by law, as the

proper subject for a design patent, but is for a mechanical function and apparatus, which, if patentable at all, should have been patented

by a mechanical patent, or by a patent for a machine or apparatus, as distinguished from a patent for an ornamental design.

2. That in view of the state of the art at and prior to the time of the alleged invention the subject-matter of the patent is not legally patentable matter, invention, or discovery.

[1] As respects the first objection, defendant calls attention to the fact that the exposure of the rear portion of the top of the body portion, when the cover of complainant's inkstand is in closed position, involves purely mechanical function. In the complainants' construction, if the rear portion of the base were not exposed when the cover is in closed position, the cover would extend beyond the base when in open position, and this result the patentee did not wish to take place, and therefore made the cover so that it does not reach quite back to the rear edge of the base when in its open position. Defendant argues that the exposed portion of the top of the base, when the cover is in closed position, does not and obviously could not form any part of an ornamental or artistic design. The flat surface is merely a flat support for the rear portion of the cover when the cover is in open position.

In reply to this contention of counsel we declare that the subject-matter of a patent is not rendered unfit as a design patent by the mere fact that it is possible somewhere in its construction to discover a mechanical function. A patentable design may consist of a new and ornamental shape given to an article of manufacture or of an ornamentation to be placed upon an article of old shape. The design law was intended to encourage the decorative arts, and therefore deals with the appearance, rather than the structure, uses, or functions, of the article. 30 Cyc. 827. In a design patent the appearance is the subject-matter of the patent, and the appearance is none the less patentable because a mechanical function is involved. The patentability of a design is determined by its appeal to the eyes, and not by the presence or absence of a mechanical function.

[2] As respects the second objection, the defendant in its answer sets up 22 patents prior in date to the patent in suit, which it claims fully and clearly show and describe the invention or design of that patent, and have substantially the same arrangement, aggregation, or combination of parts, and produce the same function and effect. But the court below stated that:

"There is nothing in the prior art which approaches at all near to the patent, even if it be given the widest scope which words permit."

We shall not enter into a detailed comparison of the patent in suit with the prior patents, but content ourselves with saying that we fully concur with the court below in its opinion that there is nothing in the prior art which impairs the validity of the Ashley patent. It is apparent that "the general form and relative proportions of the base and cover, which present to the eye an appearance of a low comparatively wide, construction," were new; nothing like them being disclosed in the prior patents. It may be that sliding covers were old, and that low, broad flat bases were not new, and yet the design of an inkstand having these elements may not be wanting in invention.

"The principle, as applied to design patents, is unassailable that whenever ingenuity is displayed in producing something new, which imparts to the eye

a pleasing impression, even though it be the result of uniting old forms and parts, such production is a meritorious invention and entitled to protection." General Gaslight Co. v. Matchless Mfg. Co. (C. C.) 129 Fed. 137; Graff v. Webster, 195 Fed. 522, 115 C. C. A. 432.

This court has before said, and now repeats, that the fact that each separate element in a patented design was old does not negative invention, which may reside in the manner in which they are assembled, since it is the design as a whole, and the impression it makes on the eye, which must be considered.

[3, 4] As we have reached the conclusion that the patent in suit is valid, we are brought to inquire whether the defendant infringes. The appellant states the question of infringement is ordinarily to be determined by a mere inspection of the complainant's and defendant's stands, and that the impression of substantial identity of appearance must exist, if infringement is to be found. In this the appellant is in error. It is not a proper test to place the two inkstands side by side, to determine whether or not there are certain differences. On the contrary, the correct test is whether the ordinary observer, giving such attention as a purchaser usually gives, would purchase the defendant's inkstand believing it to be that of complainants'; and in applying that test it is necessary to observe that the subject-matter relates to form and configuration of which no one had ever seen the like prior to the patent in suit.

In Gorham v. White, 14 Wall. 511, 20 L. Ed. 731, the Supreme Court laid down the rule as follows:

"The purpose of the law must be effected, if possible; but plainly it cannot be if, while the general appearance of the design is preserved, minor differences of detail in the manner in which the appearance is produced, observable by experts, but not noticed by ordinary observers, by those who buy and use, are sufficient to relieve an imitating design from condemnation as an infringement. We hold, therefore, that if, in the eye of an ordinary observer, giving such attention as a purchaser usually gives, two designs are substantially the same, if the resemblance is such as to deceive such an observer, inducing him to purchase one, supposing it to be the other, the first one patented is infringed by the other."

Tested by this rule the defendant infringes. It is true that there are some differences between the design of the complainants and the design of the defendant. But the differences are differences of detail and not of substance. The defendant has not made a Chinese copy of the complainants' inkstand, and yet it imparts to the mind the same general appearance, which would deceive an ordinary observer into buying one inkstand believing it to be the other. Both inkstands have: (1) A rectangular base; (2) a base of greater length than width; (3) a base of less height than width; (4) a thin cover; (5) a pen rack; (6) the cover adjacent the front edge; (7) the cover having a length less than that of stand, thereby leaving a portion of the base exposed when the stand is closed; (8) a recess or pin tray on the cover.

It is true that the exact dimensions found in the base in the complainants' inkstand are not found in the defendant's inkstand. It is also true that the exact configuration of the cover in the complainants' inkstand is not present in the inkstand of the defendant. It is also true that defendant makes its inkstand with a black composition cover only,

while the complainants make theirs both with a glass and a black composition cover; and it is true that defendant makes a circular pin tray instead of a rectangular one, and forms its pen rack by a groove in the cover, as distinguished from the pen rack formed by the raised portions of the complainants' inkstand.

We do not think, however, that the complainants' claim is to be restricted to a cover with a round pin tray, instead of an oblong one, or to one with racks for one pen, instead of two; and so far as any difference exists in the material used in the covers, it is to be observed that the general rule is, subject, it may be, to possible exceptions, that a design is independent of the material of which the article of manufacture is composed. The other trifling differences which exist between the two patents and to which we have called attention cannot suffice to relieve defendant from the charge of infringement. There is nothing in these minor differences which rises to the dignity of invention. The essence of the complainants' patent, as already indicated, consists in the form and configuration, and the relative proportions of parts in the defendant's inkstand so nearly resemble that of the complainants' that an ordinary buyer, having seen the latter, would be very likely to mistake the defendant's inkstand for it, when seen in a similar environment.

[5] In *Dobson v. Dornan*, 118 U. S. 10, 6 Sup. Ct. 946, 30 L. Ed. 63, the Supreme Court held that a design patent is not void because of its failure to contain a written description; and in *Ashley v. Tatum*, 186 Fed. 339, 108 C. C. A. 539 (1911), which was a design patent for an inkstand, and which was without any written description, we held that, in the absence of a written specification, the patentee is limited to substantially the precise article shown in the drawing of the patent. But in the case of the patent in suit there is no absence of a written specification, and the patentee is not limited to the precise article shown in the drawing. We therefore have felt justified in construing the patent in suit in the manner above stated. The patentee having a patent with written specifications relating to an entirely new form of inkstand, he is entitled, not only to the exact design shown in his drawing of the patent, but also to the protection of the court against the making and marketing of inkstands which contain the dominant features of the design described in the specification.

The application for complainant's patent was filed September 28, 1909. The application for defendant's patent was filed November 5, 1910, and defendant's patent was not granted until October 17, 1911, and complainants' patent was not granted until January 9, 1912. The two applications were copending in the Patent Office at the same time. But the failure of the Patent Office to declare an interference between copending applications is of little, if any, evidential force on the question whether the device of one is an infringement of the other. *Herman v. Youngstown Car Mfg. Co.*, 191 Fed. 579, 584, 585, 112 C. C. A. 185 (1911). It is well understood that the Patent Office is not particularly concerned with the question of infringement.

[6] This brings us to consider the relief to which the complainant is entitled. The court below awarded a perpetual injunction. It also di-

rected that plaintiffs recover of defendant the profits, gains and advantages which defendant has derived, received, and made since the date of the issue of complainants' patent. The defendant, however, alleges that, as the complainants have not complied with section 4900 of the United States Revised Statutes (U. S. Comp. St. 1913, § 9446), they are not entitled to an accounting, nor to the penalty of \$250 imposed by the statute. The provision referred to reads as follows:

"It shall be the duty of all patentees and their assigns and legal representatives, and of all persons making or vending any patented article for or under them to give sufficient notice to the public, that the same is patented; either by fixing thereon the word 'patented' together with the day and year the patent was granted; or when, from the character of the article, this cannot be done, by fixing to it, or to the package wherein one or more of them is inclosed, a label containing the like notice; and in any suit of infringement, by the party failing so to mark, no damages shall be recovered by the plaintiff, except on proof that the defendant was duly notified of the infringement, and continued, after such notice, to make, use or vend the article so patented."

And chapter 105 of the act of February 4, 1887 (24 Stat. 387 [U. S. Comp. St. 1913, §§ 9476, 9477]) provides that it is unlawful for any person other than the owner of the patent, without the license of the owner, to apply the design secured by the patent, or any colorable imitation thereof, to any article of manufacture for the purpose of sale, etc., "knowing that the same have been so applied." It then provides that any person violating the provisions of the section shall be liable in the amount of \$250. It appears from the evidence that complainant, pending the action of the Patent Office, marked his inkstand "Patent applied for." This marking was not in strict accordance with the language of section 4900 of the Revised Statutes.

The meaning of the statute is clear. A patentee or the assignee, who has not complied with the statute by marking the thing patented as the statute requires, cannot recover damages, except on proof that the defendant was duly notified of the infringement, and continued, after such notice, to make, use, or vend the article so patented. *Dunlap v. Schofield*, 152 U. S. 244, 247, 14 Sup. Ct. 576, 38 L. Ed. 426 (1894). There is no evidence which shows or tends to show actual or constructive notice to defendant prior to the filing of the bill of complaint. But the filing of the bill affords notice to defendant of the complainants' rights under the patent in suit, and the complainants are therefore entitled only to damages subsequent to the filing of the bill of complaint. If there has been no infringement since the bill was filed, then there are no damages to be recovered. The complainant is entitled as a matter of course to any profits, gains, and advantages which the defendant has derived, received, and made since the date of the issue of the complainants' design patent No. 42,077 by reason of its infringement.

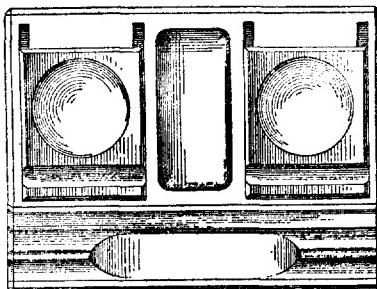
In what has been said thus far in this opinion concerning the defendant's infringing inkstand, we have had under consideration defendant's design patent No. 41,846, the drawing of which appeared at the beginning of the opinion. So far as defendant's design patent No. 43,321 is concerned, not much need be said. The specification for the patent is, as we have seen was the case with the defendant's first patent, simply a

reference to the drawings showing the inkstand in perspective. The drawing showing a top view of the inkstand is here reproduced:

It is a double inkstand, and will not be mistaken for the patent in suit, which is a single inkstand. It is evident that design patent No. 43,321 does not infringe design patent No. 42,077.

We think that the decree of the court below should be affirmed, in so far as it holds that complainants' design patent No. 42,077 is valid and has been infringed by defendant, and that a perpetual injunction should issue, and that plaintiffs recover the profits, gains, and advantages which the defendant has derived, received, and made since the date of the issue of the aforesaid design patent No. 42,077 by reason of its infringement. But the decree should be modified, so as to restrict the damages which the plaintiffs recover to the time subsequent to the filing of the bill.

It is so ordered.



DRAKE v. HALL.

(Circuit Court of Appeals, Seventh Circuit. November 2, 1914. Rehearing Denied January 15, 1915.)

No. 2110.

1. PATENTS \Leftrightarrow 192—JOINT PATENTS—TITLE AND RIGHTS OF JOINT OWNERS.

The granting of a patent to two persons vests each with an undivided half interest creating the relation of cotenants between them, so that each becomes entitled to use the invention without accounting to the other.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 269; Dec. Dig. \Leftrightarrow 192.]

2. PARTNERSHIP \Leftrightarrow 20—PATENTS \Leftrightarrow 192—TITLE OF JOINT OWNERS—CONTRACT.

On dissolution of a partnership, all of the property was conveyed to the succeeding partner except a patent, issued to the two partners jointly and under which they had been manufacturing, which was declared to remain partnership property. The succeeding partner was given the exclusive use and control of the patent for one year for which he was to pay the other party a royalty on all articles made thereunder. Held, that such agreement did not constitute a partnership, but that the ownership of the patent remained as before, vested in the parties as tenants in common.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. §§ 6, 7; Dec. Dig. \Leftrightarrow 20; Patents, Cent. Dig. § 269; Dec. Dig. \Leftrightarrow 192.]

3. PARTNERSHIP \Leftrightarrow 5—WHAT CONSTITUTES—COMMUNITY OF INTEREST IN PROFITS.

To constitute a partnership there must be a community of interest in the profits of the business.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. §§ 15, 16; Dec. Dig. \Leftrightarrow 5.]

For other definitions, see Words and Phrases, First and Second Series, Partnership.]

Appeal from the District Court of the United States for the Northern Division of the Southern District of Illinois; J. Otis Humphrey, Judge. Suit in equity by Edward E. Hall against Harry J. Drake. Decree for complainant, and defendant appeals. Reversed.

The appellee, Hall, is complainant in a bill filed against the appellant Drake for an accounting and other relief arising out of the appellant's use of letters patent No. 906,396—issued to both parties to the suit as individual patentees—alleged to constitute "a copartnership asset and copartnership property" by agreement of such parties. Upon final hearing of the issues, the decree of the District Court grants the relief sought, together with dissolution of the alleged copartnership therein and direction for public sale of the letters patent.

John C. Lawyer, of Macomb, Ill., for appellant.

Before BAKER, SEAMAN, and KOHLSAAT, Circuit Judges.

SEAMAN, Circuit Judge. [1] The decree presented by this appeal awards accounting and other relief against the appellant for his use of letters patent (U. S. No. 906,396), issued December 8, 1908, in favor of both parties to the suit as joint patentees. Under such grant the rule is elementary that each of these patentees was vested with an undivided half interest therein, creating the relation between them of cotenants for all benefits of the grant, so that each became entitled to use thereof without accountability to the other cotenant. No relation of copartnership is involved in such ownership, and whatever may have been the theory of ownership upon which the appellee's bill for equitable relief was framed and filed, the decree plainly proceeds and rests its rulings upon this proposition: That the evidence establishes conversion by the parties of their patent ownership from the relation of cotenancy fixed by the grant to that of copartnership therein.

[2] Undoubtedly the patentees may by agreement thus change the nature of their ownership and use of the patent into a copartnership business, and proof of such arrangement would furnish support for the decree. In another view, it may be that proof of their agreement or conduct as copartners in the manufacture and sale of goods under the patent, would authorize relief between the parties for an accounting of profits and losses arising in such business. Without proof, however, of one or both of these conditions in the appellant's use of the patent, as charged in the bill, no accountability arises, and the issue is thus narrowed to such inference of fact as may be derived from the evidence.

The essential facts are undisputed, in substance as follows: Appellant and appellee were copartners in business in and from 1906, up to February 22, 1911, engaged in the manufacture of tanks and troughs of various kinds "along the line of sheet metal goods," under the name of Illinois Sheet Metal Works. In 1908 an "improvement in stock troughs" was devised and they made application as joint inventors for a patent, which was granted and constitutes the patent in controversy, the expense thereof being paid out of copartnership funds. Thereafter these patented stock troughs were manufactured and sold in the course of the business, no express agreement appearing in reference thereto prior to dissolution. On February 22, 1911, their copartnership was dis-

solved, the appellee retiring from the business, under two contemporaneous written agreements, in substance as follows:

(1) A dissolution agreement providing (in the usual form) for sale to and purchase by the appellant of the property and business and assumption of liabilities, for a consideration named, together with these provisions in reference to the patent:

"It is mutually understood that in this sale, the patent for stock troughs, No. 906,396, is not included, but that said patent is still owned by the parties hereto as copartners, but not to be used in the business of the party of the first part [appellant] as partnership property, but under lease to be executed between the parties hereto, separate and distinct from this contract."

Also, that:

"This agreement is a complete and final completion of said copartnership business except as to said patent."

(2) An instrument reciting that "the parties hereto are the owners of patent No. 906,396"; that the appellant, having purchased the appellee's interest in the copartnership business, "desires to manufacture and handle said patent"; that it is agreed that the appellant "shall have the exclusive use and control of said patent" for one year, and the right to like exclusive use and control "for an additional ten years" thereafter, at his option, upon giving notice in writing of "his acceptance of said option," at least 90 days prior to February 22, 1912; and that he is to pay the appellee for "said exclusive use and control" five cents "on each and every article sold during said time" under the patent, in monthly payments as stated. It further provides for keeping account of sales thereunder, inspection of books and arbitration in case of dispute; that the appellee grants "his good will in said patent" and "will use what influence he has to increase" sales, but is not required "to devote any of his time to said purpose"; that the appellee will not sell his interest in the patent to any other person; but that if either party desires to sell his interest after termination of the agreement the other party shall have "the first option to buy the same"; and that the appellant may "permit other persons to manufacture said stock troughs, but shall be personally liable" for payment of five cents for each trough so made and sold. A supplemental agreement of March 13, 1911, is in evidence, but does not bear upon the controversy.

The appellant performed the agreement for exclusive use of the patent throughout the year and no complaint is made in respect thereof; but he failed or refused to exercise the option for extension of the term, and thereafter manufactured and sold stock troughs, within the patent, refusing to account therefor or pay the appellee any compensation for such use of the patent. Both bill and decree predicate liability upon this use on and after February 22, 1912, without other agreement in respect thereof than above recited.

From these facts—and as well from their testimony throughout—it may rightly be inferred that neither party was advised, at any of the above dates, that their interest under the patent grant was that of co-tenants, but it is unmistakable that there was no agreement, express or implied, to vest their respective titles under such grant in the pre-existing copartnership between them, nor to change their relation as pat-

entees otherwise than by way of acquiescence or license for use of the patent in the copartnership business during the continuance of their copartnership relation in such business. We are of opinion, therefore, that support for the decree cannot arise out of their transactions prior to the dissolution agreements of February 22, 1911, and that the contentions on the part of appellee founded thereon must be overruled, so that solution of the controversy must rest exclusively on the terms of their dual written agreements of that date (above recited), read as an entirety.

The contention thereupon for copartnership relation in ownership or use of the patent, on and after February 22, 1912 (when the contemporaneous license agreement expired by limitation), we understand to be predicated on the provision of the dissolution agreement which reads:

"That said patent is still owned by the parties hereto as copartners, but not to be used in the business" of appellant "as partnership property, but under lease to be executed between the parties."

From this context in which the term "copartners" is used, we believe it plainly appears, not only that such term was not employed advisedly, but that it was neither understood nor intended thereby to change their legal relation as joint patentees, either in use or ownership, from co-tenancy to that of copartnership. In any view, however, of their suppositions, either of pre-existing relationship as patentees, or of the meaning and effect of an undertaking to become copartners therein, the agreements relied upon are without force to create copartnership relation in ownership or use of the patent.

[3] The distinctions between co-ownership of property and copartnership relation therein, and that mere joint ownership and control of property does not constitute relationship as copartners therein, are well settled. *Lindley on Partnership* (2d Am. Ed.) § 6, c. 1. It is of the essence of copartnership relation that an agreement appear, express or implied, for sharing the profits of a business.

"The requisites of a partnership are that the parties must have joined together to carry on a trade or adventure for their common benefit, each contributing property or services, and having a community of interest in the profits." *Ward v. Thompson*, 22 How. 330, 334, 16 L. Ed. 249; *Meehan v. Valentine*, 145 U. S. 611, 618, 12 Sup. Ct. 972, 36 L. Ed. 835.

Without proof of such import in the agreement or conduct of these parties the contention of copartnership relation between them thus became untenable.

The "lease" referred to in the above-mentioned clause of the dissolution provisions (and executed accordingly) grants the appellant "exclusive use and control of said patent," for the term stated, with no other requirement than accounting for the number of stock troughs made and sold thereunder and payment to the appellee of prescribed royalties, and thus contains no provision applicable to or consistent with copartnership therein. While the appellant's co-ownership authorized free use of the patent in his business, exclusive right of use could only be obtained through appellee's grant thereof. Examination of the primary dissolution agreement likewise discloses no provision either applicable to or consistent with copartnership relation (through

community of profits) between the parties in ownership or use of the patent.

The decree of the District Court, therefore, is unsupported by evidence, and it is reversed accordingly, with direction to dismiss the appellee's bill for want of equity.

CENTRAL BRASS & STAMPING CO. v. STUBER et al.

(Circuit Court of Appeals, Seventh Circuit. January 5, 1915.)

No. 2120.

1. PATENTS ~~192~~—SUIT FOR INFRINGEMENT—TITLE TO SUSTAIN.

Defendants and another, who were joint owners of a patent, entered into a contract by which defendants were given the exclusive right to manufacture the patented article, paying a royalty to the other party, who was the inventor and who was to have charge of the sales. It was provided that defendants should not authorize the manufacture by any person not named in the contract without the consent of the other party, who was given the right, in case defendants did not manufacture sufficient to supply the demand, to himself take over the exclusive manufacture, which right he exercised and afterward assigned his interest in the patent to complainant corporation. The contract contained no provision as to use of the patented article. *Held*, that it did not divest defendants of their interest in the patent, and that the assignment to complainant gave it no standing to maintain a suit for infringement against defendant.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 269; Dec. Dig. ~~192~~.]

2. ASSIGNMENTS ~~19~~—EXECUTORY PERSONAL CONTRACTS.

A contract which involves a relation of personal confidence is not assignable.

[Ed. Note.—For other cases, see Assignments, Cent. Dig. §§ 28-31; Dec. Dig. ~~19~~.]

3. ASSIGNMENTS ~~19~~—CONTRACTS—ASSIGNABILITY.

An executory personal contract is not made assignable by the use of the terms "assigns" and "heirs."

[Ed. Note.—For other cases, see Assignments, Cent. Dig. §§ 28-31; Dec. Dig. ~~19~~.]

4. PATENTS ~~192~~—JOINT OWNERS—TITLE AND RIGHTS.

The owner of an undivided interest in a patent cannot maintain a suit to restrain another part owner from manufacturing thereunder or from authorizing others to do so.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 269; Dec. Dig. ~~192~~.]

Appeal from the District Court of the United States for the Northern Division of the Southern District of Illinois; J. Otis Humphrey, Judge.

Suit in equity by the Central Brass & Stamping Company against Joseph Stuber and Henry C. Kuck. Decree for defendants, and complainant appeals. Affirmed.

W. V. Tefft and John M. Elliott, both of Peoria, Ill., for appellant.
D. W. Evans, of Peoria, Ill., for appellees.

Before BAKER, SEAMAN, and KOHLSAAT, Circuit Judges.

~~192~~ For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

KOHL, SAAT, Circuit Judge. The amended bill in this case was filed by appellant to restrain infringement by appellees of patent No. 946,703, issued to L. R. Nelson and appellant on January 18, 1910, for a hose connector, etc. The District Court decreed that appellant by reason of the state of the title to the patent was without standing to maintain the bill and that the cause be dismissed for want of equity.

Appellant's title was acquired in the following manner: The patent as above stated was issued to one L. R. Nelson and to appellees, Nelson taking a one half interest, and appellees the remaining half by assignment before issue. By contract, dated November 13, 1909, between the parties, it was agreed that appellees should have the exclusive right to manufacture the connector in question during the life of the patent, with the proviso:

"That either or both of the said parties of the first part, their heirs or assigns, shall not make any arrangements which will enable any other party, not mentioned by name in this contract, to manufacture any of the above articles so as to permit competition in the manufacture of the said articles without the consent of the said party of the second part" (Nelson).

By said contract, certain royalties were to be paid to Nelson, who was given charge of the sale of the manufactured articles and the approval thereof, and appellees were to fix selling prices so long as they were acting as exclusive manufacturers. By clause 6 of the contract it was provided that, in case of failure of appellees to pay the agreed royalties or to manufacture the articles in question in such quantity and manner as to supply the demand created by Nelson or otherwise, then Nelson should have the exclusive right to manufacture said articles upon certain conditions named. Clause 7 provided that if Nelson should "devote his time to the general interest" of appellees, including the sale and approval of the goods made under the contract as appellees might direct, then appellees would pay him (Nelson) a weekly sum of not less than \$15, exclusive of royalties, "the party of the second part (Nelson) to receive pay for only such time as he may give under the directions of the said parties of the first part" (appellees). In accordance with the terms of said contract, Nelson, claiming that appellee had failed to comply with the terms thereof, took over the exclusive manufacture of said articles and proceeded to manufacture the same. Afterwards Nelson organized the appellant corporation, to which, on August 28, 1912, he assigned all of his right, title, and interest in and to said contract and all his claims, demands, and rights of action against appellees growing out of said contract, with the right to sue for the same; Nelson having previously and on June 1, 1911, assigned to appellant all his interest in and to said patent, which he described as being an "undivided one-half interest therein." This was the condition of the appellant's title at the time this suit was instituted, viz., August 31, 1912.

It is appellees' contention: (1) That no rights passed to appellant by virtue of the assignment to it of said contract; and (2) that appellees, being owner of a one half interest in said patent, appellant, the owner of the other half, had no right of action against them.

[1, 2] For support of the first proposition, it is urged that the contract of November 13, 1909, was of such a nature that it was not

within Nelson's power to transfer it. By the contract itself Nelson was prohibited from making any arrangements which would enable any other party, not named in the contract, to manufacture any of the enumerated articles so as to permit competition without consent. By the election of Nelson to take over appellees' right of exclusive manufacture, appellees were placed substantially in the shoes of Nelson, as at first arranged; the circumstances of the parties being reversed. The contract further required that Nelson should work for the interests of appellees, for which he was to be paid a salary. Nelson being the patentee and thoroughly advised as to the merits of the patented device, and also being so solicitous of its success as to take advantage of the provision of the contract in that respect, might well have been considered by the appellees as best equipped to push the device upon the market and make the investment remunerative. They were entitled to his personal efforts in that behalf. As is said in Arkansas Smelting Company v. Belden Mining Company, 127 U. S. 387, 8 Sup. Ct. 1309, 32 L. Ed. 246:

"Every one has a right to select and determine with whom he will contract, and cannot have another person thrust upon him without his consent."

And again:

"The rule upon this subject, as applicable to the case at bar, is well expressed in a recent English treatise. 'Rights arising out of contract cannot be transferred if they are coupled with liabilities, or if they involve a relation of personal confidence such that the party whose agreement conferred those rights must have intended them to be exercised only by him in whom he actually confided.' Pollock on Contracts (4th Ed.) 425."

[3] It will be noted that the contract gives the right to manufacture, and to sell. It nowhere conveys exclusive use. Nor can the right to exclusive use be implied from the facts of the case. It does use the terms "assigns" and "heirs," but, as was said by the court in Wooster v. Crane, etc., 73 N. J. Eq. 22, 66 Atl. 1093, the contract was not made assignable by the use of those terms as to its unexecuted subject-matter, if in fact it was a personal contract. If it be contended that the contract worked a sale of the whole patent, or of appellees' interest therein, it is sufficient answer to say that the failure to convey exclusive use, and the provisions of the contract, and especially that of clause 7 thereof dealing particularly with regard to Nelson's duties to appellees in the premises, clearly bring it within the rule as to nonassignability of a personal contract; and we therefore concur in the decision of the District Court that appellant took no rights through the assignment. Waterman v. Mackenzie, 138 U. S. 253, 11 Sup. Ct. 334, 34 L. Ed. 923; Excelsior Wooden Pipe Co. v. Seattle, 117 Fed. 140, 55 C. C. A. 156; Pope Mfg. Co. v. Gormully Mfg. Co., 144 U. S. 224-251, 12 Sup. Ct. 632, 637, 641, 36 L. Ed. 414, 419, 420, 423. We find no sufficient warrant in the evidence for holding that appellees at any time acquiesced in the attempt to assign. On the contrary, the record shows that they persistently refused to accept royalty from appellant, when and as soon as they were advised of the attempted assignment.

[4] As owner of a one-half interest in the patent, appellant had no standing to restrain appellees from manufacturing under their

ownership of the other one-half thereof, or from authorizing others to do so. *Blackledge v. Weir & Craig Mfg. Co.*, 108 Fed. 71, 47 C. C. A. 212; *Drake v. Hall*, 220 Fed. 905, 136 C. C. A. 471, decided by this court at the October session of the present term.

Some contention is made in appellant's brief to the effect that Nelson was practically the owner of the appellant corporation, and that the assignment of the contract to appellant was not legally within the foregoing rule as to nonassignability of personal contracts. Such, however, is not the law. The transaction stands in the same situation as though appellant were a stranger and entirely unconnected with Nelson.

It therefore follows that appellant had no legal standing to institute or maintain the bill herein, and that such disability still exists, and the decree of the District Court must be, and is, affirmed.

COLUMBIA METAL BOX CO. v. HALPER.

(Circuit Court of Appeals, Second Circuit. January 12, 1915.)

No. 124.

1. PATENTS ~~35~~—EVIDENCE OF INVENTION—COMMERCIAL SUCCESS.

The commercial success of an article is not a test of patentable invention, although in a doubtful case that fact may lead the court to sustain the patent.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 39; Dec. Dig. ~~35~~.]

Utility, extent of use, and commercial success as evidence of invention, see note to *Doig v. Morgan Mach. Co.*, 59 C. C. A. 620.]

2. PATENTS ~~21~~—INVENTION—SUBSTITUTION OF ONE MATERIAL FOR ANOTHER.

The substitution of one well-known material for another, unaccompanied by any actual advance in the art or genuine benefit to the public, does not amount to patentable invention.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 23; Dec. Dig. ~~21~~.]

3. PATENTS ~~328~~—VALIDITY—SHEET METAL JUNCTION Box.

The Blackman patent, No. 963,352, for a sheet metal junction box for use in electric wiring, held void for lack of invention in view of the prior art, which included a cast iron box having the same form of construction as that claimed as new in the patent.

Appeal from the District Court of the United States for the Southern District of New York.

This cause comes here on appeal from a decree entered on June 11, 1914, in the District Court of the United States for the Southern District of New York, dismissing the bill of complaint in a suit brought in equity to restrain an infringement of United States letters patent No. 963,352 and to obtain an accounting for profits and to recover damages.

The complainant, the Columbia Metal Box Company, is a corporation organized and existing under the laws of the state of New York and having its principal office in the city and State of New York, and is engaged in the manufacture and sale of sheet metal junction boxes.

Samuel M. Halper trades under the name of the Star Metal Box Company, and has an established place of business in the Southern district of New York.

United States letters patent No. 963,352 were granted on July 5, 1910, to Albert E. Blackman, of Mt. Vernon, N. Y., for sheet metal junction boxes. The entire right, title, and interest in this patent the said Blackman assigned, sold, and set over to the complainant, the Columbia Metal Box Company, on May 31, 1912. The usual defenses to a suit for infringement are set up in the answer, but the defense mainly relied upon the lack of patentable invention over the prior art.

The case was twice heard in the court below. On the first hearing the court sustained the patent. A rehearing was asked on the ground of newly discovered evidence, and such rehearing was granted. The newly discovered evidence consisted in substance of a cast metal box known as the General Electric box which is alleged to have been made and sold by the General Electric Company long prior to the date of the complainant's invention. After the rehearing, the court, in view of the added evidence, changed its opinion and held the patent invalid.

Newell & Neal, of New York City, for appellant.

Otto Munk, of New York City, for appellee.

Before LACOMBE, WARD, and ROGERS, Circuit Judges.

ROGERS, Circuit Judge (after stating the facts as above). The patent in suit is for a sheet metal junction box used in the electric wiring art. In the installation of electric wiring for lighting and other purposes there is located at the junction between the main line and the local circuit a fuse plug and a cut-out switch, so that any damage to the local line will not interfere with the main line, and the local line can be cut out when desired. The fuse plug and cut-out switch are mounted on an insulating slab and inclosed in a junction box. The purpose of a junction box, as shown by the testimony, is to provide a suitable compartment to contain different fuses and switches necessary for use in an electric wiring installation. It is also used as a metallic connector between the conduits on an electrical installation, and may at some time carry current in case one of the wires of an electrical installation should come in contact with the conduit in which it is installed. At the present time these junction boxes, formerly made of wood and of cast iron, are nearly all made of sheet metal. For use within the walls of a building the box should be fireproof, and for use in exposed places it should protect its contents from rain, dust, and other foreign material. The boxes are usually provided with a hinged cover, so as to give easy access to the interior of the box for operating the switch and renewing the fuse when required. Up to the time of the invention of the patent in suit the type of junction box nearly in universal use was made of sheet metal, the body having a cover hinged thereto by means of ordinary door hinges riveted thereon. This box is known in the trade as the butt hinge type of box, and it came into use about 1906, gradually displacing the old wooden boxes and cast iron boxes previously used. It was as an improvement upon this sheet metal butt hinge box that the patent in suit was made.

The patent in suit was granted to Albert E. Blackman. In his specification Blackman states his claim as follows:

"A sheet metal box, composed of a single sheet of metal folded up on four sides to form the walls of the box, and provided with integral portions of

each side extending beyond the adjacent wall to form a support for a pivotal connection, a cover for the box formed of a single blank of sheet metal having its edges folded to fit the box and provided at opposite sides with integral extensions outside of the adjacent wall of said box and fastened to the integral extensions from said box by a pivotal connection, the turned-over edge of one end of said cover which is adjacent the pivotal connection to the body of the box being located inside of the integral extensions from the main portion of the box, but overlapping the end wall of said box and free from contact therewith."

In his specification Blackman declares that his object was to simplify the construction of sheet metal boxes. He states that:

"In metal boxes for use as switch boxes or cut-out boxes, cheapness of construction is a material factor, and one of the comparatively expensive parts of the cost of assembling such a box is the pivot connection between the cover and the main body of the box. By my construction I have dispensed with the necessity of any separate pivot connections such as are usually employed, thereby reducing the cost of the box, and have attained other advantages."

The testimony shows that in the matter of cost the patent in suit saved from two to ten cents a box, depending on the size of the box, or an average of five cents per box over the butt hinge type. The importance of this saving is realized when one understands that thousands of these boxes are made and sold every day; the complainant alone selling on an average of from 500 to 1,000 per day.

[1] Some 500 of the complainant's junction boxes are installed along the Blackwell Island Bridge at Fifty-Ninth street in New York City to protect the switches and fuses of the different electric lights on that bridge. That complainant's box has been a commercial success must be acknowledged. But the commercial success of an article is not a test of patentability, although in a doubtful case that fact might lead the court to sustain the patent. In *Smith v. Goodyear Dental Vulcanite Co.*, 93 U. S. 486, 495 (23 L. Ed. 952 [1876]), the Supreme Court, speaking to this point, said:

"We do not say the single fact that a device has gone into general use, and has displaced other devices which have previously been employed for analogous uses, establishes in all cases that the later device involves a patentable invention. It may, however, always be considered; and, when the other facts in the case leave the question in doubt, it is sufficient to turn the scale."

In *Magowan v. New York Belting Co.*, 141 U. S. 332, 343, 12 Sup. Ct. 71, 35 L. Ed. 781 (1891), the fact was remarked, and evidently had much weight, that the patented product went at once into such an extensive public use, as almost to supersede products made for a like purpose under other methods. That fact was regarded as pregnant evidence of its novelty, value, and usefulness. And this success was attained, although the new product was put upon the market at a price from 15 to 20 per cent. higher than the older products, notwithstanding it cost 10 per cent. less to produce it.

The question which the trial court considered was whether the adaptation of a form of hinged cover not wholly unknown to the peculiar requirements of the new art of electric wiring constituted invention. At the first hearing the court stated that it did not appear that the form of hinging shown by the patented device had ever before been

used for the purpose sought by the inventor. And it concluded that the method of hinging used produced a tight cover without the use of the strap or butt hinges. While thinking this a small thing, the court declared it useful and desirable, a novel and meritorious device, and sustained the patent. On rehearing, after the introduction in evidence of the General Electric cast metal box, the trial court reached the conclusion that the very form of cover which the patentee of the patent in suit claimed as new had been used for electric wiring purposes before the earliest invention date claimed by complainant.

[2] The earliest date of invention claimed by the patentee of the patent in suit is March, 1908, and the evidence shows that early in 1907 the General Electric Company manufactured the General Electric box. The General Electric box was made of cast iron, while the box of the patent in suit is made of sheet iron. It may be conceded a junction box made of sheet metal has an advantage over the box of the General Electric Company in lightness, strength, and cheapness. But these advantages are due solely to the inherent qualities of the material employed. And in *Drake Castle Pressed Steel Lug Co. v. Brownell & Co.*, 123 Fed. 86, 59 C. C. A. 216, the Circuit Court of Appeals for the Sixth Circuit declared:

"The substitution of steel or wrought iron for cast iron as the material from which a structure is made does not constitute patentable invention, although such change of material also involves a change in the method of construction and in form; the new article being stamped or swaged from a single sheet of metal. When made it performs the same function in substantially the same way; its only advantage over the old structure being attributable to the inherent qualities of the material used."

And we have held in a number of cases that the substitution of one well-known material for another does not necessarily amount to patentable invention. See *American Acetylene Burner Co. v. Kirchberger*, 142 Fed. 745, 74 C. C. A. 77, affirmed in 147 Fed. 253, 77 C. C. A. 392; *New York Belting & Packing Co., Ltd., v. Sierer*, 158 Fed. 819, 86 C. C. A. 79.

Whether the substitution of one material for another amounts to patentable invention depends upon circumstances, and the rule governing the subject was well stated by Judge Coxe in *Union Hardware Co. v. Selchow* (C. C.) 112 Fed. 1006 (1901). It was there said:

"Where the inventor has discovered new and unknown properties residing in a given material, or that a long sought for result, which has baffled an army of skilled artisans, can be achieved by the change, in such cases the substitution of one material for another may reach the plare of invention. But substitution alone, unaccompanied by any actual advance in the art or genuine benefit to the public, has uniformly been held insufficient to support a patent."

In the above case, by the use of cheaper, lighter, and stronger metal, a skate was made cheaper, lighter, and stronger; but the skate operated after the change precisely as it did before, and the substitution of material was held not to amount to patentable invention.

In *George Frost Co. v. Cohn* (C. C.) 112 Fed. 1009, decided at the same time as the Selchow Case, a rubber button was substituted for a metal button in a hose supporter. The effect of the substitution was to transform a destructive and inoperative device into a highly suc-

cessful one. This was held to amount to patentable invention, and on appeal the decision below was affirmed by this court, which said:

"When the substitution has accomplished a result which those skilled in the art had long and vainly sought to effect, the evidence that it involved something beyond the skill of the calling is so persuasive that it generally resolves the inquiry in favor of patentable novelty."

The subject has been before the Supreme Court of the United States. In *Hotchkiss v. Greenwood*, 11 How. 249, 13 L. Ed. 683 (1850), the Supreme Court had under consideration the substitution of a knob made of clay in a peculiar form for a knob of metal or wood. The question was whether this substitution amounted to patentable invention, and the court held that it could not be so regarded. The court, through Mr. Justice Nelson, said:

"Now it may very well be that, by connecting the clay or porcelain knob with the metallic shank in this well-known mode, an article is produced better and cheaper than in the case of the metallic or wood knob; but this does not result from any new mechanical device or contrivance, but from the fact that the material of which the knob is composed happens to be better adapted to the purpose for which it is made. The improvement consists in the superiority of the material, and which is not new, over that previously employed in making the knob. But this, of itself, can never be the subject of a patent. No one will pretend that a machine, made, in whole or in part, of materials better adapted to the purpose for which it is used than the materials of which the old one is constructed, and for that reason better and cheaper, can be distinguished from the old one, or, in the sense of the patent law, can entitle the manufacturer to a patent. The difference is formal, and destitute of ingenuity or invention. It may afford evidence of judgment and skill in the selection and adaptation of the materials in the manufacture of the instrument for the purposes intended, but nothing more."

And in *Smith v. Goodyear Dental Vulcanite Co.*, 93 U. S. 486, 495, 23 L. Ed. 952 (1876), the Supreme Court held that the substitution of hard rubber in lieu of the materials previously used for a plate for holding artificial teeth, or such teeth and gums, was a superior product, having capabilities and performing functions which differed from anything which preceded it, and which could not be ascribed to mere mechanical skill, but was to be justly regarded as the result of inventive effort, and as making the manufacture of which they are attributes a novel thing in kind, and consequently patentable as such.

In *Brown v. District of Columbia*, 130 U. S. 88, 9 Sup. Ct. 437, 32 L. Ed. 863 (1888), the Supreme Court held that the substitution of blocks of wood of a given shape for blocks of stone of the same shape in the construction of a pavement neither involved a new mode of construction, nor developed anything substantially new in the resulting pavement, and was therefore not patentable as an invention. And in the same case a patent for an improved mode of cutting blocks for street pavements was held void, because the thing patented required only mechanical skill and involved no invention.

But enough has been said to show that if complainant had been the first to substitute sheet metal for cast iron or wood, and as a consequence had made a box which was cheaper and more durable than the boxes which were previously constructed, he would not on that account alone be entitled to maintain the patent.

[3] It is claimed, however, on behalf of the patentee, that when a

new method of manufacture is involved in the use of the new material, invention should be held to exist if the new method of manufacture involved in the use of the new material would not occur to the ordinary mechanic. And such is undoubtedly the law. The difficulty with the complainant's case is that the court is not satisfied that the new method of manufacture is one which would not have occurred to an ordinary mechanic. We think that a competent mechanic, with the General Electric box before him, could by mechanical skill alone make the same thing for the same purpose from sheet metal.

Invention is not involved in the making of integrally extending hinge portions for the cover, over the casting of hinge lugs for the cover of a cast iron box, such as the box of the General Electric Company. We have not overlooked the testimony of the patentee that a cast iron junction box like that of the General Electric box would not teach the ordinary mechanic how to make a sheet metal box with the body of one piece and a cover of one piece hinged together like the patent in suit. No doubt he believed what he said, but we do not share his opinion that an ordinary mechanic could not have worked out the result.

The appellant objects to the exclusion of certain evidence. The court at the original trial excluded evidence designed to show how much cheaper boxes could be constructed in accordance with the method specified in the patent than in the case of the old type of butt hinge box. But it is, under the circumstances of the case, quite immaterial whether the box of the patent in suit costs less than it costs to manufacture the butt hinge or the cast iron box. The fact that the box of the patent in suit costs less does not make it patentable. And if such evidence were material the evidence already in the case disclosed the fact. And there was no error committed in excluding testimony to show that after the injunction issued it was necessary to go back to the butt hinge, and that it was necessary to raise the price for the old butt hinge type.

It is also assigned as error that a superintendent of electrical construction called as a witness for complainant was not allowed to state what advantages, if any, from an electrical standpoint, result from a box constructed in accordance with the patent in suit. It is proper to say that the trial court excluded the question as opposed to rule 5 of the Equity Rules of the District Court, which provides that in the trial of a patent cause only one expert witness shall be allowed to each side, unless leave shall have previously been obtained from the court, on motion made and cause shown. One expert had already testified, and leave had not previously been obtained, or any motion made or cause shown, for the examination of any additional expert.

We find no error. Judgment affirmed.

BAKER & BENNETT CO. v. N. D. CASS CO. et al.

(Circuit Court of Appeals, Second Circuit. January 12, 1915.)

No. 162.

1. PATENTS ~~28~~—VALIDITY—DESIGN PATENTS.

It does not constitute invention from the point of view of a design patent to use for a particular purpose an article which had previously been manufactured, used, and sold for any purpose for which it was adapted, where there is no change in the form, size, shape, design, appearance, or material of the article.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 33; Dec. Dig. ~~28~~.]

2. PATENTS ~~328~~—INVENTION—DESIGN FOR SETS OF CHARACTER BLOCKS.

The Baker design patent, No. 45,249, for a design for character blocks, which, as shown in the drawings, consist of the alphabet and Arabic numerals made in block letters and figures, and which are sold as toy blocks for children, *held* void for lack of invention; it being shown that letters and figures identical in design were made and sold by another more than two years prior to the application and were used in making signs.

Appeal from the District Court of the United States for the Southern District of New York.

This cause comes here on appeal from a final decree entered on September 22, 1914, in the District Court for the Southern District of New York, adjudging that letters patent of the United States No. 45,249, dated February 17, 1914, for a design for sets of character blocks, granted to De Witt C. Baker, was a good and valid patent, and was infringed by defendants, and awarding a perpetual injunction. The plaintiff having waived an accounting and elected to recover the sum of \$250, it was also decreed that the defendants and each of them pay to the plaintiff the sum of \$250, with costs.

The Baker & Bennett Company is a corporation duly organized and existing under the laws of the state of New York, and maintains a place of business in the city of New York, borough of Manhattan, county and state of New York. The N. D. Cass Company is a corporation organized and existing under the laws of the state of Massachusetts, and maintains a place of business in the city of New York, borough of Manhattan, county and state of New York. And N. D. Cass, one of the defendants, is an officer of the N. D. Cass Company and is personally in charge of its New York office, and is alleged to have personally controlled and directed the corporation.

The plaintiff is engaged in the manufacture and sale of toys and novelties, and by a license agreement with De Witt C. Baker claims an exclusive right to manufacture, use, and sell sets of character blocks embodying and containing the invention described and patented in design patent No. 45,249. The defendants are alleged to have infringed the rights of plaintiff by making, using, and selling sets of character blocks identical in form with those manufactured and sold by plaintiff, and they are charged with inducing the customers of the plaintiff to place their orders with the defendant corporation in unfair competition, by naming a lower price to buyers than that at which the plaintiff sells his blocks.

The defendants in their answer aver that De Witt C. Baker is not the true, original, first, and sole inventor of the alleged ornamental design for a set of character blocks described and claimed in design patent No. 45,249, but that the alleged invention relating to an ornamental design for a set of character blocks was long prior to the time of the supposed invention and discovery

by Baker. The defendants also aver that design patent No. 45,249 is invalid, for the reason that character blocks of substantially the identical construction and appearance as those shown in the letters patent in suit were in public use and on public sale for more than two years prior to the date on which the application for the patent in suit was filed in the United States Patent Office.

Infringement is not contested if the patent is valid.

Hillary C. Messimer and Carl W. Bliss, both of New York City, for appellants.

Munn & Munn, of New York City (T. Hart Anderson, of New York City, of counsel), for appellee.

Before LACOMBE, COXE, and ROGERS, Circuit Judges.

ROGERS, Circuit Judge (after stating the facts as above). On October 18, 1913, De Witt Clinton Baker of New Rochelle, in the state of New York, filed an application in the United States Patent Office in which he stated that he had invented a new, original, and ornamental design for a set of character blocks, reference being made to an accompanying drawing as forming part thereof. It stated:

"The figure is a view in elevation of a set of character blocks, showing my new design. I claim: The ornamental design for a set of character blocks as shown."

The drawing accompanying the application shows simply the alphabet and the Arabic numerals made in block letters and figures. The letter B and the figure 3 will serve as illustrations:



The defendants insist that the design specified in the claim is not a patentable design. They assert that it required no invention to produce the alleged invention and discovery in an ornamental design for character blocks, but that the pretended invention and discovery were the product of mere mechanical skill, and consisted of a mere aggregation of well-known parts, performing no new use, function, or result. They also assert that the patent is invalid, because character blocks of substantially the identical construction and appearance as those shown in the patent were in public use and on public sale prior to the date of Baker's application.

The court below concluded that the character blocks in the form presented to the trade as a toy alphabet with one set of numerals possessed patentable novelty, and in that form was entitled to protection against infringement, and that the defendant's character blocks in the form exhibited and as put on the market by it constituted an infringement. It appears that the complainant company is making and vending in large quantities sets of these character blocks for children. They have proved very popular, and within one year after the issue of the patent the sale had amounted to \$75,000.

There is no substantial dispute as to the facts. The complainant sells boxes of wooden block letters to be used by children as toys. Each box contains all of the letters of the alphabet and the nine numerals, and a certain number of duplicate letters, principally vowels, to enable a child to spell out words. The patent, however, only applies to the alphabet and the set of numerals. The complainant does not manufacture the blocks, but purchases them on contract from a company at Burlington, Vt.

The testimony showed that letters and numerals identical in design with every one of the letters and numerals in the set of blocks sold by the complainant were manufactured and sold by a company at Burlington more than two years prior to the date of the application for the patent in suit. In order to fill the complainant's orders, the Burlington manufacturer did not change in the slightest particular the size, shape, design, or material of the letters he had previously been manufacturing and selling. The letters seem originally to have been used for signs. A hardware merchant in business at Burlington testified to the fact that he had purchased these letters more than two years prior to the application for the patent, and that he kept them in stock in bins just like nails or any other commodity in a hardware store, and sold them in the ordinary course of business just as he sold nails, and that he sold in this way both letters of the alphabet and numerals.

Mr. De Witt C. Baker, who is the president and general manager of the complainant company and is in the toy business, appreciated that these wooden block letters and numerals were of convenient size, shape, material, and design to be used by children as toy blocks, and so took out his patent for a set of character blocks. Baker's invention, if it be invention, consists in taking blocks already in use and combining them into "a set" containing at least one entire alphabet and at least one set of the digital numerals "0" to "9" inclusive.

[1] The facts therefore present this question of law: Does it amount to invention, from the point of view of a design patent, to use for a particular purpose an article which had previously been manufactured, used, and sold for any purpose for which it was adapted, where there was no change in the form, size, shape, design, appearance, or material of the article? We feel obliged to answer the question in the negative.

[2] To entitle a party to a design patent there must be an exercise of the inventive faculty. In *Smith v. Whitman Saddle Co.*, 148 U. S. 674, 13 Sup. Ct. 768, 37 L. Ed. 606, the Supreme Court quoted with approval the statement that:

"The adaptation of old devices or forms to new purposes, however convenient, useful, or beautiful they may be in their new rôle, is not invention."

It was there said that:

"The shape produced must be the result of industry, effort, genius, or expense, and new and original as applied to articles of manufacture. *Foster v. Crossin* (C. C.) 44 Fed. 62. The exercise of the inventive or originative faculty is required, and a person cannot be permitted to select an existing form and simply put it to a new use, any more than he can be permitted to take a patent for a mere double use of a machine. If, however, the selection and adaptation of an existing form is more than the exercise of the

imitative faculty, and the result is in effect a new creation, the design may be patentable."

In Cahoon Barnet Mfg. Co. v. Rubber & Celluloid Harness Co. (C. C.) 45 Fed. 582-585 (1891), it was said:

"And so it is forbidden for one to choose an existing design, simply to devote it to a new use, and, because of such new use, successfully to claim the benefits of the patent laws."

It must be borne in mind that a design need not be useful in the sense that a machine or a process is useful. It must be ornate; it must appeal to the eye of the beholder. The inventor of a design entitled to the protection of a patent must produce a result akin to that produced by the artist or sculptor. His design must be new, and it must be beautiful and attractive. What is it, then, that Baker has invented? He says it is an ornamental design for a set of character blocks. It certainly is not for wooden block letters, for these were unquestionably old. It cannot be for placing the letters in their natural sequence from A to Z, for this is the natural and usual arrangement. So, too, the obvious arrangement of figures is from 1 to 9 and zero. The complainant emphasizes the statement that these blocks are toys designed for children, and bases thereon an argument that novelty and invention may be predicated of that fact. The patent says nothing as to the use to which the blocks are to be applied; but if it had done so, it can hardly be maintained that a device otherwise unpatentable becomes an invention because it is to be used by children. If this were so, infringement would depend upon the age of the user.

In this case Mr. Baker created no new device or form. He simply at the best applied an old or existing device or form to a new use.

Decree reversed.

J. M. SHOCK ABSORBER CO. et al. v. BLACKLEDGE.

(Circuit Court of Appeals, Seventh Circuit. January 5, 1915.)

No. 2140.

PATENTS ~~328~~—INFRINGEMENT—SHOCK ABSORBER.

The Tilt patent, No. 988,229, for an auxiliary automobile side spring or shock absorber, is not a generic patent, so as to be entitled to a broad range of equivalents, but in view of the prior art is limited to the specific device shown and described in the specification and drawings. As so construed, held not infringed by the device of the Jacquet patent, No. 1,015,682.

Appeal from the District Court of the United States for the Eastern Division of the Northern District of Illinois; Arthur L. Sanborn, Judge.

Suit in equity by John W. Blackledge against the J. M. Shock Absorber Company and others. Decree for complainant, and defendants appeal. Reversed.

For opinion below, see 213 Fed. 478.

Drury W. Cooper, of New York City, for appellants.

George L. Wilkinson, of Chicago, Ill., for appellee.

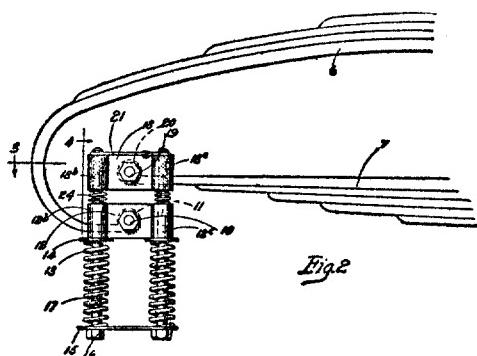
Before BAKER, SEAMAN, and KOHLSAAT, Circuit Judges.

KOHLSAAT, Circuit Judge. Appellee filed his bill in the District Court to restrain infringement of patent No. 988,229, granted to C. A. Tilt on March 28, 1911, for a vehicle side spring, and particularly for an auxiliary automobile spring or shock absorber. Thereafter such proceedings were had that appellant was adjudged to have infringed claim 1 of said patent, which reads as follows:

"The combination with the two members of a vehicle elliptical spring, of two pairs of vertical guides, means for securing the end of the lower member of the spring between the pairs of guides, two pairs of sleeves surrounding said guides, means for pivotally supporting the end of the upper member of the spring between and directly by the pairs of sleeves, a plate secured to the lower ends of said guides, and coiled springs surrounding said guides and supported intermediate of said plate and said sleeves."

This cause is now before us on appeal from that judgment.

The device of the patent consists in a supplemental spring for use "at the point of connection of the members of the elliptical spring with each other," which shall be so arranged with reference to their supports, as to serve as a connecting link between, and prevent lateral movement of, the upper and lower members of the elliptical spring, without interfering with the relative vertical movements of the springs. Fig. 2 of the patent drawings is here reproduced:



"The operation of my improvements," says the patentee at line 8, p. 2, and down to and including line 25, "is substantially as follows: The weight of the body of the automobile and the load which it carries is transmitted through the elliptic side spring 6 to the lower sliding blocks 12, 12a. The side spring 6 being pivotally attached to these blocks by means of a bolt 10, the said weight is transmitted, as above described, in any of the various angular positions which the parts may assume.

The said weight is then transmitted to the spiral springs 13, and they in turn transmit the weight to the plate 15, which in turn transmits said weight to the heads of the bolts 17. The bolts 17 carry the weight to the blocks 18 and 18a, which finally give it to the bolt or pin 19 at the end of the lower elliptic side spring 7."

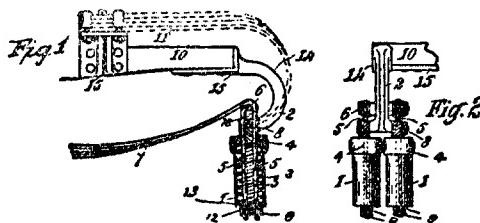
From the above cut it will be seen, as stated in the specification, that:

"The upper elliptic side spring 6 is pivotally attached at the extreme end of its downwardly curved portion to the bolt or pin 10 by means of the eye or loop 11 in the end of said spring. The bolt 10 is carried by two vertically sliding blocks 12 and 12a, one at each end of said bolt. The looped end 11 of the spring 6 lies between the sliding blocks 12 and 12a. * * * The blocks 12 and 12a rest upon spiral compression springs 13. * * * The

lower ends of the springs 13 rest upon a plate 15, and said plate is carried by the heads 16 of bolts 17. The plate 15, therefore, holds four of the bolts 17 in their proper relative positions. * * * The bolts 17 extend upwardly through the springs 13 and are slidably fitted within the ends 12b and 12c of the blocks 12 and 12a. * * * The said bolts 17 are threaded into other blocks 18 and 18a, which are similar to the blocks 12 and 12a. The only difference between the blocks 12, 12a and the blocks 18, 18a is that the former are loosely fitted upon the bolts 17 while the latter are threaded thereto. It will therefore be seen that the blocks 12, 12a, are free to slide longitudinally of the bolts, while the blocks 18 are fixed upon the ends of said bolts. The blocks 18, 18a, are also held in position by a bolt 19, and said bolt 19 passes through an eye or loop 20 in the extreme end of the lower side spring 7. The lower side spring 7 is pivotally attached to the bolt 19, and hence to the upper pair of blocks 18, 18a."

The patent also provides smaller springs 24, one around each of the bolts 17 situated between the sliding blocks 12, 12a and the blocks 18, 18a. These, it is claimed, serve to receive and cushion the sudden upward movements of the lower blocks 12, 12a, and of the vehicle body connected thereto, through the spring 6. The sliding engagement of the bolts 17 with the blocks 12, 12a, it is claimed, constrain both sets of blocks, 12, 12a, and 18, 18a, to move in alignment, thereby preventing relative lateral movement of the ends of the two elliptical spring members. Appellee is the assignee of the patent.

Appellants' alleged infringing device is that of the Jacquet patent No. 1,015,682, granted January 23, 1912, for a so-called shock absorber for use in motor cars and other vehicles, upon an application filed subsequently to that of the patent in suit. Figs. 1 and 2 of the drawings are as follows, viz.:



and supporting each spring is a U-shaped rod 5, screw-threaded at its ends 12, and provided with the nuts 9, adapted to support a disk 13 upon which the lower ends of said springs 3 rest. The upper or loop portion of said rods 5 pass over the bolt 6 of the flat vehicle spring 7, while the bolt 8 is straddled by said rods and a space 16 is provided between the top of said head 4 and said bolt 6. * * * It will be observed that the head 4 is provided with an upwardly extending portion to receive the bolt 8 and that the rods 5 pass through this extension as well as through the head proper, thereby being provided with long bearings capable of steadyng the reciprocating movements of said rods, while the said casing is free to oscillate around both the bolts 6 and 8 owing to the space 16."

This arrangement, the patentee asserts, will avoid lateral wear of the long bearings and cause the rods 5 to reciprocate smoothly. Reference to the Tilt patent discloses that the claim in suit does not call for a long bearing. This feature is covered by claims 2 and 3 not now in suit.

"My elastic spring support, or shock absorber," says the patentee (page 1, line 50), "comprises a plurality of cylinders or boxes 1, each provided with a closed head 4, through which passes the bolt or pin 8 of the hanger member 2 supported from the body of the car. Inclosed in said boxes or cases 1, are springs 3 preferably helical in form,

Application for these two patents were pending contemporaneously in the Patent Office from October 21, 1910, to March 28, 1911. This fact, appellants insist, raises a strong presumption that in the judgment of the examiner such differences existed between the two that interference proceedings would not lie. Tilt's original claim 3 was in substance the same as the claim in suit, save for the bottom plate 15. It was rejected on the ground that it did not constitute patentable novelty to double the device of original claim 2, which had been rejected on Collins and Furmidge patents, and rejection acquiesced in. After adding the bottom plate 15 and making some minor changes in the claim, it was allowed and is the claim in suit. The patentee in his specification gives as the specific objects of the patent the providing of supplementary springs and the prevention of lateral movements between the upper and lower members of the elliptical springs relatively to each other without interfering with the relative vertical movements of the springs; that is, the device should be so arranged as to absorb the shock of road or other jolts and yet leave the ends of the elliptical springs in vertical alignment, or substantially so. The patent in suit takes as well the place of both a shackle and of a shock absorber. The alignment of the opening in the sleeve blocks 12, 12a, with the threaded openings in blocks 18, 18a, for the receiving and retention of rods 17, in order that these rods may slide without friction, is essential to the practical use of the device.

Taking into consideration, then, the proceedings in the Patent Office with regard to the addition of the plate 15 into which the guiding rods 17 are rigidly placed, the four guide rods forming a parallelogram whose four corners are squarely and immovably held together at both their tops and bottoms, thereby securing alignment between the openings in sliding guide blocks or sleeves 12 and 12a and the openings which receive and rigidly retain the upper ends of the rods 17, together with the objects sought to be attained by the patent, there is presented a very persuasive argument for the proposition that the plate 15 is made an essential element of the claim in suit, and for the further claim that, in order to maintain the necessary rigidity, it is necessary that the guide rods 17 have substantially no vertical movement independent of and relatively to each other and to their top and bottom binding plates or blocks. Appellants' device lacks both of these elements. Whether or not it has the plain equivalent of the two pairs of guide rods depends upon the scope to be given to the claim in suit. The rods of the alleged infringing device consists of one rod on each side, but that one rod is bent into the shape of a hairpin with its two ends threaded and hanging down and passing through a disk 13, where it is secured with nuts. There is no connection between either the lower plate or the ends of one hairpin-shaped rod with the other rod and disk, and no bracing effect exists between the two. That the curved portion of the hairpin-shaped rod is not rigidly placed seems clear. Whether or not the practical operation of the two is similar is not the test. The two ideas are different. The one takes note of and provides against any lateral movement. The other can claim such a function only as an incident, and then only loosely, since the two guide rods do not necessarily act in unison.

It will be seen that there is a difference between the means for securing alignment of the openings through which the guide rods slide and for support of the rods themselves. In the first place, the several supports of the upper ends are entirely dissimilar, as above stated. Secondly, in place of the sliding guide block 12 of Tilt, Jacquet's rod slides through an opening in the closed head 4 and its upwardly extending portion. Integral with the head 4, and extending down to the ends of the hairpin-shaped rod or bolt, is the cylinder 1, which encloses the ends of the doubled bolt 5 and the helical spring. Thus the bolt 5, or the lower arms thereof, has not only the guide bearing or support of the head 4 and its said extension, but such lateral bracing effect as comes from the walls of the cylinder, which, while not closely hugging the spring or the bolt, yet serves to prevent any considerable lateral distortion and to relieve the strain upon the true bearing 4 and its extension. One of the advantages claimed for the Jacquet device is that it may depend from the vehicle body and is not limited to elliptical spring support. Of course, invention could not be predicated upon the mere addition of the cylinder enclosing the hairpin-shaped rod, in the absence of any special function thereof in connection with the rod and spring. It may well be that, in co-operation with the disk 13, the bolts 9 and the head 4, there is provided for the rod 5 a cushioning or pistonning result by reason of the fact that the cylindrical disk bears against the inner walls of the cylinder, thereby augmenting the efficiency of the device. The Jacquet patent presents other advantages, such as its adaptability to the substitution of springs of the same or greater tension and size.

It is claimed by appellee's counsel that Tilt's patent is so far generic as to entitle it to a large range of equivalents. After an examination of the condition of the art at the date of the application for the Tilt patent, we are of the opinion that such is not the case. The disclosures of the then existing art satisfactorily establish the fact that the idea, the concept, was well developed before Tilt, and that there was no room for a broad patent in the art.

Attention is called in the briefs to the fact that the claim makes no provision for disposition of that portion of the rod 17 located above the guide blocks 12, 12a. It does, however, call for means for securing the ends of the lower member 7 of the side spring between the pairs of guides numbered 17. This is shown in the specification and drawings to be accomplished by pivoting the end of said member 7 upon the cross-bolt 19. The only support the cross-bolt is shown to have is the block 18, unless it receives some support from the said member 7. The block 18 is rigidly supported upon the bolts 17. Such support, or the equivalent thereof, is essential to the operativeness of the device. We may therefore assume that the specification and drawings should be read into said claim in suit.

Of the patents cited by the examiner, the Furmidge patent, No. 87,612, issued December 19, 1905, is for an auxiliary vehicle spring. It has two guide rods rigidly fastened at their top and bottom and surrounded by helical springs. It lacks entirely the sleeve supports shown in the patent in suit, but otherwise operates in substantially the same manner. It was found to be defective by reason of the lat-

eral distortion growing out of its want of lateral support. It will be noticed that it is supported from the body of the vehicle rather than the members of the elliptical spring.

Collins patent, No. 907,463, issued December 22, 1908, for an automobile auxiliary spring, likewise cited by the examiner, depends from the vehicle body. It discloses a pair of vertical guide rods, which are not surrounded by the helical spring, but which pass through upper plates, and the lugs provided thereon, which act as supporting sleeves and extend downward through a bottom plate. They are held rigidly at their upper and lower ends, and braced by the sleeves or lugs, and serve to keep the helical springs in position.

Emmerich patent, No. 849,109, for an auxiliary automobile spring, being one of the patents cited by the examiner, discloses guide rods surrounded by helical springs. It has also a third helical spring. The rear end of the lower leaf of the elliptical spring is connected with the yoke part by a bolt mounted on the upper end of a rod, which is inclosed by the third helical spring. This rod moves slidably through the bottom plate. The guide rods are enlarged at a point above the upper plate, against which enlargement the plate abuts. Such at least would seem to be the meaning of the term "fixed collars," though some of the experts assume that the collars are slidably attached to the rods and constitute extensions of the upper plate. This plate is of substantial thickness. These enlargements on the rods, which are termed collars by the patentee, seem to be integral with the guide rods. Their purpose is not stated in the specification but they serve to strengthen the guide rods and form a stop to the spiral springs. The upper plate is clearly a sleeve binding the two rods together and preventing distortion. This patent shows three points at which the guide rods are supported, namely, the bolt, the upper plate and the lower plate.

In Fig. 1 of the drawings of the patent to Young, No. 901,578, granted October 20, 1908, for a steadyng device for supplementary vehicle springs, is shown a shock absorber which has two guide rods surrounded by springs—rigidly joined by a plate at their lower ends and a cross-bolt at their upper ends. The device is further strengthened by a rod located intermediate the two, having a U-shaped upper end, the two arms of which are fastened into the cross-bolt which is carried by the springs, while the lower end thereof slides through the bottom plate. The patentee refers to Emmerich, which latter patent the device closely resembles.

In Fig. 1 of the drawings of the Brooks English patent, No. 26,973, of June 21, 1906, for a shock absorber for motor and vehicle springs, there is disclosed a device having substantially the arrangement of spiral springs called for by the patent in suit, together with guide rods rigidly connected at their upper and lower ends, attached to a cross-bar located substantially midway between the upper and lower ends of the guide rods and carrying three steel sleeves which, says the patentee, "form a large bearing surface on the rods and reduce side strains to a minimum."

The English patent to Marr for a device for suspending the bodies of vehicles through the use of levers and coiled springs, accepted

February 27, 1908, discloses boxed spring and rod devices, used, however, in somewhat different relations from those of the patent in suit.

The Pernot French patent, made public March, 1907, discloses a boxed guide rod surrounded by a spiral spring similar to that of appellants.

In the foregoing patents of the prior art, the elliptical springs are mounted between the guide rods as in the patent in suit.

Whatever Tilt is entitled to must be found in the device of his patent, specifically. His bottom plate and its four rigid rods, together with his specific arrangement of his sleeves and blocks, are essential elements of his claim. Appellants do not use those features, and therefore do not infringe.

The decree of the District Court is reversed, with direction to that court to dismiss the bill for want of equity.



**DAYTON ENGINEERING LABORATORIES CO. et al. v. SIDNEY B.
BOWMAN AUTOMOBILE CO.**

(District Court, S. D. New York. February 25, 1915.)

No. 10-265.

PATENTS & 328—VALIDITY AND INFRINGEMENT—STARTER FOR MOTOR CARS.

The Coleman patents, No. 745,157, claims 3, 7, 12, 17, and 20, and No. 842,827, claims 2, 8, 7, and 9, each patent being for automatic starting system for motor cars, *held* not anticipated and to disclose invention. Such claims of the first patent *held* infringed, and of the latter patent not infringed.

In Equity. Suit by the Dayton Engineering Laboratories Company and Conrad Hubert against the Sidney B. Bowman Automobile Company. Decree for complainant on one cause of action, and for defendant on the second.

Drury W. Cooper, J. B. Hayward, and Thomas J. Byrne, all of New York City, for complainants.

Edmund Wetmore, of New York City, and Davis & Dorsey, of Rochester, N. Y., for defendant.

SANBORN, District Judge. Infringement suit on patent No. 745,157, applied for February 11, 1901, issued November 24, 1903, and No. 842,827, applied for February 11, 1901, issued January 29, 1907, both running to Clyde J. Coleman. The claims in suit of the first patent are 3, 7, 9, 12, 17, 18, 20, and 24; of the second, 2, 3, 7, 9, 19, and 26.

Complainants produced evidence tending to carry the actual date of Coleman's inventions back at least to the "Dewey Land Parade," which was September 30, 1899, long before the effective dates of two supposed prior art patents to Lanchester, which were sealed, respectively, July 25, 1900, and November 28, 1900.

The automatic car-starting apparatus of complainants is called the "Delco," and defendant's device the "North East," because it is made

by the North East Electric Company, of Rochester, N. Y. The complainant corporation is herein referred to as the Delco Company, and the manufacturer of defendant's device as the North East Company. The Delco output from 1911 to 1915 has been about 200,000 starters, used on 10 different types of cars.

Each of the patents covers part of an automatic starting system for motor cars. Broadly considered, both patents require the combination of (1) an engine; (2) a prime-mover, which shall be capable of transforming potential energy, of some form, into kinetic energy, or power to start the engine, and also of the reciprocal function of transforming power, derived from the engine, into potential energy; (3) mechanical connections between the engine and the prime-mover, for the reciprocal transfer of power between them; (4) energy-storing means of some kind for receiving energy from, and returning it to, the prime-mover; and (5) connections between the prime-mover and the energy-storing means, these connections depending, for their character, upon the nature of the energy by which the prime-mover is operative. In both patents the characteristic features of the apparatus lie in the connections just referred to, and the distinction between the patents resides in the fact that in the earlier patent it is the connections between the prime-mover and the engine which are involved, while in the later patent it is the connections between the prime-mover and the energy-storing device which are involved.

Both patents show in their drawings a motor-dynamo as the prime-mover, and a storage battery, with the motor-dynamo acting first as a motor to start the engine, and then as a dynamo, run by the engine, to convert mechanical to electrical energy to recharge the battery. But in their specifications and claims these patents show inventions of broad scope, not limited to electrical means, but including the utilization of any form of energy. In this way the prior art is brought in, not only as to storage batteries, generators, and motors, but also as to compressed air and spring devices.

No successful starting apparatus has ever been made which was distinctly under the Coleman patents. It is true that in 1901 a starter was rigged upon a Brewster runabout and used for two weeks, but it was not made strictly in accordance with either of the patents in suit. Mr. Kettering, for the Delco Company, developed its starter before it ever heard of these patents, and was then advised by its attorneys that the apparatus would, in their opinion, infringe these patents. Licenses were then obtained. What is true of Kettering holds good for the North East Company, through its engineer, Halbleib. These men attacked the problem at nearly the same time, and each produced a successful and practical apparatus without knowledge of the Coleman disclosures.

In a general way Coleman's inventive idea was to so connect an engine and electro-magnetic machine that each was adapted to actuate the other, and to put them on a motor car. This had been done in different ways by half a dozen prior inventors, but Coleman was, of course, at liberty to improve on their work by adopting forms of his own. For this purpose he took out the two patents in suit, one in which

the mechanical idea predominates, the electrical in the other. The main idea of the first patent is the differential gear and clutch mechanism between motor-dynamo and engine; of the second, the change of intensity in the magnetic field of the motor-dynamo from an intense field in starting to a weaker field in charging.

In approaching the problem on its electrical idea Coleman was unfortunate in discarding all the prior art as to variable speed lighting. Charging a battery with a constant speed dynamo is quite a simple thing compared with the variable speed problem. As Mr. Waterman, testifying for defendant, says:

"The variable speed problem is enormously more difficult. It is more difficult to comprehend, to get into the mind, and it is infinitely more difficult to design. When, therefore, a man wants to design a device which shall, operating under widely varying speed, act to charge a storage battery with due regard to conditions of safety to the battery which are imposed, he does not go to a source of information regarding constant speed control. On the contrary, if he is wise, he tries to forget all that he ever knew about constant speed control, and he goes to the arts which have developed variable speed control, and rearranges his ideas, because they have to be essentially rearranged to the altered conditions of variable speed operation."

This matter had been worked out in 1901, when Coleman filed his applications. Testifying for complainants, Mr. Bentley says that the constant current system of train lighting now in general use dates from 1900, when the first system was put in, which was more or less of an experimental apparatus, but was the present system.

While there are important differences between train lighting, including battery storage, and automobile starting and battery storage, yet the real problem was not, as Coleman conceived it, to use a constant speed engine, and switch in the dynamo only when full normal speed was reached, so as to keep the dynamo-speed constant. That was not the problem solved by Kettering and Halbleib, and has only a distant relation to it. The real difficulty, and in 1901 no doubt a serious one, was to utilize the variable dynamo-speed train lighting system to the variable speed engine and dynamo. Coleman did not address himself to this question; he either dodged it, or thought he could get something better in his own way.

Under the first patent the operation may be thus described: Having equipped the car with an explosion engine, storage battery, motor-dynamo, differential gearing connecting them with the engine, and a centrifugal governor to control a switch for opening and closing the electrical circuit, his starting and charging operation is this: By a hand-lever the operator closes the circuit, by the same movement opening the fuel supply, and closing the sparking circuit. Current flows from the battery to the motor, through a wiring so arranged as to enable the motor to revolve rapidly, and send a large torque or turning power through the differential gearing to the engine-crank. Assuming that the engine has started, the condition contemplated by Coleman is quite different than at the present time, because he is to use a constant speed engine, which must reach its full speed as soon as possible after starting, since the fuel is all turned on, and there is no need for any throttle. Therefore he leaves the hand-lever in its initial position until the engine is well started, then puts it in its second position, thus

breaking entirely the electrical charging circuit, and throwing the disk-clutch into registry, and so connecting the engine and driving gear. The motor-dynamo remains out of circuit until the engine reaches its normal speed, and this rate of speed spreads the arms of the governor and makes them close the circuit again. During the period that the circuit has been broken the revolutions of the engine, by means of the differential gearing and overrunning clutch-mechanism located on the motor-shaft, have been turning the armature in an idling way, since there is then no current to energize either the series field or the armature shunt, thus producing little or no electro-motive force. But as soon as the governor closes the circuit at full engine speed the current now flows from the motor-dynamo acting as a generator in the opposite direction around the circuit to the battery and thence through the field, and also shunts through the armature brushes, thus charging the storage battery. As soon as the engine speed is cut down, either by loading or cutting off the fuel, the governor opens the circuit, and all electrical operation ceases. Mr. Waterman sums up the matter by saying that Coleman took the old shunt-dynamo of the time, with its old constant speed engine, and put them on an automobile without alteration. He thinks this was not a forward step.

Mr. Waterman also gives another reason why he thinks the first patent to Coleman was not an addition to the electrical art; that is, that the centrifugal governor is not only unnecessary, but a positive detriment, because it allows the charging operation only to go on at high engine-speed. This is explained by the much-repeated statement of fact that a dynamo and a motor are one and the same thing in structure, the only distinction being in result. When electrical force is used to drive the device to produce mechanical force it is a motor; when mechanical force is used to turn the armature and produce electro-motive force it is a dynamo. Thus in the above description the motor, actuated by battery-pressure, turns the engine-crank, starts the explosions in the cylinders, they in turn drive the engine, and the latter, through the differential and overrunning clutch-gearing, drives the motor, which then begins to give out electro-motive force as a dynamo. When this dynamo pressure or voltage exceeds the battery voltage, current begins to flow into the battery, and the charging operation begins. The two operations run smoothly into each other. The battery-charging depends on the needs of the battery and not on the engine speed. This change from one operation to the other was well known before Coleman entered the field, as shown by many prior patents for lighting systems. Therefore the use of the unnecessary centrifugal governor was a step backward, not forward.

Not only did the inventor fail to appreciate the generator operation immediately following the motor operation, without stopping, but he describes the charging current flowing in the same direction as the starting current. Of course, the charging current into the battery must be the reverse of the starting current flowing from the battery; otherwise, the battery would be both giving up current and receiving it at the same time. This is possibly only a mistake, however, and a similar one was corrected in the description of the second patent, at the suggestion of the examiner.

Date of Coleman Invention. On the trial Mr. Coleman was examined as a witness. In order to show the actual date of his invention he produced three sketches made in 1899, marked C-1, C-21, and C-4. The first one is dated April 20, 1899, being the date when it was left with Coleman's attorney in Chicago. It refers wholly to electrical circuits and apparatus, without any suggestion of gears or clutches. It was not intended to show any complete or operative structure, as Coleman states in his testimony. By the rule of Moline Plow Co. v. Rock Island Plow Co. (in the Seventh circuit) 212 Fed. 727, 129 C. C. A. 337, to the effect that a prior drawing or model must be sufficiently plain to enable one skilled in the art to understand the invention, this sketch C-1 is not sufficient. It was not intended to be more than a suggestion of something to be worked out later.

Exhibit C-21, like the others, is a rough pencil memorandum, but its explanation is somewhat elaborate. It contains two generators, one very small, whereby the voltage of the other was to be kept constant. This feature not appearing in either patent, it seems clear that the patentee's scheme had not yet been completed. The sketch shows no switches or governors, simply a battery, two motors, and connecting wiring. The writing on the sketch, however, is much more complete, but still not absolutely so. Coleman says this was made before July 20, 1899, and contains instructions to a draftsman (Mr. Cravath) "to make a working drawing of these different suggestions and instructions." The written matter in part reads thus:

"Then also let him lay out full dimension drawings for motor-generator—better figure on about 15 watts on shunt field winding when engine is running generator about 1,000 r. p. m. Think safe to figure on high speed of engine being 800 r. p. m. Of course, field current will then be less—proportionally as speed of engine and generator are higher. Lewis' engine was I believe 600 revolutions and 5" diameter by 5" stroke and with full charge about 50 pounds when compressed. Put shunt coils of field on core nearest armature, so as to get best efficiency when it is generating current to recharge batteries, and the series coils on field can come right up against the inside of field ring and back of shunt coils—use both shunt and series field coils for starting engine. Find out if Roth Bros. have a frame about right size that we can wind for this outfit. Let me know when this is all laid out, and I will give you my ideas about switches for starting and control. Think perhaps better figure on six cells of storage battery, same as these copper oxide battery jars, only about one half as high and, of course, of hard rubber. If we could get some plates from Haske, same size as used in burning battery, could saw them into four 6x6 plates and burn lugs to them. (Generator 100 watts.) (Starting current 500 watts.)"

It will be noticed that the conception was still incomplete as to "switches for starting and control."

The last sketch and explanation, C-4, was made on a large envelope shortly before the Dewey Land Parade in New York, which was September, 30, 1899, and the drawing was shown to four people on or about that day. It shows that Coleman's idea had become much more definite than in the other forms, and contains a rough suggestion of a motor vehicle, a gas engine, a controlling lever or handle, two field windings, one heavy and one light, the latter connected in series with a centrifugal governor, called a governor circuit closer and automatic control, a dynamo with brushes and commutator, field and shunt windings, a chain drive connecting motor and engine shaft, and an auto-

matic clutch on the dynamo-shaft with a planetary gearing, which means literally one gear wheel meshed with another and traveling around it, planet fashion. The accompanying description reads:

"Take out two patents, one using dynamo and motor separately, so motor will have different gearing leverage or torque connection with gas engine of automobile from the dynamo, which must run slower; could use electric clutches to connect one or the other as required. Other case to have both effects combined in one apparatus. The shunt winding on field is to be used when engine is running electric motor or generator as a dynamo to charge batteries, and the series winding is to be used to increase the electrical torque when gearing is thrown in so as to give motor enough leverage to start gas engine. Use two ratchet clutches on same idea as my electric street car motor with revolving field and armature. In the hub of gas engine or electric generator sprocket is a set of ratchet or coaster brake style clutches and a set of reducing gearing so placed to give electric motor enough torque to rotate gas engine to start it, and when engine starts and runs ahead the second clutch takes hold so engine will run dynamo slower and safe speed; first clutch and gearing is idle at this time."

Coleman street car motor is shown in patent No. 516,916, of 1894, claim 7 of which reads thus:

"A motor having its field and armature adapted to rotate in opposite directions, gearing connections of a differential nature between each of the same and the driven shaft, and clutches for independently engaging and holding the field and armature from rotation, said clutches having a common operative connection, so that the application of the one will release the other, substantially as set forth."

Mr. Coleman thus explains the connection:

"Q. What physical change would you have to make on the gears shown in that street car motor patent, and, for example, I will ask you with reference to Fig. 2 what change you would have to make—to adapt those gears to the use on the sketch Exhibit C-4? A. In relation to the other clutch, you would only reverse the clutch relation; that is to say, the clutch engagement direction, so that it would be adapted to either the engine locking through one set of gearing to actuate the dynamo, or the other clutch operating through the other clutch to actuate the engine at the ratio of gearing to which it was associated with."

It is obvious that there is nothing in any or all of these sketches and written explanations which brings the electrical connections between the dynamo and storage battery within the rule of the Moline Plow Case, or within Judge Coxe's statement of the rule in *Thayer v. Hart* (C. C.) 20 Fed. 693. As to these connections there is no reduction to practice—no complete mechanism whatever. The general idea is there, but no practical result. How is the battery to be connected with the motor? At what speed is the centrifugal governor to start the charging? Is the engine to be of the stationary or variable speed type? How are the series and shunt-windings to be made? No doubt some of these questions might appear easy of solution to a skilled electrical engineer, but where is the reduction to practice? Under the strict rule governing the proof of anticipation, is it not clear that none of these sketches or explanations is sufficient?

As to the differential connections between motor and engine and the latter and dynamo the case is different. Coaster brake clutches and reducing gears are mentioned, and the drawings and explanations in Coleman's patent 516,916, referred to in C-4 (although intended for

a different purpose), are sufficient, taken together, to enable a skilled workman to so apply the clutches and gears as to obtain the differential ratios desired. I think a sufficient reduction to practice is shown. This conclusion, however, makes it evident that the first patent, covering the differential, although clearly valid as a combination, was not broadly new after the disclosures of Gibbons and Wilcox and those of the Coleman patent 516,916. Indeed, it seems obvious that, after the suggestions of claim 7 of the latter patent are in mind, it becomes simply a matter of experiment with gears and overrunning clutches to reach the result of Coleman, Kettering, or Halbleib. On this basis the Coleman patent, covering a certain form of differential, might be novel, and so might Kettering's and Halbleib's forms, if sufficiently distinguished. The date of the invention of the first patent should therefore be September 30, 1899.

The First Coleman Patent. The leading idea is the differential gear arrangement with overrunning clutches, located between motor-dynamo and engine-crank, so constructed (as the patentee says) "that the motor-dynamo drives the engine at one ratio of speed, and the engine when self-actuated drives the motor-dynamo at another and different ratio of speed." This description verbally fits the North East system, the only differences being that the patent system is not so efficient as the other, and does not clearly provide against back-firing. Without describing this differential arrangement in detail, it is enough to quote a claim in an application of Mr. Halbleib (who had to do with designing the North East system), and which was rejected on the first Coleman patent:

"Claim 5. Engine starting apparatus having in combination an electric device adapted to operate either as a generator or as a motor; means for connecting the electric device with an engine, including a one-direction clutch adapted to transmit power from the engine to the electric device when the latter operates as a generator, but to permit the electric device to overrun the engine when the electric device operates as a motor, and reduction gearing; and a second one-direction clutch for connecting the electric device when operating as a motor to actuate the engine; said second clutch being adapted to permit the engine to overrun the reduction gearing."

The gearing ratios in Coleman are 5 to 1 and 1 to 1, and in the North East machine the ratios are 29 to 1 and 1 to 2, respectively.

It is obvious that Coleman was careful not to confine his claims to any kind of power; so, of course, all similar power devices of the prior art are pertinent. With a spring as the prime mover, and differential gears and clutches, a similar device is shown by the Gibbons and Wilcox patent 581,816, of 1897; also in Strong, 597,921, January 25, 1898. I omit the English patents to Lanchester and the United States patent to Melvin, because I think Coleman's date of invention of the differential gear was prior to any of them.

Counsel for defendant in their brief say that it is not denied that, if the claims sued on in the first patent are valid, some of them would be infringed by defendant's machine. In his testimony for defendant Mr. Waterman says:

"Referring to the defendant's apparatus, the apparatus differs from the Coleman apparatus in every respect except that it employs a differential gear arrangement with overrunning clutches. That arrangement shown by Mr.

Coleman seems to me to be an extremely ingenious one, unfortunately embodied in an impractical form. In the defendant's apparatus it is embodied, if the two are held to be alike, in a practical form, in that the gears are both of the positive type, and the clutch mechanism which permits back-firing is put into one of the gears. The defendant's device is practical in other ways, where the Coleman device is impractical. Of course, to run exposed gears in that way without lubrication would be, while not inoperative at the start, impractical, in that it would soon become inoperative. The noise, also, would be prohibitive, because these gears run all the time. The gears 9 and 11, for instance, which are actually used only in starting, are nevertheless running all the time; and the prime necessity, therefore, is that they should be continuously lubricated and inclosed, and that, of course, is prohibited where the friction gear is present, because the friction gear would be inoperative in the presence of such lubrication. In all that which goes to the embodiment of the structure in a usable form the defendant's gear is different; but in that it involves the use of overrunning clutches, giving two speeds, it seems to me that it is very much the same."

While defendant's differential arrangement differs in detail and improves upon Coleman, it is substantially the same conception, and infringement should be found. The defects on the electrical side have no effect on the differential. Coleman was not the first to use a differential, but his conception was novel, and he gets a better result.

The Second Coleman Patent. This application was filed with that of the first patent, February 11, 1901, which must be taken as the true date of invention in this case. The patent supplements the first (which covers chiefly the differential connections between motor and engine), by covering electrical storage means connections between the engine and battery.

Like the other, this patent is not designed to improve the automobile. It shows no transmission clutch, nor throttle, the engine has only one speed, gauged as the proper one to store the battery, and the engine must be stopped every time the car is. The motor also starts the car every time it starts the engine. Mr. Waterman says:

"In other words, in this patent, again, Coleman did not solve the automobile problem; he did not even attack it. He entirely dodged it, by taking the stationary engine practice, namely, the use of a constant speed engine, notwithstanding the fact that in doing that he had to sacrifice all controllability of the automobile. He simply put the stationary engine charging outfit onto the automobile and used it with its well-known functions."

Change of field intensity between starting and storing is the gist of this patent. Several of the claims in suit provide:

"A field of great intensity, as a motor, to start the engine * * * and a field of less intensity, as a dynamo."

The general difference between the two patents is thus described by Mr. Bentley:

"The general purpose of the organization in this patent No. 842,827 is the same as that in patent No. 745,157, but it accomplishes that purpose electrically instead of mechanically; that is to say, Coleman aims when the electrical machine is acting as a motor to start the dynamo, to give a very large torque or turning force to the motor. In the patent No. 745,157 he did this mechanically by means of gearing, which gave the motor a large leverage over the engine shaft. In patent No. 842,827 the electrical machine at the time it acts as a motor has a special electrical organization, so that it will have a very strong field-magnet and have a greater torque electrically, corresponding to the greater mechanical torque, which it would have had by the mechanical

arrangement of patent No. 745,157. Similarly, when the machine acts as a dynamo to charge the battery, it is to have a weaker field-magnet, and therefore have less charging electro-motive force, or be a weaker machine, just as in the former patent it was made weaker by means of the gearing."

In other words, by the first patent it is immaterial what kind of power drives the motor, the important point being its speed. The work is mechanical, depending merely on the fact that the motor runs fast and the engine much slower. In the second patent the work is electrical, through the field magnet of the electric motor.

In operation the device is designed to act somewhat as follows: A battery, motor-dynamo, and electrical connections are provided. The motor-dynamo shaft is belted to the engine shaft, so as to drive the latter one-seventh as fast as the former, without change of ratio. To start the engine and car an operating lever is pushed in, to fully open the fuel valve and close the electrical circuit. Current flows from the battery to multiple windings of the electro-magnet, so as to produce an intense field and get a strong starting torque or turning effort; part of the battery current being carried to the armature. The electrical machine now acts as a motor with a strong magnetic field, and turns the engine-crank slowly until it starts, at a ratio of about seven turns of the dynamo-shaft to one of the crank-shaft. The engine speeds up and the motor continues to operate, being impelled both by the battery current and the engine, now running on its own power. About the time the engine reaches normal speed, the accompanying armature speed opens a centrifugal governor located on the opposite side of the motor dynamo from the engine shaft; the governor shifts the contacts of a switch in the electric circuit and reverses the current. As the engine is now propelling the armature, the electrical machine now begins to act as a dynamo; current flows therefrom back to the battery, thus charging it. How the weaker field is now obtained, so as to get a lower charging rate, is described by Mr. Bentley as follows:

"Now, we have the two fields working together; but in this case the dynamo is the source of energy, and it is opposed by the voltage of the battery, so that the effective voltage of the electro-motive force is a differential between that of the dynamo and that of the battery. It is only the excess of the dynamo voltage over the battery voltage which now causes the current to flow in the circuit; that gives a very much lower voltage, so that we have a very much lower voltage magnet strength for the dynamo during the time that it is working in charging the storage battery."

Mr. Waterman thinks it is nonsense. He says:

"In so far as he has arranged his electrical connections, in other words, he has done his best to defeat the object. The structure is wholly absurd. I have no hesitation in saying that it is inoperative. I want to be entirely fair about it. If there was anything else that I could think of to say in its favor, I would. It is unintelligible from an electrical point of view, and unintelligible from a mechanical point of view. The only possible way of assuming it to be operative at all is to assume that by virtue of the governor the charging rate would be small, just as it always had been small under those circumstances; it would be anything that you set the governor for. If that was what the patentee meant, I think he should say that the governor should have been set so that it would attain that result, because the statement which he makes, unless interpreted with much allowance and piecing together of things for him, is nonsense."

The patent, however, must be held to show an operative design, because an alternative operation is given in the patent (Figure 3), which seems to give a weaker field for storing. The criticism of this plan, that the operation would destroy the armature, is, I think, cleared up by Mr. Bentley, where he says this result would not occur in a small machine.

Assuming the structure to be operative, the gist of its action is that the battery energizes the motor to start the engine with a large torque; the governor reverses the current; then the motor becomes a dynamo with a weaker magnetic field, and charges the battery under those conditions.

Comparing the operation of the North East apparatus with that contemplated by the second Coleman patent, great differences appear. The starting switch, when swung to the left, contacts on two points. As it passes the first, the full force of the magnetic field is thrown in, being the shunt field added to the series field, by which a large torque is momentarily applied. This gives a slow movement to the crank-shaft, not sufficiently fast to surely start the engine. So an intermediate step is now unconsciously taken, through the swinging of the switch past the first to the second contact. The series field is now short-circuited, leaving only the shunt field in operation. This speeds up the armature, and crank-shaft geared to it, continuing on with the weaker field, but much quicker speed. When the engine starts the switch is manually released and flies back to its normal position, and the intermediate or noncharging period is reached. This stage need not be described further than to say that, when the battery voltage has been overcome by that of the electrical machine now operating as a generator, motor operation has been thrown over to generator operation, and the current reversed. The engine has overtaken the armature shaft, the latter gripped by the overrunning clutch-member, and now driven entirely by the engine, and the charging operation nearly reached.

The generator pressure, though now somewhat higher than that of the battery, is not high enough for charging, because the current from the generator towards the battery runs through a fine wire shunt resistance-coil of about 235 ohms connected with a switch called "automatic switch No. 1." This high resistance keeps the current very low, until it can be cut out. When the pressure of the generator reaches 30 volts switch No. 1 closes. The closing of the switch short-circuits the resistance, and the charging period is now reached. The engine has now reached about 500 r. p. m. (revolutions per minute), and this switch will open when that falls to 350 r. p. m. and the charging ceases.

The charging operation occurs in this way: Current flows from the generator through the series and shunt field through the battery back to the opposite side of the generator, with a weakened field strength, regulated also by another switch called "automatic switch No. 2," which need not be particularly described, except to say that it opens and closes to maintain constant charging conditions. The weakened field results from the series field and shunt field opposing each other, while in the first stage of the starting it will be remembered they were

assisting each other. This "bucking" comes from reversing the current, which now goes through the series field one way, and the shunt field in the same direction as it did before, just as a person entering his front gate from the street goes in the same direction, no matter from which way he approaches the gate.

Obviously this is a very different operation from that of the second patent, although the broad claims calling for field intensity in starting and a weaker field in charging may be read upon it. If Coleman was the first to grasp this fundamental conception of the modern starter, infringement might be found.

The Art Prior to 1901. Ten years before Coleman applied for his patents, Patton devised his electric street car shown in his patent No. 475,702, issued May 24, 1892. In his description he says:

"I utilize the dynamo as a motor for starting up and running the gas or analogous engine or motor until the speed of the engine is such as to drive the dynamo at a rate of speed sufficient to convert it into a generator. The dynamo is thus primarily supplied from a storage-battery, and as a convenient, economical, and effective arrangement I supply the dynamo from a storage-battery which in running the car is employed as an auxiliary and adjunct to the dynamo, as hereinbefore set forth. When, therefore, the dynamo and electric-motor circuits are open and the engine is at rest, the dynamo can be started up as a motor by placing the storage-battery in circuit connection with the dynamo, whereupon the dynamo will at once run as a motor and start up the engine. As soon, however, as the engine attains a proper rate of speed, it will so increase the speed of the dynamo as to convert the same into a generator, whereupon the dynamo will supply back the storage-battery, and the two will be in readiness for supplying the electric motor."

No change of field intensity was thought of in this patent. This was apparently the first electric starter, and was used in Pullman, Ill., in 1890 or 1891. Along the same line is the Washburn patent of 1895, No. 550,008, which also shows Coleman's fundamental idea. A rheostat is shown, which the patentee says is to regulate and pre-determine the amount of current delivered to the storage battery.

The notion of change of field intensities is claimed by Mr. Waterman to be present (though not expressly described) in the Greengrass English patent, No. 26,302, of 1896, because a compound wound motor is employed, which would have a field of less intensity when the current is reversed for charging, as described in the patent. Counsel for complainants point out that, as the electric machine is as large as the gas-engine, no intense field would be necessary; also that the patentee had no such idea, because he says a "shunt or compound wound motor" could be used.

In the Clubbe and Southey English patent, No. 11,053, of 1896, there is a starting and storing apparatus with a reversing switch. The motor-dynamo is to have a shunt winding, and there is no suggestion of a change of field intensities.

But in the Munson United States patent, No. 653,199, issued July 3, 1900 (applied for May 16, 1898), this notion is expressly provided for. He says he uses two sets of field windings, used separately to constitute the machine either a motor or a dynamo, and traces the motor circuit through the field windings, and the dynamo circuit through the shunt field windings. Both are clearly shown in the diagrams. It is true that Munson and Coleman were working at different

problems, and that the former does not strictly anticipate the latter; but it is certainly true that Coleman did not originate the broad, fundamental idea of the great value of the change of field intensity, which is clearly present in Washburn and Munson.

Infringement of Second Patent. Six claims are in suit, one of which follows:

7. The combination—

1. Of an engine and an electric motor connected together so that each is adapted to actuate the other.
2. Electrical storage means.
3. Means for connecting the motor as a field of great intensity as a motor, with the storage means to start the engine.
4. Means for connecting the motor with a field of less intensity, as a dynamo, with the storage means.

No doubt this claim reads on defendant's apparatus, not quite accurately as to the field of great intensity to start the motor, because defendant's field is normally cut down to the shunt field while the motor is starting. The claim reads almost equally well on Munson, and is thus much too broad. Coleman conceived that a strong field for starting and a weaker field for charging would be useful, and described two ways for getting results. Others had preceded him in the same idea, and had described the forms in which they proposed to embody it. Complainants and defendant also at a later time designed other forms for carrying out the same idea. Defendant does not use Coleman's forms, or either of them; the two are widely different. Not only this, but defendant adopted well-known forms of windings, resistances, and switches which antedated Coleman, and did this without any aid from him. These forms are quite similar to Lewis, No. 516,496, and particularly Creveling, No. 644,409, issued February 27, 1900.

Washburn had the right to claim this variation of field intensity, because he was the first to discover it; but Munson and Coleman each had the right to his own form of how the idea should be carried out, so long as they did not trespass on any valid patent rights. Coleman adopts one form, defendant another. "The latter is not a mere colorable departure from the form of Todd [Coleman], but is a substantial departure." *Duff v. Sterling Pump Co.*, 107 U. S. 636, 2 Sup. Ct. 487, 27 L. Ed. 517.

There should be a decree sustaining the claims 3, 7, 12, 17, and 20 of patent 745,157, and declaring these claims infringed; also sustaining claims 2, 3, 7, and 9 of patent No. 842,827, but declaring this patent not infringed. There should not be costs for or against either party. The decree should also provide for an injunction and accounting under the five claims of the first patent referred to.

JAMES A. VOGEL CO. v. A. WEISKITTEL & SON CO.

(District Court, D. Maryland. February 25, 1915.)

1. PATENTS ☞328—VALIDITY AND INFRINGEMENT—FLUSHING APPARATUS.

The Vogel patent, No. 737,796, for a flushing apparatus for water-closets, designed to be frost-proof, claim 4, *held* valid, but not infringed by an apparatus in which a by-pass is substituted for a ring valve, which is made an essential element of the patented combination.

2. PATENTS ☞328—VALIDITY AND INFRINGEMENT—FLUSHING APPARATUS.

The Vogel patent, No. 801,754, for a flushing apparatus for water-closets, designed to be frost-proof, claim 5, was not anticipated, discloses patentable invention, and is not invalid for prior use; also *held* infringed.

In Equity. Suit by the James A. Vogel Company against the A. Weiskittel & Son Company. On final hearing. Decree for complainant.

Gans & Haman, of Baltimore, Md., and E. Hume Talbert, Thomas A. Connolly, and Joseph B. Connolly, all of Washington, D. C., for plaintiff.

German H. H. Emory, of Baltimore, Md., and Eugene G. Mason and Charles L. Sturtevant, both of Washington, D. C., for defendant.

ROSE, District Judge. The plaintiff owns letters patent No. 737,796, September 1, 1903, and No. 801,754, October 10, 1905, both issued to Joseph A. Vogel. He is the president of the plaintiff. In this case there is no occasion to distinguish between him and it. The word "plaintiff" will be used, whichever is meant. Both patents are for flushing devices for water-closets. In each the purpose is to make a frost-proof apparatus. To attain this end both the supply and the drain pipe, as well as the valve which controls the flow of water from the latter, must be below the frost line. The device must operate automatically. If it does not, some one forgets, and the water freezes. To be commercially practicable, its parts must be few, and its mechanism simple. Its valves must be easily removable for repair or replacement. The apparatus shown in the plaintiff's first patent complies with these conditions fairly well, but that described in the second meets them so much more satisfactorily that the plaintiff has never attempted to put the former on the market. The latter has gone into extensive use. Upwards of 50,000 of them have been sold at a wholesale price of \$9.60 apiece. In Baltimore the recent introduction of a complete system of sanitary sewers has led to the installation of many closets in unheated buildings. Under such circumstances the municipal health department requires that the closet shall be frost-proof. In consequence more than 15,000 of plaintiff's devices have been sold in this city. No question is made that both here and in latitudes as far north as Nova Scotia they have worked satisfactorily. The essential difference between the device of his first and of his second patent is that in the former the valve-seat is above the valve which controls the inlet from the water main, and in the second is below it. In each a spring aids in keeping the valve normally closed—in the earlier device by push-

ing it up from below, and in the later by pushing it down from above. Slight as the change now appears to have been, it made possible the omission of a number of parts. It resulted in great simplification of the structure as a whole. When the spring and the valve were below the seat of the latter, it was difficult, and in the form of device described in the first patent impracticable, to lift the valve-rod with the valves and spring upon it out of the pipe into which it was fitted. It was necessary to take the pipe itself out. In order to make it practicable to do that, the plaintiff in his first device provided an outer or jacketing pipe, which remained permanently in the ground, and into which the inner or valve-incasing pipe was removably fitted. In his later device there was no occasion for a jacketing pipe. The valve-rod, carrying all the parts upon which repairs were at all likely to be required, could be taken out without at all disturbing the underground pipe. Earlier inventors, such as Marshall, letters patent No. 382,820, May 15, 1888, and Casler and Hastings, No. 532,530, January 15, 1895, had shown valve connections and antifreezing valves for frost-proof closets which could be similarly removed; but their devices were adapted for use only in direct-flush closets of which a pressure tank formed no part. Plaintiff sought to provide an apparatus which could be adapted to use with an after-flush as well as a direct-flush closet. His problem was thereby additionally complicated. He solved it.

[1] In this case he charges the defendant with infringing only one claim of his first patent, viz., the fourth, which reads as follows:

"In a flushing apparatus, the combination with the bowl, the tank, and a valve-chamber having communication with the bowl and the tank, of a water-pipe, leading to the valve-chamber and formed with drain-ports, a reciprocable valve-rod in the pipe, valves at the respective ends of the valve-rod, a spring to lift the rod with the valves, a ring-valve actuated by the valve-rod to open and close the drain-ports, and a pipe to carry the drain off."

To economize water and to make its full flow available for flushing, it is in all this type of apparatus desirable to close the drain whenever the supply is open. The waste-pipe in plaintiff's first devise opened out of the jacket into which the water flowed from the inner pipe through certain ports. To close these he used the outer circumference of a ring-valve, which, however, permitted the water from the main to pass freely through its open center up the inner pipe to the tank. It is this ring-valve which is made an element of the claim above quoted.

Defendant necessarily provides a means by which water from the main passes by the closed mouth of the drain. It does so, however, by the use of a by-pass, and not a ring-valve. Plaintiff says one is a well-recognized equivalent of the other. For many, doubtless for most, purposes that is so, but not necessarily for the one presently in hand. In plaintiff's earlier device a by-pass would have been more or less inconvenient. A ring-valve suited his turn perfectly. Requiring two pipes, it is desirable that the inner should be of small diameter. A ring-valve probably takes less room than a by-pass. When it can be employed to equal advantage, it is seemingly simpler and more direct in its operation. Moreover, the ring-valve element served as an additional distinction from some of the structures shown in the prior art, as, for example, the device of Casler and Hastings, *supra*.

I am persuaded that the plaintiff deliberately elected to make a ring-valve, as distinguished from a by-pass, an element of his claim in suit. As that feature is not found in defendant's device, it does not infringe.

[2] The only other claim before the court is the fifth of the patent No. 801,754. At the time application for it was made, the art to which it related was somewhat crowded. It is true there was still room for improvement. Plaintiff doubtless thought he had taken quite a step forward. Nevertheless his solicitor evidently had in mind the expediency of restricting some of his claims to the structure actually shown in the drawings. As a consequence, the claim in suit, being for a combination containing a number of elements, is rather narrow. It reads as follows:

"In a flushing apparatus, the combination of a bowl, a tank, a valve-case communicating with the bowl and tank, a supply-pipe communicating with the valve-casing and provided with an inlet and drain apertures, a rod extending through said pipe and casing and carrying inlet and flushing valves, the latter controlling the flow of water between the supply-pipe and tank and between the tank and bowl, said rod being provided with a by-pass for the flow of entering water between the inlet to the pipe and the valve-casing, a seat-lid, means operated when the seat-lid is depressed to raise the rod to open the inlet-valve and close the flush-valve, and a spring within the valve-casing adapted to force the rod downward to open the flush-valve and close the inlet-valve and normally maintain said parts in such position."

This claim cannot be read on any structure which does not contain a valve-casing communicating with both bowl and tank. Defendant says that in its device the valve-casing does not communicate with the tank. This contention is true only in the sense that in plaintiff's closet the communication between the valve-chamber and the tank is direct, and in the defendant's it is somewhat indirect. For every practical purpose the difference is immaterial. Both operate in precisely the same way to attain the same result. The language of the claim does not necessarily require that the communication shall be direct. In this respect there is no reason why the court should add restrictions which the wording of the claim does not compel. Other details in which defendant says the claim cannot be read upon its device are even more minute and unimportant. It follows that, if the claim is valid, defendant has infringed it.

Is it valid? Defendant's expert says that the first Vogel patent is closer to the claim in suit than is any other prior disclosure. I am not prepared to hold that to make the advances which the combination described in the claim in suit shows over plaintiff's earlier device did not involve invention. The same expert believes, however, that the differences between plaintiff's structure and that of the defendant are more important than to me they seem to be. He says that he regards the device shown in the Healy patent, No. 580,279, April 6, 1897, as the nearest approach to that of the defendant, which may mean that, if the distinctions between defendant's apparatus and that of plaintiff are to be regarded as immaterial, he thinks Healy's is more nearly like the plaintiff's than any other shown in the prior art. Healy has his inlet valve below its seat, and the valve is normally kept closed by the

pressure of the water, assisted by the action of a spring which, while mounted above the valve, operates to pull it upward against its seat. Healy shows a hydrant. His structure has no tank or bowl connections. Such connections had been often made before his day, and they had been very frequently adapted to automatic use, either in a continuous or an after-flush closet. Nevertheless, to adapt his device to serve the purposes of such an apparatus as that described in the claim in suit required various adjustments. They seem simple enough, now that somebody has made them. Any expert can look over the old patents and show how plaintiff's machine could be made by taking one idea from one patent, borrowing another from a second, and adapting still another suggested by a third. The difference between the expert and the inventor seems to be that the former is wise after, the latter before, the event.

Defendant says that, even so, plaintiff's patent is invalid, because the device there shown was anticipated by certain closets in use in Buffalo, N. Y., and in Walla Walla, Wash. In 1901 and 1902 the Zero Valve & Brass Manufacturing Company of Buffalo, hereinafter referred to as the Zero Company, was trying to construct a frost-proof closet. It is highly probable that it came near anticipating plaintiff's invention. It is not satisfactorily established that it did. No specimen of the actual structure it made has been preserved. Drawings and sketches show that the Zero Company was then approaching very close to plaintiff's conception. Some of the closets it constructed were put in actual use. There is some testimony that they gave satisfaction. It is significant, however, that after the experiments had been tried those who managed the Zero Company came to the conclusion that it was not possible to produce a reliable frost-proof closet for latitudes as far north as that of Buffalo. No attempt has been made to contradict plaintiff's evidence that his closets have worked well as far north as Nova Scotia. There must have been some difference between what plaintiff does and what the Zero Company did. That difference seems to measure the distance between failure and success. It is possible that the shortcomings of the Zero Company's closets were due to some purely mechanical defects, which could have been remedied without the exercise of invention. That does not seem very probable, however. The Zero Company appears to have been an experienced manufacturer of such goods and to have skilled mechanics at its command. Moreover, the defendant has not attempted to show the existence of any such remediable defects in the constructions relied on as anticipating plaintiff's device. In my view, anticipation by prior use has not been made out by that clear and convincing testimony requisite to sustain that defense.

It follows that the fifth claim of patent No. 801,754 is valid and is infringed. A decree in accordance with these conclusions may be presented.

ROBBINS V. WEBSTER.

(District Court, D. Maryland. February 11, 1915.)

PATENTS 328 — VALIDITY AND INFRINGEMENT — DAVIT-SUPPORTING MEANS FOR SHARP STERN BOATS.

The Robbins patent, No. 902,452, for davit-supporting means for sharp stern boats, discloses patentable invention and is valid; also *held* infringed.

At Law. Action by Joseph E. Robbins against Thomas B. Webster. Trial to court. Judgment for plaintiff.

Marbury, Gosnell & Williams and George Winship Taylor, all of Baltimore, Md., for plaintiff.

Whitelock, Deming & Kemp and W. Thomas Kemp, all of Baltimore, Md., for defendant.

ROSE, District Judge. This is a suit at law for the infringement of letters patent No. 902,452, issued October 27, 1908, to Joseph Edward Robbins, the plaintiff. By agreement of the parties, the case has been tried before the court sitting as a jury. The patent is for a davit-supporting means for sharp stern boats. The case has been tried upon an agreed statement of facts. No prior patents or publications have been cited against the patent in suit. No prior use of any means of carrying yawl boats or tenders upon davits at the stern of sharp stern boats is shown or claimed. It is agreed that such sharp stern boats, generally known as "bugeyes," more accurately as "buckeyes," have been used upon the waters of the Chesapeake and its tributaries for 40 years or more; that upon square stern vessels of the same class it had been common to carry a yawl boat upon davits at the stern, but that it never had been done on sharp stern boats, although many captains and owners of such vessels recognized that it would be convenient and desirable to carry their yawls there. On such boats the yawl had to be lashed on deck or towed astern. It could not be carried on davits on the side of the vessel for two reasons: First, because in that position it would interfere with the handling of the sails; second, it would often be put under water when the vessel keeled over.

The invention was made in 1908, and since then has gone into use on about one-half of the 200 bugeyes on the Chesapeake. About 50 of these have paid the license fee which the patentee has been in the habit of exacting, viz., \$25 a boat. Some 25 more have agreed to abide by the determination of this suit. The only defense is lack of invention. The device of the patent consists of two parallel wooden beams which are secured to the outside of the gunwale and extend rearwardly and upwardly. Upon their upper surfaces at their outer ends rests a transverse beam, the center of which is also supported by the gunwale. The beam is braced and secured by angle irons or wooden brackets to prevent twisting. Secured to the inside of the gunwale of the boat, adjacent to the point where the upwardly and rearwardly projecting beams are made fast, are brackets through which the davits proper

pass. Below the brackets in the deck, sockets are provided in which the lower ends of the davits are secured. For some distance the davits go directly upward, and are then bent so as to extend rearwardly and upwardly in a plane parallel to that of the two beams first mentioned, but considerably above them. The davits extend out beyond the extreme end of the vessel. Braces or brackets with their upper ends secured to the lower surface of the davits extend upwardly from the crossbeam before referred to. The principal weight of the davits rests upon these braces, and the former are thus relieved of the strain to which they would otherwise be subjected. Secured to the upper faces of the extreme outer ends of the davits is a transverse wooden beam, which further braces them and prevents their twisting. The eye-bolts which sustain the blocks to support the yawl are secured to the lower face of the outer end of the davits.

This construction seems simple. The defendant says that it involves no invention, and relies upon such cases as *Morris v. McMillin*, 112 U. S. 244, 5 Sup. Ct. 218, 28 L. Ed. 702; *Outlook Envelope Co. v. Sherman Envelope Co.*, 216 Fed. 754, 132 C. C. A. 575; *Osgood Dredge Co. v. Metropolitan Dredging Co.*, 75 Fed. 670, 21 C. C. A. 491. The patent in suit has in its favor the ordinary presumption of invention arising from its grant. The want of such a device had been long recognized. Since it was patented it has gone into fairly extensive use. In view of the fact that for more than 30 years nobody found out how to do it, I am not prepared to hold that the way of doing it was so obvious that it involved no invention.

The patent has eight claims. Some of them are phrased in quite general terms. Others are precise and minute. The record does not go fully enough into the prior art to make discrimination among them expedient. Some of the more specific claims of the patent are in my view valid. Nothing more need be here determined. It is admitted that the defendant has used the patented device on three of his boats. There is no dispute that the plaintiff's fixed license fee is \$25 per boat.

The plaintiff is therefore entitled to a verdict of \$75, and judgment for that amount may be entered thereon.

UNITED STATES v. DELAWARE, L. & W. R. CO.

(District Court, N. D. New York. February 15, 1915.)

1. CARRIERS ~~37~~—CARRIAGE OF LIVE STOCK—ACTIONS FOR PENALTIES—EVIDENCE.

Under Act June 29, 1906, c. 3594, 34 Stat. 607 (U. S. Comp. St. 1913, §§ 8651-8654), prohibiting carriers from confining animals in cars, boats, or vessels for longer than 28 consecutive hours, or 36 hours on request of the owner or person in custody of such animals, without unloading them for rest, water, and feeding for the period of at least 5 consecutive hours, where in an action for penalties it was stipulated that defendant received a shipment of horses from a connecting carrier after they had been confined without unloading them for 44½ hours, that 2½ hours elapsed thereafter before they were unloaded at defendant's nearest unloading point, that the actual running time between the point where the car was

received and such unloading point was 1 hour and 5 minutes, that the movement of the car to the unloading point was through an exceedingly busy and active railroad yard, and that the maximum temperature on that day was 40 degrees, the minimum temperature 23 degrees, and the mean temperature 32 degrees, but the probable or approximate time necessarily used up by reason of weather or switching did not appear, defendant did not sustain the burden of showing that it exercised diligence and acted with reasonable promptness in moving the car to the unloading point and commencing unloading, as the court could not find without evidence that 1 hour and 25 minutes was necessarily used in switching operations and movements, or in such movements interfered with and delayed by weather conditions.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 95, 927; Dec. Dig. ☞37.]

2. CARRIERS ☞37—CARRIAGE OF LIVE STOCK—CONFINEMENT—LIABILITY.

A railroad company, which received a shipment of horses after they had already been confined without unloading for food, water, and rest for a period in excess of that permitted by the Twenty-Eight Hour Law, was bound to exercise diligence and to act with reasonable promptness in moving the car to its nearest unloading point and in commencing the unloading.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 95, 927; Dec. Dig. ☞37.]

3. CARRIERS ☞37—CARRIAGE OF LIVE STOCK—ACTIONS FOR PENALTIES—BURDEN OF PROOF.

In an action for a penalty for the violation of the Twenty-Eight Hour Law by a railroad company, which received from a connecting carrier a shipment of horses already confined without food, water, and rest for a longer period than that permitted by the statute, the burden was upon it to show that it exercised diligence and acted with reasonable promptness in moving the car to its nearest unloading point and in commencing unloading.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 95, 927; Dec. Dig. ☞37.]

4. CARRIERS ☞37—CARRIAGE OF LIVE STOCK—CONFINEMENT—LIABILITY.

Under the Twenty-Eight Hour Law, where a carrier unloaded a shipment of horses which had been confined without food, water, and rest for 44½ hours, and after 3 hours reloaded them and forwarded them to their destination, there was a new violation of the statute, though it required only 3 hours to reach their destination and they were then immediately unloaded, and though the owners of the horses consented to such reloading, as the statute requires an unloading and rest of at least 5 hours, and the consent of the owners cannot nullify the statute.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 95, 927; Dec. Dig. ☞37.]

5. CARRIERS ☞37—CARRIAGE OF LIVE STOCK—CONFINEMENT—LIABILITY.

While it is not a defense to an action for a penalty under the Twenty-Eight Hour Law that a carrier has instructed its employés to comply strictly with such law, such instructions will bear on the amount of the penalty which the court should impose.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 95-927; Dec. Dig. ☞37.]

6. CARRIERS ☞37—CARRIAGE OF LIVE STOCK—VIOLATIONS—AMOUNT OF PENALTY.

Where, after a carrier received from a connecting carrier a shipment of horses which had been confined without food, water, and rest for 44½ hours, there was a delay of 2½ hours before they were unloaded, and after only 3 hours they were reloaded and forwarded to their destination.

☞ For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

and it did not appear that the carrier had instructed its employés to comply with the statute, though there was no intentional violation of the statute, there was such negligence as called for the imposition of more than the minimum penalty for the second violation, and a penalty of \$200 would be imposed.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 95, 927; Dec. Dig. ~~37~~.]

Action by the United States against the Delaware, Lackawanna & Western Railroad Company, to recover penalties for an alleged violation of the Twenty-Eight Hour Law, so called. Judgment for the United States.

John H. Gleason, U. S. Atty., of Albany, N. Y., and Thos. H. Dowd, Asst. U. S. Atty., of Cortland, N. Y., for the United States.

F. W. Thomson, of Syracuse, N. Y., and W. S. Jenney, of New York City, for defendant.

RAY, District Judge. [1] The facts in this have been stipulated as follows:

"1. That a car loaded with 20 horses, consigned to the order of the Winters & Prophet Canning Company, at the village of Mt. Morris, N. Y., by a consignor named Omer Van Winkle, of the city of Anderson, Ind., was delivered by the Cleveland, Cincinnati, Chicago & St. Louis Railroad Company, as initial carrier, and the Lake Shore & Michigan Southern Railway Company, as connecting carrier, on December 18, 1910, to the defendant, the Delaware, Lackawanna & Western Railroad Company, at Buffalo, N. Y.

"2. That said car was delivered as aforesaid and was received by the defendant upon a side track which is called an 'interchange track,' and which is a track set apart for the common use of both said Lake Shore & Michigan Southern Railway Company and the defendant company to accomplish the interchange of through traffic.

"3. That said car was delivered as aforesaid to the defendant company at 12:30 o'clock in the afternoon of December 18, 1910.

"4. That in making said delivery as aforesaid the Lake Shore & Michigan Southern Railway Company also delivered to the defendant company a waybill showing destination, route, etc., of said car, and also showing, by a statement indorsed thereon, that said horses had been loaded at 4 p. m., on December 16, 1910, at Anderson, Ind., and also showing, by a statement indorsed thereon, that said horses had been fed and watered in transit, between Anderson, Ind., and Buffalo, N. Y.

"5. That at the time defendant received said car as aforesaid said horses had been already confined by the Cleveland, Cincinnati, Chicago & St. Louis Railroad Company, the initial carrier thereof, and the Lake Shore & Michigan Southern Railway Company, the connecting carrier, in a railroad car without unloading them for food and water and for rest, in violation of law, for a period of 44½ hours.

"6. That the horses in said car were accompanied by the consignor thereof and were subject to the 36-hour period under said law, and the Cleveland, Cincinnati, Chicago & St. Louis Railroad Company and the Lake Shore & Michigan Southern Railway Company had exceeded said period by 8½ hours.

"7. That when delivery of said car was tendered to defendant by its connecting carrier, the Lake Shore & Michigan Southern Railway Company, upon said interchange track, under the conditions as aforesaid, there were but two courses for this defendant to follow: One course was to refuse to accept the said car, which would have compelled its said connecting carrier, the Lake Shore & Michigan Southern Railway Company, to haul said car back on its own line to its nearest stockyard for unloading said horses; and the other course was to accept the car and assume the duty of hauling said car with

reasonable promptness, under all the circumstances, to its own nearest stock-yard for unloading.

"8. That this defendant company accepted the car and thereby accepted whatever responsibilities and duties in relation thereto which, under the circumstances then present, were placed upon defendant by the federal statute regulating the transportation of live stock.

"9. That said car was delivered to the defendant at 12:30 o'clock in the afternoon of December 18, 1910, by the Lake Shore & Michigan Southern Railway Company, as connecting carrier, at the said interchange track in Buffalo, and defendant took said car from said interchange track in the afternoon of said date, and moved it to East Buffalo stockyard, defendant's nearest facility for unloading, where the horses were unloaded for food, water, and rest at 3 p. m. on December 18, 1910.

"10. That between the time of delivery of said car to the defendant company by its immediate connecting carrier on said exchange track and the time when defendant unloaded the horses as aforesaid 2½ hours elapsed.

"11. That said haul from the interchange tracks to the stockyards of the terminal, was a movement through an exceedingly busy and active railroad yard.

"12. That defendant did not carry said car from the interchange tracks in any main line movement towards destination prior to unloading. That said car was handled in a separate movement from the said interchange track to said stockyards by a yard engine.

"13. That the actual running time of the car from Buffalo to East Buffalo, exclusive of the necessary switching movement, was 1 hour and 5 minutes.

"14. That the maximum temperature on said December 18, 1910, was 40 degrees, the minimum temperature 23 degrees, and the mean temperature was 32 degrees.

"15. That no penalty has been collected from the Cleveland, Cincinnati, Chicago & St. Louis Railroad Company, nor the Lake Shore & Michigan Southern Railway Company on account of the handling of said car by them or either of them, and no action for such purpose has been brought.

"16. That after said horses had been fed, watered, and rested from 3 p. m. on December 18, 1910, until 6 p. m. on the same day, said horses were, at the request of the consignor thereof and attendant, Omer Van Winkle, reloaded and forwarded from East Buffalo on December 18, 1910, at 6:45 p. m., easterly to their destination at Mt. Morris, N. Y., a distance of 57 miles, where they arrived at 9:45 p. m. on said December 18, 1910, and they were immediately unloaded.

"17. That the defendant is a corporation organized under the laws of Pennsylvania."

This car load of horses came to the defendant, Delaware, Lackawanna & Western Railroad Company, after the horses contained therein had been confined without rest, food, or water for 8½ hours in excess of the statutory period of 36 hours, to which provision of the law it was subject, and of this fact the defendant company had knowledge. If, therefore, the defendant company had moved the car forward towards its destination without first unloading for the statutory time, it would have made itself a party to the illegal confinement, and would be liable to the penalty imposed by law. However, it did not do this, but after the lapse of 2½ hours actually unloaded the horses at its nearest point for performing this service for rest, food, and water.

From the thirteenth conceded fact it appears:

"That the actual running time of the car from Buffalo (where it was received by the defendant) to East Buffalo (which was the defendant's nearest unloading point), exclusive of the necessary switching movement, was 1 hour and 5 minutes."

How much time for the necessary switching movement or movements of this car in transferring it to the unloading point was reasonably necessary does not appear. It also is conceded and stipulated:

"That said haul from the interchange tracks (where the car was received) to the stockyards of the terminal (unloading point) was a movement through an exceedingly busy and active railroad yard."

It is also stipulated and conceded:

"That the maximum temperature on said December 18, 1910 (the day in question) was 40 degrees, the minimum temperature 23 degrees, and the mean temperature was 32 degrees."

Deducting the actual running time from the receiving point to the unloading point, 1 hour and 5 minutes, from the time unloading was delayed, we have 1 hour and 25 minutes' delay unaccounted for, except that the temperature may have had some influence and switching operations may have had, and probably did have, something to do with this delay of about 1½ hours in the unloading. However, there is neither stipulation nor evidence showing the probable or approximate time necessarily used up by reason of weather or switching. The distance from the receiving point to the unloading point is not given, but the running time is. I do not think the court can find, without evidence, that 1 hour and 25 minutes was necessarily used in switching operations and movements, or in such movements interfered with and delayed by weather conditions.

[2, 3] It was the duty of the defendant, on receiving this car of horses, in view of the violation of the statute which already had been committed by the connecting lines, to exercise diligence and act with reasonable promptness in moving the car to the unloading point and commencing the unloading. The burden of showing the exercise of such diligence, and that prompt movements, including switching operations, were made, was on this defendant. This court cannot surmise, guess, or speculate that there was a necessary delay of 1 hour and 25 minutes in switching under prevailing weather conditions. The movement of this car was through "an exceedingly busy and active railroad yard"; but this is no excuse, in the absence of some breakdown or blockade which active care and precaution could not have foreseen and provided against. This court has already, in another case, held that the movement of ordinary freight and passenger cars in such yards must give way to the movement of cars loaded with horses, cattle, etc., under such conditions. For anything that appears to the contrary, the defendant's employés took their time in moving this car load of horses, and permitted it to await its turn with cars of ordinary freight, regardless of the fact that the animals had already been confined without rest, food, or water for more than the time permitted by law. It does not appear that this fact of unlawful confinement was brought to the attention of those engaged in moving this car, or any of the cars, or that diligence and promptness in moving this car, or in unloading, was enjoined upon them. This court does not think there was a purpose to evade, on the part of the defendant, or violate, the law; but the delay was known, and, so far

as appears, willful, on the part of defendant's employés for whose acts in this matter the defendant is, of course, answerable.

[4, 5] From the sixteenth stipulated finding of fact it appears that after such horses had been unloaded and fed and watered and rested on said day from 3 p. m. to 6 p. m., a period of 3 hours only, they were at the request and with the approval of the consignor and the attendant on such horses, one Omer Van Winkle, reloaded and at 6:45 p. m. forwarded easterly to their destination at Mt. Morris, N. Y., a distance of only 57 miles from East Buffalo, where they arrived at 9:45 p. m. the same evening, and were then immediately unloaded. Here was a plain violation of the statute, a separate and distinct violation, and the request and consent of the consignor and attendant is no excuse or defense. The statute requires an unloading and a rest of at least 5 hours before reloading; and it is not a question of the extent and duration of the suffering, if any, of the horses, except as it bears on the amount of the penalty that should be imposed. By such reloading in violation of law the penalty was incurred. The consent of owners and consignors of cattle, horses, etc., cannot be permitted to nullify the plain provision of the statute. I think railroad corporations should enjoin upon their employés, and enforce, a strict compliance with the law. Here it does not affirmatively appear that the employés of defendant engaged in moving this car, or cars, similarly loaded, had received any instruction the one way or the other; but I am of opinion that defendant would have called the attention of the court to the fact, had any instruction been given. Of course, instructions in this regard, and a violation thereof by employés, would not be a defense; but it would bear on the question of amount of penalty the court should impose.

[6] I am of opinion that, while there was no intentional violation of the statute on the part of the defendant company or its officers, there was such negligence as calls on the court to impose for the second violation in reloading after 3 hours' rest only more than the minimum penalty. There will be a judgment for the plaintiff of \$100 for the first-mentioned violation, and for \$200 for the second violation, and for costs. The acts themselves were knowingly and willfully done, and hence the defendant knowingly and willfully failed to comply with the provisions of the act of June 29, 1906 (34 Stat. 607, 608, U. S. Comp. St. 1913, §§ 8651, 8652, 8653).

Judgment is directed accordingly.

BENNETT v. BANK OF COMMERCE AND TRUST CO. et al.

(District Court, N. D. Mississippi, E. D. September 22, 1914.)

No. 5.**1. COUNTIES ~~CO~~182—BONDS—PURCHASE—MEDIUM OF PAYMENT—CHECKS.**

The delivery to a county treasurer in payment of the purchase price of county bonds of a check payable to his order as treasurer, which he accepts and receipts for as money, and indorses and deposits as money in bank to his credit as such officer, constitutes a payment for the bonds.

[Ed. Note.—For other cases, see Counties, Cent. Dig. §§ 275-281, 283, 284; Dec. Dig. ~~CO~~182.]

2. COUNTIES ~~CO~~155—PAYMENTS TO COUNTY TREASURER—VALIDITY AND EFFECT—CONSTRUCTION OF STATUTE.

The provisions of Code Miss. 1906, §§ 352, 987, which require the issuance of a receipt warrant by a county auditor to authorize the payment of money into the county treasury, are for the purpose of providing a system of checks between the auditor and treasurer, as a matter of bookkeeping, and the issuance of such a warrant is not a condition precedent to the vesting of title in the county to money actually paid to the treasurer, or to the discharge of the liability of the person making the payment.

[Ed. Note.—For other cases, see Counties, Cent. Dig. §§ 223-225; Dec. Dig. ~~CO~~155.]

3. WORDS AND PHRASES—“MONEY.”

“Money,” in the modern meaning of the word, is not restricted to legal tender, coin or currency, but includes also such classes of paper as are in general use commercially as mediums of exchange.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Money.]

In Equity. Suit by W. T. Bennett, receiver, against the Bank of Commerce and Trust Company and others. On exceptions to report of Special Master W. D. Anderson respecting issues between Tishomingo County, Miss., and defendant Trust Company. Exceptions overruled, and decree for defendant.

W. J. Lamb, of Corinth, Miss., for receiver.

Lamb & Warriner, of Corinth, Miss., for Tishomingo County.

Julian C. Wilson, of Memphis, Tenn., for Bank of Commerce & Trust Co.

NILES, District Judge. From the record in this cause it appears that in November, 1911, defendant Bank of Commerce and Trust Company, of Memphis, Tenn., entered into a contract with the board of supervisors of Tishomingo county, Miss., to purchase certain county bonds, of the value of \$35,000, issued by said county for building and maintaining roads in supervisor's district No. 1, agreeing to pay therefor par and accrued interest, together with the expense of lithographing said bonds; the total amount to be paid being \$35,700.

Defendant, pursuant thereto, issued its check for the agreed purchase price, payable to the order of one W. M. Hundley, treasurer of Tishomingo county, and sent this check to J. H. Faircloth, president of the Tishomingo Banking Company, Iuka, Miss., for deliv-

ery. Faircloth delivered the check to Hundley, the treasurer, who signed the following receipt:

"I, W. M. Hundley, county treasurer of Tishomingo county, Miss., do hereby certify that I have this 15th day of December, 1911, received from the Bank of Commerce and Trust Company, Memphis, Tenn., thirty-five thousand seven hundred dollars (\$35,700), the purchase price of \$35,000 road bonds of Tishomingo county, supervisor's district No. 1, of the denomination of \$500 each, dated August 15, 1911, numbered from 1 to 70, both inclusive, and payable, bonds Nos. 1 to 14, inclusive, respectively, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, and 24 years after date, and bonds Nos. 15 to 70, inclusive, 25 years after date, bearing interest at the rate of 6 per cent. per annum, payable semi-annually on February 15th, and August 15th, being \$35,000, the par value of said bonds, and \$700, accrued interest on said bonds, to December 15, 1911, the date of delivery of said bonds to the purchaser and payment therefor."

"W. M. Hundley, County Treasurer Tishomingo County, Mississippi."

"Attest: J. H. Faircloth."

Faircloth, after obtaining this receipt and indorsement of the check by Hundley, credited the check on the books of the Tishomingo Banking Company to "Road Fund, District No. 1," and forwarded same to the Bank of Commerce and Trust Company for collection, charging the Bank of Commerce and Trust Company with the amount of the check. The defendant Bank of Commerce and Trust Company thereupon credited the Tishomingo Banking Company on its books with the \$35,700 which sum was later checked out, or practically so, by the Tishomingo Banking Company in due course of business.

Soon thereafter the Tishomingo Banking Company was placed in the hands of a receiver, having become insolvent, and the county of Tishomingo is seeking in this suit to recover from the Bank of Commerce and Trust Company the purchase price of these bonds, upon the grounds: (1) That said bonds were invalid; (2) that the bonds had not been legally paid for by the defendant Bank of Commerce and Trust Company.

At the October term, 1913, of this court, Hon. W. D. Anderson was appointed special master to take testimony and report his findings of fact and conclusions of law to the court. The special master afterwards filed his report, recommending that the bill be dismissed, to which report complainant excepts.

The question of the legality of the bonds is eliminated, as upon the trial before the special master complainant abandoned that feature of the bill and conceded the validity of the bonds. The sole question (aside from certain motions by both sides to set aside process, and suppress certain testimony, which is not considered necessary to discuss) is, to quote the special master:

"Whether the bonds involved had been legally paid for by the defendant the Bank of Commerce and Trust Company."

Complainants prefer to state the question thus:

"Did the defendant Bank of Commerce and Trust Company pay the complainant Tishomingo county for the bonds which it bought from the county."

The defendant Bank of Commerce and Trust Company states the issues presented as:

"Whether or not this proceeding amounted to payment by the Bank of Commerce and Trust Company of the purchase price of these bonds, so as to relieve the bank from further liability on their contract of purchase."

Certainly it would be a hardship for Tishomingo county to lose this large amount of money, especially when it was to be devoted to the purpose of improving its roads, which in the court's opinion adds so much to the prosperity and pleasure of a community; but this seems to be the situation:

The county legally issued the bonds, the validity of which is unquestioned. The purchaser issued his check for the purchase price, payable to the county treasurer, taking his receipt therefor. The check was properly indorsed by the treasurer in his official capacity, and the proceeds placed to the credit of "Road Fund, District No. 1," in the Tishomingo Banking Company, of Iuka, where the treasurer kept his official account, and through which bank his business as treasurer was transacted.

The treasurer, in his examination before the special master, on page 51 of the record, testified as follows:

"Q. Where did you keep your money as treasurer? A. In Tishomingo Banking Company.

"Q. That is the only bank in the county? A. Yes, sir; at that time. Yes; I reckon it was during all my term.

"Q. Did they pay your warrants for you? A. Yes, sir.

"Q. Who would make out deposit slips when you deposited money? A. It was done by some one in the bank; don't know whether it was the cashier or not.

"Q. Whichever one was handy would do it? A. Yes, sir.

"Q. You deposited all the county funds you had there? A. Yes.

"Q. How long had you been doing that? A. During the term of four years.

"Q. When you would get checks on different places, what would you do with them? A. Turn them in there.

"Q. Deposit them in there, and have them collect for you? A. Yes, sir; they transacted all my financial matters.

* * * * *

"Q. And all checks you had you deposited there, and they would collect them for you; you would indorse the check? A. Yes, sir. * * *

It seems beyond question that in this instance the treasurer indorsed the check, as was his custom, as the Tishomingo Banking Company (which institution was only another name for Faircloth, its presiding genius), as testified by the treasurer, "transacted all my financial matters." It is further clear that the treasurer signed the receipt accompanying the check.

It is admitted that Faircloth acted for defendant in the negotiations leading up to the purchase of the bonds, and it is also a fact that defendant sent its check for the payment of the bonds to Faircloth. The special master finds, under the facts in the case, that, while Faircloth was the agent of defendant in the sale and purchase of these bonds, "the Tishomingo Banking Company acted as the agent of the defendant, to the extent of effecting a delivery of the bonds and making payment therefor, but it is not true that the agency of the Tishomingo Banking Company extended beyond this."

Complainant earnestly contends that the Tishomingo Banking Company was the agent at all times pertaining to this matter of the Bank of Commerce and Trust Company, and because of the defendant having selected the Tishomingo Banking Company as its agent it was the cause of this trouble, and therefore ought to sustain the loss, and

the defendant is estopped because of its acts and conduct in dealing with the Tishomingo Banking Company in disputing this fact, both as a matter of fact and as a matter of law, between it and the complainant in this case.

The court has carefully considered the record herein, realizing that by the unfortunate failure and insolvency of the Tishomingo Banking Company a serious loss will necessarily follow, either to the people of Tishomingo county, or to the defendant, which has parted with its money. It is considered by the court that, aside from the question of agency, the issue here presented is whether such a payment by defendant bank is one that relieves it of further liability on its purchase contract. Was it lawful in the first place for the county treasurer to accept other than coin or other legal tender money of the United States for these bonds?

[1] Commercial usage in the everyday safe and convenient practice of treating checks as money is almost universal, and the legality of such a payment in the instant case is well settled and especially binding upon this court, upon the authority of *Montgomery County v. Cochran*, 121 Fed. 17, 57 C. C. A. 261. Quoting from the opinion of the court in the authority just cited (*Montgomery County v. Cochran*):

"Was it the intention of the Legislature that no transactions with the board of revenue and the purchaser of the bonds and the treasurer should be permitted, except by the use of coin or bank bills? The statute must be construed in the light of commercial usage and common knowledge of business transactions. The word 'money,' when used in this statute, does not mean only coin and bank bills. 'Such a construction,' said Lyon, C. J., in *State v. McFetridge*, 84 Wis. 473, 515, 54 N. W. 1, 10, 998, 20 L. R. A. 223, 'would be extremely technical, and is, we think, uncalled for. "Money" is a generic term, and may mean, not only legal tender coin and currency, but also any other circulating medium, or any instruments or tokens in general use in the commercial world as the representatives of value.' And it was held that a certificate of deposit was money within the meaning of a statute. In *Taylor v. Robinson* (D. C.) 34 Fed. 681, Judge McCormick said: 'The term "money" is used to designate the whole volume of the medium of exchange recognized by the custom of merchants and the laws of the country, just as the term "land" designates all real estate.' In *Allibone v. Ames*, 9 S. D. 74, 81, 68 N. W. 165, 167, 33 L. R. A. 585, the court applies this definition to a certificate of deposit: 'When the certificate of deposit was delivered to plaintiff, and accepted by him, it had all the characteristics of money. Its return to the bank must be regarded as a deposit of that amount of currency. It was, the parties so treating it, precisely the same as if the treasurer had received the coin and again deposited it. To say that if a person deposits a draft or certificate of deposit with a bank, and receives credit for the amount of it, he does not make a deposit of that amount, is simply absurd, in view of the modern methods of transacting business.' And there are other authorities to the same effect, showing that the words 'funds or money' and 'proceeds of sale,' as used in the act, should not be confined in their meaning to coin and bank bills. *State v. Krug*, 12 Wash. 288, 41 Pac. 126; *Byrom v. Brandreth*, 16 L. R. Eq. Cases, 475; *State v. Hill*, 47 Neb. 456, 66 N. W. 541; *People v. McKinney*, 10 Mich. 55; *Bork v. People*, 16 Hun, 476. The use of checks, certificates of deposit, and other commercial instruments is so universal and so essential in large transactions that we cannot assume that the Legislature of Alabama meant to forbid their use in the negotiation and sale of the bonds. If Josiah Morris & Co. had had the coin on hand to pay for the bonds in question, the transaction would have been conducted by the use of checks or certificates of deposit, and we think without any violation of the terms of the statute. If silver coin had been in bank as the basis of the transaction, its weight (about 6,546 pounds) would have made the use of

checks or certificates necessary to conveniently complete the transaction. We think, therefore, that checks or certificates of deposit received in good faith by the board of revenue, and delivered to the treasurer, or delivered by direction of the board of revenue to the treasurer, would be 'funds or money,' or the 'proceeds of sale' of the bonds, in the hands of the treasurer. The check for the price of the bonds in the hands of the treasurer, he having received for the same as money, was 'funds or money' in his hands, within the meaning of the statute. It was not his duty to keep the check, but to have it cashed, and to keep the coin or notes received on the check. In doing this, he should conform to the law of the state, and keep the coin or notes under his actual personal control, as, for example, in his own safe, or on special deposit. It is conceded to be the settled law in Alabama that, if the check was money in the treasurer's hands, it was a conversion of it to make a general deposit of it in a bank. *Alston v. State*, 92 Ala. 124, 9 South. 732, 13 L. R. A. 659. If there was reluctance in applying this rule generally to a deposit in a solvent bank, it should be applied without question under the circumstances under which the treasurer deposited this fund. If the check was funds or money, within the meaning of the statute, that would seem conclusive. But if it was necessary that the check be collected before it became money, it is urged with great force that the effect of the deposit of the check to the credit of the treasurer was to collect the check. When the check was presented at the bank and accepted by crediting the amount of it to the treasurer, the effect in law of the transaction was the same as if the amount of the check had been handed to the treasurer and by him returned to the bank. *National Bank v. Burkhardt*, 100 U. S. 689, 25 L. Ed. 766; *City National Bank v. Burns*, 68 Ala. 267, 44 Am. Rep. 138; *Zane on Banks & Banking*, par. 133."

[2] Next will be considered the duty of this treasurer in receiving public money. Sections 352 and 987 of the Annotated Code of Mississippi of 1906 provide:

"Sec. 352. To Issue Receipt Warrants.—It shall be the duty of the county auditor to issue his receipt warrant to any person desiring to pay money into the county treasury, specifying the amount and the particular account on which such payment is to be made, and the fund to which it belongs; but a receipt warrant shall not be credited to the person making such payment, nor be charged to the county treasurer, until they shall be produced and filed with such auditor a duplicate receipt, signed by the treasurer, for the sum specified in such receipt warrant."

"Sec. 987. Money Received on Receipt Warrants Only.—It shall not be lawful for the county treasurer to receive any money except on the receipt warrant of the clerk of the board of supervisors; and when any payment shall be made into the treasury in pursuance of any receipt warrant, the treasurer shall give to the person making payment duplicate receipts, specifying the warrant on which the payment is made, one of which shall be filed with such clerk."

No such receipt warrant was issued in the instant case, and because of the failure to comply with the statute complainant contends that the payment for these bonds was in fact no payment.

Defendant contends that the Code provision quoted requiring the receipt warrant was a statutory method of bookkeeping in the handling of county funds, and is not an essential condition precedent to the vesting of title in the county. The court is of opinion that this contention of defendant is well taken and supported by the authorities, among them *Heppe v. Johnson*, 73 Cal. 265, 14 Pac. 833; *Shanklin v. Madison County*, 21 Ohio St. 575. In the case of *Heppe v. Johnson*, *supra*, the Supreme Court of California held:

"It is further contended that the treasurer was not authorized to receive the money from the clerk, because it was not accompanied by the certificate of the auditor, as provided in sections 4145 and 4217 of the Political Code. On

the other hand, it is claimed for the respondent that these sections have no application to special deposits made by the clerk of the court of record. However this may be, it is clear that the money was deposited and receipted for as required by the acts of 1864. Bellmer received it without question, and held it during his term of office, and then turned it over to his successor. It was evidently his duty to so turn it over, and we can perceive of no irregularity in the manner of his doing it. Now, if it be conceded that Bellmer received the money irregularly, does it follow that Callahan, after he received it, could embezzle it, without any official responsibility? Suppose Bellmer had received from the tax collector public funds without the certificate and discharge required by the Political Code, and had regularly turned the money over to Callahan, could Callahan have embezzled that money and not be responsible for it on his official bond? We think not. It seems to us that when Callahan received the money in question, whatever irregularities there may have been in making the deposit with Bellmer, he received it in his official capacity, and was bound to pay it out, on the order of the court, or to turn it over to his successor in office." Heppe v. Johnson, 73 Cal. 265, 14 Pac. 833.

We quote from *Shanklin v. Madison County*, *supra*, construing a statute of Ohio requiring the issuance of a receipt warrant by the county auditor in order to authorize payment of money into the county treasury:

"The warrant of the county auditor required by statute * * * is not an essential condition precedent to the vesting of title in the county in any case. In devising a system of checks on the treasurer, the Legislature deemed the auditor's warrant an efficient instrumental for that purpose, by the registry of which in the books of his office the aggregate liability of the treasurer might be shown. * * * It was competent for Putman to have restored in money to the vaults of the treasury the \$5,000 embezzled. Can it be seriously insisted that, without the previous warrant of the auditor, the title to the money so refunded would not have vested in the county? We cannot understand why it should not." *Shanklin v. Madison County*, 21 Ohio St. 575.

Upon the facts as disclosed by this record, there can be no question but that Hundley indorsed the check of defendant for the purchase price of the bonds, and receipted for same, and delivered the check to the president of the bank for deposit to his official credit, as was his invariable custom. This, together with the entries as detailed on the books of the Tishomingo Banking Company and defendant, constitute a legal payment, in spite of the fact that no receipt warrant was issued. That the treasurer was lax in his duty, or was imposed upon under the facts, should not work a hardship on this defendant; nor should he be permitted to impeach his own official acts.

Entertaining these views, the court agrees with the special master that a decree should enter dismissing complainant's bill.

In re COHN et al.

(District Court, E. D. Pennsylvania. February 24, 1915.)

No. 5312.

1. BANKRUPTCY ~~89~~—INVOLUNTARY PROCEEDINGS—ANSWER TO PETITION—SUFFICIENCY.

Where an involuntary petition in bankruptcy conformed to the statute with respect to the number of petitioning creditors, and the amounts of their claims, and alleged as the ground upon which an adjudication was prayed that the alleged bankrupts had acknowledged in writing their inability to pay their debts and their willingness to be adjudged bankrupts, an answer alleging that the proceedings were collusive, that the petition had been filed for the purpose of defrauding creditors, that the alleged bankrupts had been negotiating with their creditors for a settlement, and while they were admittedly insolvent had bought largely of new stock, and that the petitioning creditors would withdraw the proceedings when a settlement was effected, set forth no grounds for denying an adjudication, as it neither denied the salient facts set forth in the petition, nor showed cause against an adjudication.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 120-122; Dec. Dig. ~~89~~.]

2. BANKRUPTCY ~~89~~—INVOLUNTARY PROCEEDINGS—NECESSITY OF ANSWER TO PREVENT ADJUDICATION.

When a petition in bankruptcy sets forth the necessary jurisdictional facts, and is in conformity with the statute, an adjudication must follow, unless an answer is interposed.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 120-122; Dec. Dig. ~~89~~.]

3. BANKRUPTCY ~~89~~—INVOLUNTARY PROCEEDINGS—PERSONS ENTITLED TO OPPOSE PETITION.

Creditors opposed to an adjudication in bankruptcy may file an answer to an involuntary petition.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 120-122; Dec. Dig. ~~89~~.]

4. BANKRUPTCY ~~95~~—INVOLUNTARY PROCEEDINGS—HEARING—CONCLUSIVE-NESS OF ANSWER.

When a hearing is had upon an involuntary petition in bankruptcy and an answer thereto, the averments of the answer must be taken as true.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 132, 140, 145; Dec. Dig. ~~95~~.]

5. BANKRUPTCY ~~65~~—INVOLUNTARY PROCEEDINGS—DEFENSES.

Creditors of alleged bankrupts could not oppose an adjudication on the ground that the bankrupts were solvent, that they were preparing to conceal their assets, or that false claims of indebtedness would be made, as they were not harmed by the bankrupts' solvency, while the remedy for the other matters was the appointment of a receiver, who would unearth assets intended to be concealed, and the exactation of proof of all claims.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 54, 121; Dec. Dig. ~~65~~.]

In Bankruptcy. In the matter of Alexander B. Cohn and others, bankrupts. On hearing on the petition and answer. Adjudication ordered.

Alfred Aarons, of Philadelphia, Pa., for petitioning creditors.
George F. Deiser, of Philadelphia, Pa., for objecting creditors.

DICKINSON, District Judge. [1] This is an involuntary petition in bankruptcy. The petition conforms to the act of Congress with respect to the number of the petitioning creditors and the amount of the claims of each and all. The ground upon which the prayer for the adjudication proceeds is the acknowledgment in writing by the alleged bankrupts of their inability to pay their debts and their willingness to be adjudged bankrupts.

An answer has been filed by certain creditors. The answer is rested upon the general averment upon information and belief that the proceedings are "collusive," and that the petition has been filed "for the purpose of defrauding creditors of the alleged bankrupts." These general averments are followed by the more specific ones that for some weeks prior to the filing of the petition the alleged bankrupts had admitted their insolvency and were negotiating with their creditors for a settlement, and when admittedly insolvent, and at the very time the negotiations for a compromise settlement with their creditors were pending they had bought largely of new stock. A further averment is made, on the like basis of information and belief, that the petitioners will withdraw the proceedings when a settlement is effected. To these are added averments that some of the petitioning creditors have set forth the amounts of their claims at sums less than is really due them. The usual prayer for the dismissal of the proceeding follows.

[2-4] It must be obvious that, when a petition in bankruptcy sets forth the necessary jurisdictional facts and is in conformity with the provisions of the act of Congress, an adjudication must follow the petition unless an answer is interposed. It is clear that such answer may be filed by creditors, and that, when the hearing is had upon the petition and answer, the averments of the answer must be taken as true. It must likewise be conceded, however, that an answer is not an obstacle to the adjudication, unless it is so far responsive as to raise an issue of fact or of law, to be passed upon in some one of the modes provided in the practice in bankruptcy for the determination of such questions. The answer in this case is in no sense and in no respect responsive to the averments of the petition. There is no denial of the salient facts which the petition sets forth, and nothing set up by way of answer which can be called a showing of cause against the adjudication. It follows, therefore, that an adjudication must be ordered. These propositions are so clear that nothing need be added by way of their vindication.

The earnestness and zeal of counsel for the responding creditors does, however, call for a consideration of the cases to which our attention has been directed. As was to be confidently expected, we find nothing in these cases in conflict with the premises above cited. In point of fact the cases confirm and support the conclusions reached.

Mattoon Bank v. Bank, 102 Fed. 728, 42 C. C. A. 1, is authority for the two propositions that creditors may file an answer and that in a hearing upon petition and answer the averments of the answer must be taken as verity.

In re Moench & Sons Co. (D. C.) 123 Fed. 977, extends the answering right of a creditor to one whose claim will be avoided or affected

by the adjudication, although not having such a claim as itself is provable in the bankruptcy proceedings.

In re Duplex Radiator Co. (D. C.) 142 Fed. 906, might safely be relied upon as authority in favor of the adjudication and against the respondent creditors. It also rules two things. One is that an answer asserting the solvency of the alleged bankrupt is no answer at all to a petition which bases the adjudication, not upon the fact of insolvency, but upon the other fact of an admission in writing by the alleged bankrupt of his inability to pay his debts and his willingness to be adjudged a bankrupt. The other is that the fact that the petitioning creditors joined in and filed the petition at the request of the alleged bankrupt does not prevent the adjudication prayed for.

[5] Although the objections to the adjudication here do not very definitely or clearly appear, it is plain that the responding creditors are either not affected by the things of which they complain or they have mistaken their remedy. If the charge that the proceedings are collusive means that the alleged bankrupts are not in fact insolvent, this does no harm to the creditors, for the reason that if the bankrupts are solvent the creditors will receive payment of their claims in full, and in consequence are in no position to object to the proceedings. If the implication is that the alleged bankrupts are preparing to conceal their assets, the remedy of creditors is not an objection to the adjudication, but the appointment of a receiver, who will unearth the assets intended to be concealed. If the danger to be averted is that false claims of indebtedness will be made in the distribution of the assets of the bankrupt, here again the creditors have mistaken their proper remedy, because it clearly lies along the line of exacting proofs of all claims, so that the distribution of the assets will be confined to the real creditors of the bankrupt.

The adjudication is accordingly ordered.

DAVIS v. CASSELS et al.

(District Court, N. D. Alabama, M. D. January 23, 1915.)

No. 7.

1. FRAUDULENT CONVEYANCES \Leftrightarrow 99—SETTING ASIDE—EXTENT OF RELIEF.

Where all of the recited consideration for a deed from a debtor to his wife, except \$200, was paid the debtor by his wife's father, the fact that the \$200 recited to have been so paid was the money of the debtor did not render the conveyance fraudulent as to creditors in its entirety, but only gave them an interest to the extent of the \$200.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. §§ 323, 327, 328; Dec. Dig. \Leftrightarrow 99.]

2. FRAUDULENT CONVEYANCES \Leftrightarrow 208—VOLUNTARY CONVEYANCE—VALIDITY AS TO FUTURE CREDITORS.

It was competent for a husband to give an interest in real estate to his wife as against future creditors.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. §§ 631, 633; Dec. Dig. \Leftrightarrow 208.]

3. FRAUDULENT CONVEYANCES ☞208—HUSBAND AND WIFE—GIFTS—LIABILITY FOR HUSBAND'S DEBTS.

A gift of a husband's interest in real property to his wife being valid as against future creditors, the consideration for a subsequent conveyance to a third party, in which the husband and wife joined, belonged to the wife without regard to the time it was actually paid or whether it was actually paid to the husband or the wife, and the money paid was not subject to the husband's debts.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. §§ 631, 633; Dec. Dig. ☞208.]

4. FRAUDULENT CONVEYANCES ☞183—FAILURE TO RECORD DEED—IMPROVEMENTS BY GRANTEE.

Where a wife's money was used to build a house upon a lot, title to which was in her only by virtue of an unrecorded deed, fraudulent as to creditors because not recorded, and because of a fraudulent concealment of the change of ownership, the improvements placed on the lot by the wife, if she participated in the fraud, would follow the fate of the lot and be subject to any debts of the husband created upon the faith of his ownership of the property.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. §§ 578-582, 695; Dec. Dig. ☞183.]

5. FRAUDULENT CONVEYANCES ☞301—CONCEALING CHANGE OF OWNERSHIP—FRAUDULENT INTENT—EVIDENCE.

Evidence held to show that conveyances by a husband to his wife were withheld from record and concealed, to avoid impairing the husband's credit, so as to be void as to creditors who gave the husband credit on the faith of his apparent continued ownership.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. §§ 904-907; Dec. Dig. ☞301.]

6. FRAUDULENT CONVEYANCES ☞301—INTENT OF GRANTEE—SUFFICIENCY OF EVIDENCE.

Where a wife's part in transactions whereby her husband conveyed land to her, withholding the deeds from record to prevent an impairment of his credit, consisted of the passive receipt of the conveyances, slight evidence of participation or knowledge of the husband's fraudulent purpose would suffice to charge her with fraud sufficient to invalidate the conveyances.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. §§ 904-907; Dec. Dig. ☞301.]

7. FRAUDULENT CONVEYANCES ☞154—CONCEALMENT OF CHANGE OF OWNERSHIP.

Where the withholding from record of deeds from a husband to his wife for considerable periods of time, during which he contracted debts, was accompanied by other badges of fraud, such as his retention of possession, exercise of dominion and appropriation of benefits, and representations by word or act of his continued ownership, and these elements of fraudulent concealment continued after the deeds were recorded, the recording of the deeds did not end the fraudulent scheme, and the deeds were fraudulent as to creditors thereafter extending credit to the husband on the faith of his ownership, without actual knowledge of the deeds.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. §§ 485-492; Dec. Dig. ☞154.]

8. FRAUDULENT CONVEYANCES ☞154—NECESSITY OF ACTUAL INJURY TO CREDITORS.

In a suit to set aside conveyances from a husband to his wife on the ground that because they were withheld from record, and the change of ownership was concealed, they were fraudulent as to creditors extending credit to the husband on the faith of his ownership, it was not incum-

☞ For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

bent on plaintiff to show that the complaining creditors were in fact injured; it being sufficient that it was probable that they might have been injured.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. §§ 485-492; Dec. Dig. ☞154.]

9. FRAUDULENT CONVEYANCES ☞154—CONCEALMENT OF CHANGE OF OWNERSHIP.

The withholding from record of deeds from a husband to his wife and the concealment of the change of ownership did not render the deeds fraudulent as to a creditor who became such prior to the execution of the deeds, and who neither remitted any effort or remedy nor released any lien or security because of any misapprehension as to the state of the title.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. §§ 485-492; Dec. Dig. ☞154.]

In Equity. Suit by H. G. Davis, trustee in bankruptcy of T. M. Cassels, against T. M. Cassels and others. Decree for plaintiff.

Goodhue & Brindley, Hood & Murphree, and W. J. Boykin, all of Gadsden, Ala., for plaintiff.

W. P. Acker, of Anniston, Ala., and W. J. Martin, of Gadsden, Ala., for defendants.

GRUBB, District Judge. This is a bill in equity, filed by the plaintiff as trustee in bankruptcy of the defendant Thomas M. Cassels to set aside certain conveyances made by him to the defendant Ida B. Cassels, his wife, mediately or immediately, and to divest out of her the title of certain property, which was conveyed by third persons to the said Ida B. Cassels, and which it is alleged was paid for by her husband for her, for the purpose of subjecting it to the claims of the creditors of the bankrupt.

The plaintiff contends: (1) That the conveyances were voluntary and made when the bankrupt was indebted, and are therefore constructively fraudulent as to existing creditors, and that the trustee represents that class of creditors; and (2) that the conveyances were fraudulently concealed with actual intent to defraud creditors, an intent participated in by both the bankrupt and his wife, and for that reason void as to existing and subsequent creditors.

There are three separate transactions assailed by the trustee, which may be designated as: (1) The two mill lots; (2) the Turrentine avenue home place; and (3) the lots and house on Harralson avenue and the 22 vacant lots in Richardson's addition. The circumstances attending each of these transactions are in some respects different. Each requires separate treatment in some respects because of that fact. However, the plaintiff contends that the evidence shows a general scheme to defraud creditors which infected, among others, each and all of the transactions mentioned.

[1] As I see it, the plaintiff has not made out a case as to any one of the assailed transactions, upon the theory that the conveyances were voluntary and voidable as to existing creditors and assailable for that reason by the trustee as the representative of existing creditors. From the evidence, as I construe it, no one of the conveyances was made

after the debts now represented by the trustee were incurred, unless it be the conveyance of the home place as to the debt of Strater Bros. It appears that their claim had accrued but had not been reduced to judgment prior to October 24, 1906, the date of the bankrupt's conveyance of the home place to his wife. I think, however, that the preponderance of the evidence shows that there was a consideration moving to the bankrupt from his wife's father to all but possibly \$200 of that recited to have been actually paid. The fact, if it be a fact, that the \$200 recited to have been paid in money was the money of the bankrupt and not that of his wife, should not operate, as I see it, to destroy the conveyance in its entirety, but only to give the trustee an interest to that extent in the transferred property.

[2-4] With reference to the \$2,600 invested in improvements upon the Harralson avenue lot, it seems to me that this money consisted of the \$500 paid the defendant Ida B. Cassels by her father-in-law for purchasing a heating plant and the \$2,100 which the defendant T. M. Cassels received after the death of his father from him and deposited to his credit with Cassels Mills in November, 1908. On April 12, 1905, T. M. Cassels conveyed to Ida B. Cassels his interest in real estate in Georgia, previously deeded to him and his brothers and sisters jointly by his father. At this date, as I construe the evidence, none of the debts of T. M. Cassels, outstanding when the petition in bankruptcy was filed, had been created. It was competent for him then to give this interest to his wife as against future creditors. On December 3, 1906, Ida B. and T. M. Cassels conveyed the same interest to Mrs. W. B. Pope for a recited consideration of \$2,600. Both deeds were promptly recorded in Georgia. In view of this recital in the recorded deed, it seems to me the fair inference is that the \$2,600 subsequently paid to T. M. Cassels or Ida B. Cassels by L. M. Cassels represented the recited consideration of \$2,600 in the deed to Mrs. Pope from Ida B. and T. M. Cassels, which the evidence tends to show was agreed to be paid by L. M. Cassels for the transfer of the interest in the Georgia property by Ida B. and T. M. Cassels to Mrs. Pope. If this interest was the property of Ida B. Cassels, as against her creditors, through the voluntary conveyance of it to her by her husband when he was not indebted, the consideration for the transfer of it to Mrs. Pope would belong to Ida B. Cassels rather than her husband, without regard to the time it was actually paid or whether it was actually paid by L. M. Cassels to Ida B. or T. M. Cassels, and would not be subject to the debts of T. M. Cassels. However, it appears from the evidence that the money was used to build a house upon the Harralson avenue lot, title to which was in Ida B. Cassels only by virtue of an unrecorded deed from T. M. Cassels. If this deed was fraudulent as to creditors of T. M. Cassels because not recorded and because of a fraudulent concealment of the change of ownership, the improvements placed on the lot by Ida B. Cassels, if she participated in the fraud, would follow the fate of the lot, and so be subject to any debts of her husband which were created upon the faith of his ownership of the houses and lots, caused by the failure to record the wife's deed to the lots.

The other contention of the plaintiff is that the deeds were withheld from record by the defendants for the purpose of giving an apparent credit to the bankrupt, to which he would not have been entitled if they had been recorded, and that there was a fraudulent concealment of this change of ownership; that the defendant Ida B. Cassels participated in the fraudulent plan; and that the conveyances affected were therefore fraudulent in fact and void as to existing and subsequent creditors, which classes the trustee in bankruptcy represented.

[5] It is shown that the conveyances, which concerned the transferred property situated in Alabama, were in fact withheld from record for periods of varying length. This, of itself, would not suffice to show fraud. It is essential that it also appear to have been done with the purpose of falsely sustaining the credit of the grantor, and that this purpose be that of the grantee as well as that of the grantor. It is a general principle that actual fraud is never presumed and that the burden of showing it is on the party asserting it—a principle, however, probably of less force, if applicable at all, in cases where the transactions are between husband and wife to the detriment of creditors, as is true of this case. The defendants deny that there was any purpose on the part of either of them to fraudulently conceal the change of ownership in withholding the deeds from record, and that neither of them knew, at least until the defendant Ida B. Cassels was otherwise informed by her brother, of the necessity for record. The record, however, shows that the deed from the defendants to Mrs. Pope for the interest in the Georgia property was promptly recorded in Georgia, and that the deeds to the mill lots were recorded in April, 1911, shortly after the contracts between the defendant T. M. Cassels and Eddins and Hunsaker were entered into. It also shows that there was no visible change of possession of any of the real estate in question from the bankrupt to his wife, accompanying any of the conveyances by him to her; that he took and continued in possession of the real estate, conveyed by third persons to his wife; that he exercised dominion over all the tracts, treating them as his own, collecting the rents and appropriating them to his own use, and using funds from the mill business he was conducting for their improvement. The evidence also tends to show that the bankrupt at varying times represented the property to be his, either expressly or by implication, and that no claim was ever made to it by his wife, and that, until the record of the deeds, no one but the bankrupt and his relations and stenographer were made acquainted with the transfers. The record shows that the bankrupt at the time of his marriage and thereafter owned valuable real estate, and that his wife was without means, and acquired thereafter none except through him, and that at the time the petition in bankruptcy was filed the situation was reversed, the bankrupt being without property and largely indebted, and his wife being the owner of the valuable real estate, which had once been his, or which funds of his had paid for. The evidence shows, also, that the defendant T. M. Cassels' salary was at his instance by the corporation, the Cassels Mills, made payable in advance to avoid its subjection by garnishment to his debts; that his stock in Cassels Mills,

including 10 shares surrendered by Eddins, was put up by him to secure a supposed indebtedness to his brother C. G. Cassels; and that this left him at the time the petition was filed with no property subject to the payment of his debts.

[6] The conclusion fairly deducible from the evidence, most favorably construed for the defendants, is that the deeds were withheld from record with an undefined purpose on the part of the defendants to profit by the withholding, if future exigencies demanded, by preventing the impairment of credit that would necessarily result from placing on record conveyances that would have shown that all of the defendant T. M. Cassels' real estate was in the name of his wife; that the exigency did arise in connection with the said defendant's dealings with Eddins and Hunsaker and others, was availed of by the said defendant, and, after having been so availed of, the deeds to the various lots were placed on record. The fact that title to exclusively business property was taken in the name of the wife, the mill itself and the business connected with it remaining the property of the husband, the fact that title was in the wife not being disclosed by the record or otherwise, in connection with the facts heretofore stated, and others not mentioned but shown by the evidence, seem to admit of no other rational conclusion than that the purpose was to conceal the status of the ownership from prospective creditors of the bankrupt to aid his credit. It may be that the evidence is not full as to the participation of the defendant Ida B. Cassels in this purpose, but this is because the defendant Ida B. Cassels had little or no part in the three transactions through which title was invested in her. If the wife's part in the transactions is the mere passive receiving of the conveyances, it is not to be expected that her active participation in the fraud could be shown. In that event, her husband acts not only as grantor in the delivery of the conveyance, but, largely, as agent for the wife in accepting the conveyance, and his knowledge of his own fraudulent purpose in the transaction should be charged to her. If the husband executed a deed to his wife, without her knowledge and with fraudulent intent, and made delivery by placing it on record for her, it is clear that his knowledge would be imputed to her, since her acceptance was through him only. While this case may not be that strong in its facts, the part of the defendant Ida B. Cassels in the various transactions assailed by the plaintiff was negative and passive, and slight evidence of participation or knowledge would for that reason suffice to charge her.

Without entering upon any extended discussion of the facts, my conclusion is that the evidence satisfactorily shows that the original withholding of the deeds from record and the concealment of the changed status of ownership was with the general purpose of avoiding the impairment of the bankrupt's credit, inevitable from the contrary course, in anticipation of future need; that the necessity thereafter arose, and the withholding and concealment was continued and availed of; that it was only after it had been utilized in the Eddins and Hunsaker transactions (those with Strater Bros. and the Southern Grocery Company were not of sufficient importance to furnish a motive), and had thereby served its purpose, that the deeds were

recorded; and that the defendant Ida B. Cassels is chargeable with knowledge of the bankrupt's intent and purpose. *The Distilled Spirits.* 11 Wall. 356, 20 L. Ed. 167; *McIntire v. Pryor*, 173 U. S. 3, 8, 19 Sup. Ct. 352, 43 L. Ed. 606; 9 Encyc. Sup. Co., 693 note.

This conclusion is supported by both the Alabama and federal authorities.

In the case of *Seals v. Robinson*, 75 Ala. 363, 372, 373, the Supreme Court of Alabama said:

"Another circumstance it is of importance to consider. More than six months passed after the execution of the conveyance before its registration. Whatever may have been the general circumstances of the donor at the time of the execution of the conveyance, and upon this point the evidence is not so clear and satisfactory as it could probably have been made, the fact is that, when the conveyance was delivered to the judge of probate for registration, he was insolvent, and, in but little more than a month thereafter, made a general assignment for the benefit of creditors. During the interval between the execution and registration of the conveyance, he continued in possession, claiming ownership of the property, vouching the ownership as entitling him to credit, and upon the faith of it obtained credit. The omission to register the conveyance is but a fact or circumstance indicative of fraud, and is open to explanation, which, if just and reasonable, would neutralize all unfavorable inferences that may be drawn from it. The only explanation now offered is that the donee was ignorant of the necessity for registration; ignorant that the law required registration to protect her from the claims of subsequent purchasers from the husband, or from the claims of judgment creditors. This is ignorance of law, which cannot be accepted as explanatory of the omission. But she was not ignorant that the husband, after the execution of the conveyance, and before its registration, embarked in a new mercantile enterprise, contracting debts to a large amount. Nor is ignorance of the necessity of registration, or of the duty of giving publicity to the fact that he was not the owner of the property, imputed to him. The evidence is conclusive that he concealed the fact of the conveyance, and represented himself as having title.

"The omission to register the conveyance, the want of notoriety of its existence, the magnitude of the property conveyed, when compared with the value of that which was retained, the attempted reservation of a specific benefit to the donor, which he could hold free from liability for debts, his engagement in business very soon after the execution of the conveyance, obtaining a false credit because of his possession and representations that he was the owner of the property, to which, to say the least, the donee by her supineness contributed, are all badges of fraud, or circumstances indicative that the intent of the donor was the hindrance, delay, and fraud of creditors. *Bump on Fraud.* Con. 308. It is not of importance whether the intent was directed against present or subsequent creditors; in either event, the conveyance may be successfully impeached by a subsequent creditor. We concur in the conclusion of the chancellor that the conveyance must be deemed fraudulent as to creditors, prior or subsequent, and the decree is of consequence affirmed."

In the case of *Mobile Savings Bank v. McDonnell*, 87 Ala. 736, 6 South. 702, the Supreme Court of Alabama said:

"This leaves but one ground upon which to maintain the bill, and that is the failure or refusal of the bank to record the mortgage, and the alleged fraudulent motive with which this was done. There may, no doubt, be cases where a deed, or mortgage, not at first fraudulent in its inception, may become so by being actively concealed, or not pursued, 'by which means creditors,' as said in an old English case, 'are drawn in to lend their money.' *Hungerford v. Earle*, 2 Vern. 261; *Hildreth v. Sands*, 2 Johns. Ch. (N. Y.) 35. We are not dealing with the case of a deed, where the vendor is left in the possession, contrary to the essential nature and terms of the conveyance, but with a mort-

gage, where continued possession by the mortgagor, for a length of time not unreasonably long, is consistent with the nature of the security."

In the case of *Lehman v. Van Winkle*, 92 Ala. 450, 8 South. 872, the Supreme Court of Alabama said:

"But when, as here alleged, the failure to record is not a mere omission attributable to inadvertence, inconvenience, or negligence, but is an affirmative and intentional withholding from record, with the ulterior purpose charged in the bill, we cannot be in doubt that the transaction is tainted with actual fraud, which will vitiate it as against subsequent creditors, and the like, who have been drawn into contractual relations with the mortgagors, by assuming their apparent to be their real status, with respect to the property covered by the mortgage; and this result follows notwithstanding the conveyance is free from infirmity in every other respect."

In the case of *Blennerhasset v. Sherman*, 105 U. S. 100, 117, 26 L. Ed. 1080, the Supreme Court of the United States said:

"But where a mortgagee, knowing that his mortgagor is insolvent, for the purpose of giving him a fictitious credit, actively conceals the mortgage which covers his entire estate and withholds it from record, and while so concealing it represents the mortgagor as having a large estate and unlimited credit, and by these means others are induced to give him credit, and he fails and is unable to pay the debts thus contracted, the mortgage will be declared fraudulent and void at common law, whether the motive of the mortgagee be gain to himself or advantage to his mortgagor. It is not enough, in order to support a settlement against creditors, that it be made for a valuable consideration. It must be also bona fide. If it be made with intent to hinder, delay or defraud them, it is void as against them, although there may be in the strictest sense a valuable or even an adequate consideration. * * * As long ago as the case of *Hungerford v. Earle*, 2 Vern. 261, it was held that 'a deed not at first fraudulent may afterwards become so by being concealed or not pursued, by which means creditors are drawn in to lend their money.' This doctrine has been repeatedly reaffirmed."

In the case of *Clayton v. Exchange Bank*, 121 Fed. 630, 633, 57 C. C. A. 656, 659, the Circuit Court of Appeals for this circuit said:

"A mortgage not at first fraudulent may become so by being concealed, 'because by its concealment persons may be induced to give credit to the grantor.' And omissions to place deeds on record are often held to be instances of secrecy, within the rule. *Bump on Fraud. Conveyances* (1st Ed.) 82, and cases there cited.

"In *Hildreth v. Sands*, 2 Johns. Ch. [N. Y.] 35, Chancellor Kent approved the proposition which was first announced in *Hungerford v. Earle*, 2 Vern. 261, that 'a deed not at first fraudulent may afterwards become so by being concealed or not pursued, by which means creditors are drawn in to lend their money.' This is approved by the Supreme Court in *Blennerhasset v. Sherman*, 105 U. S. 100, 118, 26 L. Ed. 1080. In *Hilliard v. Cagle*, 46 Miss. 309, a mortgage is held void against existing and future creditors. The principal circumstance relied on was the fact that the grantor retained possession of the property, and the deed was withheld from record, and the mortgagor was thereby enabled to contract debts upon the presumption that the property was unencumbered. The court declared that the natural and logical effect of the conduct of the parties was to mislead and deceive the public, and induce credit to be given to the mortgagor which he could not have obtained if the truth had been known, and the whole scheme was fraudulent as to subsequent creditors."

The plaintiff does not rely upon the effect of the recording acts of Alabama, since they afford no protection to the class of simple contract creditors, alone represented by him. His reliance is upon the principle that a conveyance, the making of which is concealed by the

parties to it, for the purpose of giving the grantor a false appearance of continued ownership, in order to bolster his credit, is a conveyance in hindrance and fraud as to creditors existing and subsequent.

[7] A fraudulent concealment of a change of ownership for the purpose of giving the grantor a false credit has the effect to avoid the transfer as to subsequent creditors, who may have extended credit to the grantor upon the faith of his apparent continued ownership of the transferred property, when otherwise they would not have done so. This fraudulent concealment may avail to avoid the conveyance in the absence of any other infirmity in the transaction, or any other intent to hinder or defraud creditors, and may consist rather in the subsequent use made of the conveyance and the property conveyed than in any fraud attending the execution of the conveyance itself. The subsequent withholding of the deed from record and the retaining possession of the property by the grantor, when delivery to the grantee is alone consistent with honesty, and the exercise of continued dominion by the grantor, and representations by him calculated to mislead as to the status of ownership, done with the purpose to create a false basis of credit, may of themselves constitute a fraudulent scheme, though the transaction would be otherwise unassailable by creditors. It will be seen that the fraud in such cases does not consist alone in the withholding of the deed from record; that is but one of the elements of the fraud. Along with it may go the retention of possession and the continued exercise of an inconsistent dominion by the grantor, together with other circumstances or representations calculated to deceive as to the state of the title. If the fraud consisted only of withholding the conveyance from record, it might be that the subsequent record thereof would end the scheme as to all creditors who extended credit after the record, inasmuch as, at the time such debts were incurred, the grantor should not be said then to be guilty of any fraudulent concealment. But where, in addition to the withholding of the conveyance from record, there are other badges of fraud going to make out the fraudulent concealment, such as inconsistent retention of possession and exercise of dominion and appropriation of benefits and representations by word or act of continued ownership on the part of the grantor, the mere recording of the deed, after an interval of withholding, and while the other elements of fraudulent concealment still continue, will not avail to end the fraud, or prevent creditors, who extend credit after the deed is recorded—at least in the absence of actual knowledge on their part of its contents—from claiming their remedy by virtue of it.

Record is, at most, constructive notice. In the absence of actual notice, the creditors may continue to be misled, even after record, by the false appearance of ownership which has been created by the other elements of concealment. Creditors who rely on the general worth of their debtor in extending credit are not accustomed to search the deed and mortgage records for conveyances executed by their debtor, and should not be charged with constructive notice of conveyances so recorded, and are not presumed to have acquired actual knowledge because of such record. A general reputation of ownership created by prolonged possession and the withholding of deeds from record di-

vesting title out of the possessor might well continue for a long period after a subsequent recording of such deeds, and do injury to prospective creditors by still conferring a false appearance of ownership. It cannot be said that such a subsequent recording removes all danger of injury of that character, certainly when other misleading circumstances continue thereafter. The circumstances of this case do not require a decision of the effect of actual knowledge of a fraudulently withheld conveyance on the part of the subsequent creditor. There are Alabama cases cited by the plaintiff which go to the extent of holding that actual knowledge of a fraudulent conveyance will not estop a subsequent purchaser or creditor, going upon the idea that such a conveyance is void as to all but the parties to it. *Gilliland v. Fenn*, 90 Ala. 230, 8 South. 15, 9 L. R. A. 413; *Echols v. Peurprung*, 107 Ala. 660, 18 South. 250; *Echols v. Orr*, 106 Ala. 237, 17 South. 677. These are cases in which the conveyances were fraudulent in their inception rather than by the subsequent use made of them and of their subject matter. In this case there is no evidence that any of complaining creditors, represented by the trustee, had actual knowledge of any of the conveyances before the petition in bankruptcy was filed. The only notice, justified by the evidence, is such constructive notice, if any, as would arise from the subsequent placing of the deeds on record. If they are not to be charged with knowledge by reason of such subsequent record of the conveyances, made before they became creditors of the bankrupt, they are not chargeable at all, and in that event it would be immaterial that the conveyances were recorded before the debts were incurred by the bankrupt.

In view of the fact that the false appearance of ownership in the bankrupt is shown by the evidence in this case to have been contributed to by the inconsistent retention of possession and exercise of dominion and appropriation of benefits, as well as by misleading acts and representations on his part, and that these additional means of concealment of changed ownership continued after the recording of the deeds and until the filing of the petition in bankruptcy, it seems that the recording of the deeds before the incurring of the debts to the complaining creditors should not avail to deprive the trustee from recovering the transferred property for the benefit of the creditors represented by him.

Constructive notice by the recording of a deed fraudulent as to creditors has been held not to estop subsequent creditors in the case of *Marshall v. Roll*, 139 Pa. 399, 20 Atl. 999, 23 Am. St. Rep. 198; the court saying:

"It was alleged, however, that, inasmuch as the conveyance was made and recorded before the indebtedness to Meyer and Lang, it was not fraudulent as to them. It does not appear that they had knowledge of the conveyance, and the record was not constructive notice to them. Had they been purchasers or mortgagees the case might have been different. Meyer and Lang were mere creditors, and were not obliged to search the records every time they sold a bill of goods. The jury having found that the conveyance was made with the intent to hinder and delay subsequent creditors, there is nothing left for us to discuss."

In the case of *McCanless v. Smith*, 51 N. J. Eq. 505, 25 Atl. 211, the third paragraph of the syllabus reads:

"A husband paid for, and caused to be conveyed to his wife, a tract of land upon which were a race track and the stabling and other improvements

suited thereto, together with a plain dwelling. He also caused to be conveyed to her other adjoining tracts, which he added to the race-course tract, and expended upon these lands large sums in additional stabling and barns and an expensive clubhouse, and placed upon the premises stallions and mares for breeding purposes, and with his wife's knowledge and acquiescence carried on there the business of breeding horses in his own name, and appeared to the outside world as the owner thereof, while the title stood on the public records in the name of his wife. At the date of the settlement, and thence almost continuously until his failure, he was operating largely upon margins upon the New York Stock Exchange. Held, that subsequent creditors of the husband, who became such in reliance upon such apparent ownership, are entitled to have the lands subjected to the lien of their judgment."

The case of *Danner v. Stonewall Ins. Co.*, 77 Ala. 184, relied upon by defendants, was one in which the agreement to withhold from record was abandoned immediately upon being made and before injury was accomplished by it, and relief was denied because fraud in the absence of injury was not actionable, and no one could have been injured since no one was induced to extend credit because of the abandoned fraudulent agreement. In this case the deeds were actually withheld from record for substantial periods, and the withholding was accompanied by other acts of concealment. It cannot be predicated of this case that no one was induced to extend credit by reason of the fraudulent concealment. If the present creditors had been informed that all of the property of the bankrupt was in his wife's name at the time the credit was extended, it is unlikely that credit would have been extended as it was.

[8] It is not incumbent upon the plaintiff to show that the complaining creditors were in fact in each instance injured; it is enough that the circumstances were such as that it is probable that they may have been injured, provided that the intent to obtain a false credit by a fraudulent concealment is shown to have been present with the parties to the transaction. The cases of *Clayton v. Exchange Bank*, 121 Fed. 630, 57 C. C. A. 656, and of *Lehman v. Van Winkle*, 92 Ala. 443, 8 South. 870, only hold that the fraudulent concealment must be shown to have some relation to the extension of credit by the complaining creditors. In a case in which there had been a fraudulent concealment by inconsistent retention of possession and exercise of dominion and appropriation of benefits, after the transfer, and continuing until after the extension of credit, as well as by the withholding of conveyances from record, the subsequent recording of the conveyances, even before the extension of credit, cannot have the necessary effect of removing all chance of injury to creditors who thereafter extend credit. Such record imparts constructive but not necessarily actual notice to prospective creditors of the transfer, and it requires, at the least, actual knowledge brought home to the creditors to remove the presumption of injury.

[9] For the reasons assigned, the plaintiff is entitled to the relief prayed for by him in the bill as to the two mill lots, the Turrentine avenue homestead, the Harralson avenue property, and the 22 lots in the Richardson addition, subject to the bankrupt's right of exemption therein, and with the exceptions to be noted. The Turrentine avenue homestead should not, however, be subjected to the satisfaction of the

debt of Strater Bros., since it was contracted before the conveyance of the home place by the bankrupt to his wife, and any fraudulent concealment of the status of the ownership as to this tract by the withholding of that deed from record, or by other means, could not have misled Strater Bros. into extending a credit, which had in fact been extended before the transfer was made. Nor does the record show that Strater Bros. remitted any effort or remedy or released any lien or security because of any subsequent misapprehension as to the state of title, due to any fraudulent concealment, as was the case in *Lehman v. Van Winkle*, 92 Ala. 443, 8 South. 870; but, on the contrary, they seem to have pursued their legal remedies for collection with all diligence. Possibly Strater Bros. are entitled to subject the Turrentine avenue tract to their claim to the extent of \$200, the amount of money paid by the defendant Ida B. Cassels to L. M. Cassels, as part of the consideration for the conveyance, and which sum she seems to have received from her husband, T. M. Cassels.

However, it is probable that these considerations are not of practical importance, and that a decree in favor of the plaintiff, as trustee, divesting the title to the two mill lots, the Turrentine avenue property, the Harralson avenue property, and the 22 lots in Richardson's addition out of Ida B. Cassels, and vesting it in the plaintiff, and protecting the defendant T. M. Cassels in his right of exemption, and taxing the defendants with the costs, would subserve the necessity of the situation.

In re IRVING.

(District Court, D. Arizona. February 16, 1915.)

No. B-90.

1. HOMESTEAD ~~83~~—PROPERTY CONSTITUTING HOMESTEAD—LEASEHOLD INTERESTS.

Under Civ. Code Ariz. 1913, par. 3288, providing that every head of a family residing within the state may hold as a homestead, exempt from attachment, execution, and forced sale, real estate not exceeding in value \$4,000 and consisting of the dwelling house in which the claimant resides and the land on which it is situated, or land that the claimant shall designate in one compact body, where a lessee, under a lease giving him the privilege of removing all improvements, built on the leased premises a building in which he and his family resided and in which he also conducted a mercantile business, he was entitled to claim as a homestead the leasehold interest in the land with the building thereon.

[Ed. Note.—For other cases, see Homestead, Cent. Dig. § 120; Dec. Dig. ~~83~~.]

2. BANKRUPTCY ~~396~~—EXEMPTIONS—APPLICATION OF STATE LAWS.

Though a claim of homestead filed with the county recorder prior to bankruptcy, in attempted compliance with Civ. Code Ariz. 1913, par. 3289, was not under oath as required by that section, and though a claim in due form, subsequently filed, was not so filed until after bankruptcy had intervened and the bankrupt had filed his original schedules, the homestead claim would not be denied, as the federal courts are not bound to follow the state courts with respect to the time of filing the declaration of the claim of exemptions, and in their discretion may allow claims of

~~83~~ For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

exemption to be made by amendment after the original schedule has been filed.

[Ed. Note.—For other cases, see *Bankruptcy*, Cent. Dig. §§ 659-668; Dec. Dig. ☞396.]

In *Bankruptcy*. In the matter of Thomas George Irving, bankrupt. On review of an order of the referee disallowing a homestead exemption. Reversed.

Hayes & Laney, of Phoenix, Ariz., for bankrupt.
Lysander Cassidy, of Phoenix, Ariz., for creditors.

SAWTELLE, District Judge. Thomas George Irving was on the 18th day of March, 1914, by this court adjudged a bankrupt, and in due course the matter was referred to Fred A. Larson, Esq., one of the referees in bankruptcy. In due course the bankrupt filed his schedule, in which he claimed as exempt from the acts of Congress relating to bankruptcy the unexpired portion of the leasehold interest held by him in and to the property herein referred to and described. The referee's certificate on review herein recites:

"In Schedule B (5) of the debtor's petition, the debtor claimed as exempted from (by) the acts of Congress relating to bankruptcy, under and by virtue of the laws of the state of Arizona, the following described property, to wit: 'The unexpired portion of the leasehold interest held by petitioner under and by virtue of that written lease described as follows, to wit: Dated April 15, 1912, running for a period of five years from date thereof, in which Mrs. M. E. Sargent is lessor, and George Irving, the petitioner herein, is lessee, which lease reserves a rental of fifty dollars (\$50.00) per annum; said rental having been paid to April 15, 1914, and demising that parcel of real property situated at Alhambra, Maricopa county, Arizona, and bounded and described as follows to wit: Beginning at a point on Grand avenue approximately 100 feet north of a lot owned by Henry Renaud, where a division fence forms an angle with the north edge of Grand avenue; running thence north 417 feet; thence west 417 feet to Grand avenue; thence along Grand avenue 490 feet to the place of beginning—containing approximately two acres. Said lease contains a covenant by lessor that lessee may remove all improvements placed upon the leased premises by him; and lessee has constructed a house thereon at a cost of sixteen hundred and thirty-eight dollars (\$1,638.00).'

"On May 4, 1914, the trustee in the above-entitled matter filed his report of exempt property therein, in which he reported that the above-described leasehold interest had been designated and set apart by him to be retained by the bankrupt as exempt property. On May 24, 1914, the Standard Wooden Ware Company, one of the unsecured creditors in the above entitled matter, filed its 'Exceptions to Report of Trustee, Setting Off Exemptions,' which exceptions, so far as they appertain to the leasehold above mentioned, are based on the ground 'that neither said leasehold interest nor the improvements on the land covered by said lease are exempt under the laws of the state of Arizona, and that the said bankrupt is not entitled under such laws to have the said leasehold interest or the said improvements set apart to him as exempt.' On September 24, 1914, after both the excepting creditor and bankrupt had been fully heard upon said report of the trustee and the exceptions thereto, the referee made and entered an order 'that the leasehold interest described in the bankrupt's schedules, and claimed therein as exempt under the laws of the state of Arizona, is not exempt, and that the said leasehold is subject to the disposition of the trustee in bankruptcy of the above-entitled matter,' basing said order upon the provisions of chapter 1, title 20, Revised Statutes Arizona 1913, Civil Code.

"The evidence introduced at said hearing showed that on February 13, 1914, Nellie Irving, the lawful wife of the bankrupt, made an attempt in good faith to secure as exempt to the family of herself and her husband, under the laws of the state of Arizona, the leasehold interest above described, together with all appurtenances thereunto belonging, by executing and recording in the office of the county recorder of Maricopa county, Ariz. a declaration of homestead as to said leasehold, but that the declaration so recorded was irregular, in that it was merely acknowledged, and not sworn to, as required by law. That on July 22, 1914, and immediately upon the said Nellie Irving's learning of the irregularity contained in the above-mentioned 'Declaration of Homestead,' she made out and recorded in the office of the county recorder of Maricopa county, Ariz., a claim of homestead as to said leasehold, which claim was regularly sworn to by her according to the laws of the state of Arizona. That at the date of the filing of the above-mentioned trustee's report of exempt property, and for more than a year prior thereto, the bankrupt was the head of a family, and resided, together with his above-mentioned wife and their children, in the county of Maricopa, state of Arizona, in that certain house hereinafter mentioned, which is located upon the land demised under the above-mentioned lease. That said house had been constructed upon said land by the bankrupt, during the term of the above-mentioned lease. That the bankrupt, for more than a year prior to the date when the trustee filed his aforesaid report of exempt property, had conducted a retail merchantile business in the front part of said building, and had lived with his family as aforesaid in the rear portion of said building. That neither said bankrupt nor his said wife claim or hold any other homestead than the leasehold above mentioned. That said lease provides that if the lessee therein, the bankrupt herein, 'does not buy the place or renew the lease, he will have the privilege of removing all improvements except the well.' That said leasehold interest, together with all privileges thereunder, including the right to remove said building, are the community property of the bankrupt and his wife, Nellie Irving."

Said referee disallowed said homestead exemption, holding that:

"The leasehold interest described in the bankrupt's schedules, and claimed therein as exempt under the laws of the state of Arizona, is not exempt, and that the said leasehold is subject to the disposition of the trustee in bankruptcy of the above-entitled matter."

The questions presented on this review are:

(1) Whether this leasehold interest in the land above described, together with the store building and dwelling house combined, which has been constructed upon the same by the bankrupt as aforesaid, may be claimed as a homestead under the provisions of chapter 1, title 20, Revised Statutes Arizona 1913, Civil Code, and set apart to the bankrupt as exempt.

(2) Whether the bankrupt and his aforesaid wife have sufficiently complied with the laws of the United States appertaining to bankruptcy, and the laws of the state of Arizona appertaining to homestead exemptions, to entitle the bankrupt to have the above-described leasehold interest and all privileges thereunder set apart to him as a homestead.

[1] 1. Sections 3288, 3289, and 3290 (chapter 1, title 20), Revised Statutes Arizona 1913, Civil Code, are as follows:

"3288. Every person who is the head of a family, and whose family resides within this state, may hold as a homestead, exempt from attachment, execution and forced sale, real property to be selected by him or her, which homestead shall be in one compact body, not to exceed in value the sum of four thousand dollars, and shall consist of the dwelling house in which the claimant resides and the land on which the same is situated or of land that the claimant shall designate, provided the same is in one compact body.

"3289. Any person wishing to avail himself or herself of the provisions

of the foregoing section shall make out under oath his or her claim in writing, showing that he or she is the head of a family, and also particularly describing the land claimed and stating the value thereof; and shall file the same for record in the office of the county recorder in the county where the land lies.

"3290. The claim of homestead may be made by the husband, or by his wife, or by any unmarried person who is the head of a family."

I cannot believe that the Legislature of Arizona intended to deprive a citizen of the state of the benefits of the homestead laws merely because he does not own the fee in the land upon which he resides. As was said in the case of *In re Emerson*, 58 Minn. 450, 60 N. W. 23,

"The less the estate and interest the more important its preservation to the claimant and his family, and the greater the necessity for surrounding it with the defenses of the statute. *Wilder v. Haughey*, 21 Minn. 101."

It has been uniformly held that the exemption laws should be liberally construed.

"The spirit of the bankrupt law in the matter of exemptions is one of liberality, and, under facts as presented herein, the bankruptcy court will allow the homestead exemption recognized by the state." *In re Culwell* (D. C.) 165 Fed. 828.

This question has been before the state Supreme Courts in several of the states, and it has been uniformly held that the benefits of a homestead law are not confined to an ownership in fee, but attach to the house and lot to which the debtor has such a term as may be sold on execution, and that a tenant for years is as clearly within the reason of the statute as the owner of a larger estate. See *Anheuser-Busch Brewing Ass'n v. Smith* (Tex. Civ. App.) 26 S. W. 94, *Allen v. Ashburn et al.*, 27 Tex. Civ. App. 239, 65 S. W. 45, and *In re Emerson*, 58 Minn. 450, 60 N. W. 23, *supra*.

In 21 Cyc. 504, it is stated that:

"A homestead may be secured by a tenant for years in leasehold premises, unless the lease provides that the premises are to be used exclusively for business purposes, or unless the lessor also resides on the leased tract."

And this text seems to be supported by decisions of the state Supreme Courts of Alabama, Illinois, Iowa, Kansas, Michigan, Minnesota, Mississippi, Texas, and Wisconsin.

[2] 2. The federal courts are not bound to follow the state courts in the matter of the time of filing the declaration of the claim of exemptions. See *In re Culwell*, *supra*, and *In re Fisher* (D. C.) 142 Fed. 205, in both of which cases it is held that the federal court is not precluded in its discretion from allowing claims of exemption to be made by amendment after the original schedule has been filed, and in the Culwell Case, 165 Fed. 828, the court, in a well-considered opinion, said:

"I do not construe the Bankrupt Act as meaning that upon the trustee's qualifying the bankrupt is deprived of all right to perfect his homestead exemption, provided in his schedule she claims a designated piece of realty as a homestead and exempt, * * * without delay, and provided, always, there is no fraud involved in the matter of the claim. * * * Yet the act does not make it a precedent to having a homestead allowed to the bankrupt claiming the same in the bankruptcy court that the homestead shall have been designated, pursuant to the state statute, prior to the date of adjudication in bankruptcy. *In re Friedrich*, 100 Fed. 284, 40 C. C. A. 378,

If the bankrupt has expeditiously and in good faith made his declaration, following the claim in the schedule, the property is exempt and cannot be retained for administration."

In the case of *In re Fisher*, 142 Fed. 205, supra, the court said:

"The sole question raised by the petition for review is as to the propriety of allowing the claim of homestead as to this interest in the real estate mentioned, and the ground of objection to allowing it is delay in perfecting the claim under the state law and in claiming the exemption in the bankruptcy proceeding. * * * In so far as the strictly regular time and manner of asserting in the bankruptcy court the claim of exemption is concerned, section 7, cl. 8 [Comp. St. 1913, § 9591], is the guide. But I regard this as directory, and, taken in connection with the express right of allowing amendments (Act July 1, 1898, c. 541, par. 39, 30 Stat. 555 [Comp. St. 1913, § 9623]; Gen. Order XI [89 Fed. vii, 32 C. C. A. viii]), there is clearly some discretion in the bankruptcy courts to allow claims of exemption to be made after the original schedules have been filed. The very slight delay in filing the homestead deed and the amended schedules in the case at bar is satisfactorily explained, and no good reason occurs to me for denying the claim of the homestead in question. The mere qualification of the trustee did not 'subject' the property 'under legal process.' * * * The action of the referee in granting the bankrupt leave to file amended schedules was proper, and is affirmed."

The Supreme Court of the state of Arizona, in the case of *Wilson v. Lowry*, 5 Ariz. 335-341, 52 Pac. 777, 779, in construing the exemption laws of said state, has held that:

"It is the well-settled policy of the courts to liberally construe those humane and beneficent provisions of the law exempting certain property from execution for the payment of debts. The state has an interest in protecting families, and especially helpless children, against pauperism, and securing to them the means of reasonable comfort and education."

Reading the Arizona statute in the light of this case and the cases hereinbefore referred to, I see no good reason why the bankrupt's claim of a homestead should be disallowed.

The action of the referee in this case is reversed.

UNITED STATES v. GREEN et al.

(District Court, E. D. Pennsylvania. February 26, 1915.)

No. 28.

1. BANKRUPTCY ~~495~~—OFFENSES AGAINST BANKRUPTCY LAWS—EVIDENCE.

On a trial for conspiracy to conceal the assets of a bankrupt, there was no statutory ground for excluding the schedules; the statute excluding admissions in pleadings having been repealed, and the excluding provision of the Bankruptcy Act being confined to testimony given by a bankrupt under examination.

[Ed. Note.—For other cases, see *Bankruptcy*, Cent. Dig. § 912; Dec. Dig. ~~495~~.]

2. CRIMINAL LAW ~~829~~—INSTRUCTIONS—REQUESTS.

The omission to formally and specifically affirm points presented by accused was not error, where they were in substance and fact affirmed by the charge as given.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 2011; Dec. Dig. ~~829~~.]

~~For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes~~

3. CRIMINAL LAW ☞560—EVIDENCE—DEGREE OF PROOF REQUIRED.

The evidence in a criminal case need not exclude the possibility of innocence.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1266; Dec. Dig. ☞560.]

4. CRIMINAL LAW ☞745—QUESTIONS FOR JURY.

Where an inference of guilt may be fairly drawn, the evidence meets the test of legal sufficiency, and its credibility and weight must be determined by a jury.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1718; Dec. Dig. ☞745.]

5. BANKRUPTCY ☞495—OFFENSES AGAINST BANKRUPTCY LAWS—EVIDENCE.

On a trial for conspiracy to conceal a bankrupt's assets, where there was evidence, not only of the concealment, but of the joint participation of the defendants in the acts by which the fraud had been accomplished, the evidence supported a conviction, as evidence of aid in the commission of the offense, by assisting in the concealment of it and having in possession the fruits thereof, was evidence of a conspiracy to have the offense committed.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 912; Dec. Dig. ☞495.]

Jacob Green and another were convicted of conspiracy to commit an offense, and they move for a new trial. Motion discharged.

Robert J. Sterrett, Asst. U. S. Atty., and Francis Fisher Kane, U. S. Atty., both of Philadelphia, Pa., for the United States.

Wm. T. Connor and John R. K. Scott, both of Philadelphia, Pa., for defendants.

DICKINSON, District Judge. The defendants were indicted for a conspiracy to commit an offense against the laws of the United States. The offense to commit which they are charged to have conspired is that of fraudulent concealment by a bankrupt of his assets from his trustee in bankruptcy. The real question in the case is whether the offense was made out, or more particularly whether there was evidence upon which the jury were justified in finding a verdict of guilty.

The reasons for a new trial are nine in number and cover the usual wide range. The first four have been characterized as formal, in the sense that they appeal to the discretion of the trial judge. These may be disposed of with the observation that, if the evidence is sufficient in law to form the basis of a conviction, there is nothing in the case to call upon the court to nullify the declared judgment of the jury.

[1] The succeeding five reasons are directed to complaints of trial error. The seventh reason presents the only question we consider open to discussion. In form it complains of the answer to a point presented; but, as that point asked for binding instructions to the jury to render a verdict of acquittal, it brings up the real question in the case to which we have adverted. Other trial errors complained of include rulings upon the admission of evidence and instructions given to the jury or not given as prayed for in the points submitted. The exception taken to the admission of the schedules is disposed of by the case of *Ensign v. Pennsylvania*, 227 U. S. 592, 33 Sup. Ct. 321, 57

L. Ed. 658. The grounds of objection to this testimony are not given. The schedules would certainly be admissible under the general rules of evidence. If inadmissible, the objection must be based upon some excluding statute or exception to the general rule. The statute excluding admissions in pleading having been repealed, and the excluding provision of the Bankruptcy Act being confined to testimony given by a bankrupt under examination, no statutory ground of exclusion now exists. Our attention has not been called to any other ground of exclusion, and we are therefore unconvinced of error in the admission of this evidence.

[2-4] An exception to a refusal to charge as requested in the fourth and fifth points presented by the defendants would, we think, be well taken. There was no thought in the mind of the trial judge to do otherwise than affirm the proposition of law set forth in these points. It was the intention to affirm them, and we think this was done. The thought in mind was to affirm the points which were affirmed in the early part of the charge, and to reserve the answer to the fourth and fifth points as in more logical order of presentation at the close of the charge. The points were laid aside for this purpose, and were overlooked at the close of the charge. What the trial judge really had in mind in this part of the charge was not the written points as submitted, but the ruling of the court on the motion to strike out this testimony, when the intention was expressed to limit the effect of the testimony of each of the defendants as evidence against himself and not the other, unless the fact of the conspiracy had been made to appear, and the statements made were during and in pursuance of the conspiracy. The fact is the points as formal points were overlooked, and there was in consequence an omission to formally and specifically affirm them. They were none the less in substance and fact affirmed. This brings this branch of the case within the rule that, where the trial judge has in his charge instructed the jury upon the law embodied in requests for charge, he need not make specific answer to the points submitted. The seventh and eighth reasons present the real question involved. If there was evidence worthy of submission to the jury, we think the instructions given were correct. The shade of thought involved does not readily lend itself to compression within an absolutely accurate phrase of expression.

The argument of counsel for defendants goes almost to the length of the statement that the evidence must exclude the possibility of innocence. It does not, of course, go to this extent. The principle invoked must be accorded recognition as a principle of the administration of the criminal law. The real question is: What are its limitations? They can be best traced through any one of many trite and commonplace, because familiar, illustrations. The possession of stolen property is consistent with a theory of guilt. It does not forbid a theory of innocence. If the scale of judgment is on an equipoise, a statutory or other authoritative creation of *prima facie* evidence would incline it. Slight circumstances may themselves incline it. If an inference of guilt may be fairly drawn, the evidence meets the test of legal sufficiency, and its credibility and weight must be determined by a jury. The doctrine of presumption of innocence and that of rea-

sonable doubt present, when contrasted, the same distinction. If there is nothing from which the inference of guilt may be drawn, the legal insufficiency of the evidence to base a finding must be declared. There can be no compulsion of the mind in the entertainment of a reasonable doubt in fact.

The jury in the case at bar were instructed in effect that although the facts as established by the evidence were consistent with the theory of guilt, and the evidence as a whole by its preponderance led their minds to the inference of guilt, they might base an acquittal upon the mere fact of the existence consistently with the facts of a theory of possible innocence. They were also most emphatically told that if they did in fact entertain a doubt they must acquit. If the case was to be submitted to the jury at all, nothing more would have been said in relief of the defendants than was said. The complaint against the charge is therefore logically not a complaint against what was said, but of the omission to direct a verdict of not guilty. This brings us back to what has been several times characterized as the real, and really the only, question in the case. Should the jury have been given binding instructions?

[5] The weight of the argument for the defendants lies in this. There was ample evidence of the offense of a fraudulent concealment of assets by the bankrupt, but none that the defendants had concerted the commission of the offense. It is aside from anything necessary to a decision of the question presented, but it serves to give point to the thrust of the argument to make the comment which the defendants in effect do make that the United States charged the crime of conspiracy, and offered evidence only of the offense of the bankrupt to commit which the defendants are charged to have conspired. This is followed with the thought that because, for some reason, the United States chose to forego the framing of an indictment against the bankrupt for an offense which they might have proven is no reason for convicting these defendants of another offense of their guilty participation in which there is no evidence. The position of the United States is that the evidence supplies supporting ground for the inference of the existence of a guilty conspiracy between these defendants to fraudulently conceal the assets of the bankrupts, and that, the jury having found guilt beyond a reasonable doubt under adequate instructions from the court, the verdict should stand. If evidence of guilt was before the jury, their judgment of its weight should be accepted.

The submission of the case would seem to have the support of the decided cases. The sufficiency of evidence and its weight are at times so nearly allied as to become difficult of separation. We think the real question here to be radically different from that ruled in *Commonwealth v. Byers*, 45 Pa. Super. Ct. 38. There was in that case no proof of a crime, and none that the defendant was connected with it, if the commission of the crime was assumed. Here there was evidence, not only of the offense to be committed, but of the joint participation of the defendants in the acts by which the fraud has thus far been accomplished. Evidence of aid in the commission of an offense by assisting in the concealment of it and having in possession the fruits of it is evidence of a conspiracy to have the offense committed. Proof

of a verbal suggestion to commit it, or a verbal agreement to join in it, or a verbal acknowledgment of participation in it, is not indispensable. It is the policy of our law that the administration of the Criminal Code is the peculiar and special province of the jury. This is subject, of course, to the right of defendants, which every court should be alert and resolute to secure. If, as in Commonwealth v. Byers, *supra*, the evidence does not afford a basis for a fair and reasonable inference of guilt, the courts should so pronounce, and make their pronouncement effective. We do not feel moved to such action in this case.

The motion for a new trial is discharged, and the United States has leave to move for sentence.

STRAUSS v. PENN PRINTING & PUBLISHING CO.

(District Court, E. D. Pennsylvania. March 1, 1915.)

No. 1283.

1. COPYRIGHTS ~~29~~—NOTICE OF COPYRIGHT—OMISSION.

Under Copyright Act March 4, 1909, c. 320, § 18, 35 Stat. 1079 (Comp. St. 1913, § 9539), providing that in certain cases the required notice of copyright may consist of the letter "C" inclosed within a circle, where there appeared upon copies of a copyrighted picture, as printed in a newspaper, a blurred print mark, the outline of which was roughly semicircular, within which was an indistinct and blurred impression, which upon close scrutiny bore some resemblance to the extreme upper part of the letter "C," but which would not have conveyed to the mind of any one, not searching for notice and having no actual notice of the copyright, the fact that they were intended for the letter "C" inclosed within a circle, there was an omission of the notice of copyright within section 20 (Comp. St. 1913, § 9541), providing that, where the copyright proprietor has sought to comply with the provisions of that act with respect to notice, the omission by accident or mistake of the prescribed notice from a particular copy or copies shall not invalidate the copyright, or prevent recovery for infringement against infringers with notice, but shall prevent the recovery of damages against an innocent infringer misled by the omission.

[Ed. Note.—For other cases, see Copyrights, Cent. Dig. §§ 29, 30; Dec. Dig. ~~29~~.]

2. COPYRIGHTS ~~87~~—DAMAGES AND PROFITS—OMISSION OF NOTICE OF COPYRIGHT.

Under Copyright Act, § 20, relative to the omission by accident or mistake of the required notice of copyright, and section 25 (Comp. St. 1913, § 9546), providing that infringers shall be liable to an injunction and to such damages as the copyright proprietor may have suffered, as well as all profits which the infringer shall have made, or, in lieu of actual damages and profits, such damages as to the court shall appear to be just, in assessing which the court may in its discretion allow the amounts therein stated, the omission of the copyright notice by accident or mistake, though preventing a recovery of damages against an innocent infringer, did not prevent a recovery of the infringer's profits, but did prevent an allowance of such damages as appeared just in lieu of actual damages and profits, as the court is not authorized to allow such damages in lieu of profits alone.

[Ed. Note.—For other cases, see Copyrights, Cent. Dig. § 81; Dec. Dig. ~~87~~.]

3. COPYRIGHTS &—ACTIONS—COSTS—ATTORNEY'S FEES.

Under Copyright Act, § 40 (Comp. St. 1913, § 9561), providing that in all actions or suits thereunder, with certain exceptions, full costs shall be allowed, and the court may award to the prevailing party a reasonable attorney's fee as part of the costs, where a copyright proprietor obtained an injunction, with a judgment for profits, against an innocent infringer, misled by the accidental omission of the copyright notice, who did not in his answer admit that the complainant was entitled to the relief granted, an attorney's fee will be allowed.

[Ed. Note.—For other cases, see Copyrights, Cent. Dig. § 85; Dec. Dig. & 90.]

In Equity. Suit by Malcolm Strauss against the Penn Printing & Publishing Company. On final hearing. Decree for complainant.

Alison M. Lederer, of New York City, and Arthur S. Minster, of Philadelphia, Pa., for plaintiff.

Weaver & Drake, of Philadelphia, Pa., for defendant.

THOMPSON, District Judge. The complainant is the owner of a duly registered copyright granted to him October 2, 1911, for a picture or drawing conceived and executed by him, which copyright entitled him to the sole right to print, reprint, publish, copy, reproduce, and vend the said picture or drawing. The complainant granted a license to Gimbel Bros., merchants of the city of New York and Philadelphia, to reproduce and publish copies of the picture, under its name "La Promenade des Toilettes at Gimbel Bros.", for the purpose of illustrating advertisements of their wares. In pursuance of that license, the picture, representing a woman in artistic pose and costume, was reproduced in the Press, a newspaper of Philadelphia, on October 4, 1911, as an advertisement of Gimbel Bros. in connection with "La Promenade des Toilettes."

The defendant, a corporation engaged in printing posters, copied the picture from a copy of the Press of October 4, 1911, caused a cut to be made therefrom much enlarged in size, and made therefrom 2,500 posters. It sold 2,250 copies, and at the time of the hearing had in its possession, unsold, 250 copies. There was offered in evidence by the complainant from the bound files of the Press a copy of the Press of October 4, 1911, containing the picture with Gimbel's advertisement. There was also offered by the defendant a page of the Press of October 4, 1911, containing the picture and advertisement, which, as appears from the testimony, was similar to the copy from which the cut was made from which the posters were manufactured.

The defendant admits that the posters manufactured by it, including those sold, are copies of the Press' reproduction of the complainant's copyrighted work, but denies that upon every copy of the picture or drawing published or caused to be published by Gimbel Bros. there was inscribed or printed as prescribed by law the letter "C" inclosed within a circle, with the complainant's name thus, "© Malcolm Strauss," as claimed by the complainant. The defendant denies that there appeared on the copies whereof it has or had knowledge any notice of the copyright of the picture, and avers that there was an omission of the requisite notice, and that it was misled by the omission into

believing that the picture was by the publication in the Press dedicated to the public.

[1] An examination of the pictures printed in the Press, in evidence, is sufficient to show that the notice of copyright prescribed by the act was omitted from those reproductions. The name "Malcolm Strauss" appears below the figure of the woman, and immediately below the initial "S" of the name "Strauss" appears a small blurred print mark, the outline of which is roughly semicircular in shape, with the arc uppermost. Within the semicircular outline is an indistinct and blurred impression, which, upon close scrutiny by one searching for notice or having actual notice of the copyright, bears some resemblance to the extreme upper part of the letter "C." To one not searching for notice and having no actual notice of the copyright, the mark would appear merely as an irregular and indistinct blur upon the paper, such as frequently occurs accidentally in newspaper prints. Without notice these blurred and indistinct impressions would not convey to any one's mind the fact that they were intended for the letter "C" inclosed within a circle, thus: ©, as prescribed by section 18 of the Copyright Act of March 4, 1909. In view of present knowledge that the complainant's work was copyrighted, it is apparent that, through accident or mistake causing injury to the matrix or stereotyped plate used in making the print, the blurred, irregular, and indistinct mark was caused to appear in place of the copyright notice for which it was intended. Under these circumstances, under section 20 of the act, the copyright is not invalidated, nor would the complainant's recovery for infringement be prevented if the defendant, after actual notice of the copyright, had begun an undertaking to infringe. There is no evidence in the case that the defendant had actual notice of the copyright, but, on the other hand, it is sufficiently established that it is "an innocent infringer who has been misled by the omission of the notice," as provided in section 20.

Counsel for the complainant contends that there is no "omission," as the notice was present, although in distorted form. As the mark accompanying the picture in the Press does not resemble the letter "C" within a circle, it would not give notice to any one not having notice otherwise, and as the act is explicit as to the form of the notice prescribed, and there is no letter "C" and no circle present, it follows that there was an omission of the prescribed notice.

[2] Under these circumstances, the complainant is not entitled, in view of section 20, to recover damages, and none were proved at the trial. It is apparent from the language of the act, however, that damages alone are excluded from recovery, and not the infringer's profits, as section 25 of the act provides that the person infringing shall be liable (a) to an injunction and (b) to "such *damages* as the copyright proprietor may have suffered due to the infringement, as well as all the *profits* which the infringer shall have made from such infringement." That damages are differentiated from profits further appears, in that the section provides that the complainant shall recover "in lieu of actual damages and profits such damages as to the court shall appear to be just, and in assessing such damages the court may, in its discretion,

allow the amounts as hereinafter stated, * * * and such damages shall in no other case exceed the sum of five thousand dollars nor be less than the sum of two hundred and fifty dollars, and shall not be regarded as a penalty." It appears, therefore, that the damages which the court in its discretion may allow are to be "in lieu of actual damages *and profits*."

Inasmuch as section 20 provides that circumstances such as are found in this case "shall prevent the recovery of damages," they preclude the recovery of "such damages as to the court shall appear to be just" under section 25, as there is no provision that such damages shall be assessed in lieu of profits alone. The distinction between "damages" and "profits" is pointed out in the opinion of Judge Gray in Sharpless v. Lawrence, 213 Fed. 423, 130 C. C. A. 59. Neither does the act provide any minimum or maximum limitation of amount of profits recoverable. They are to consist of "all the profits the infringer shall have made from such infringement." It appears by the proofs that the gross amount realized by the defendant from its sales was \$108, and the cost of the 2,500 copies was \$67.15, leaving a profit of \$40.85.

A decree may be entered in favor of the complainant, for an injunction restraining the infringement, for the payment to the complainant of the profits made by the defendant amounting to \$40.85, and its full costs, and requiring the defendant to deliver up on oath for destruction all the infringing copies, as well as all plates, molds, matrices, or other means for making such infringing copies.

[3] Under the circumstances in this case the complainant is entitled to a reasonable attorney's fee as part of the costs under the provisions of section 40 of the act. If in the answer the defendant had admitted that the complainant was entitled to the relief granted herein, as was conceded at the trial, it is questionable whether an attorney's fee would have been allowed. The answer, however, compelled the complainant to sustain by proof its right to any relief whatever.

Under these circumstances, and taking into consideration, on the other hand, that the issues involved are clearly defined and simple, and raise no intricate questions of law, an attorney's fee of \$75 is awarded as part of the costs.

GRANDISON v. NATIONAL BANK OF COMMERCE OF ROCHESTER.

(District Court, W. D. New York. February 15, 1915.)

1. BANKRUPTCY ☞303—ACTIONS—PREFERENCES—EVIDENCE OF INSOLVENCY—BOOKS.

In a suit by a trustee in bankruptcy to recover alleged preferential payments, the books and papers of the bankrupt were admissible to show the bankrupt's insolvency at the time of the payments.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 458-462; Dec. Dig. ☞303.]

2. BANKRUPTCY ☞166—PREFERENCE—KNOWLEDGE THAT PREFERENCE WILL RESULT.

Where a bank, to whom an insolvent corporation was indebted, had pressed for payment and had protested for nonpayment a number of notes and a draft against the corporation, which were not renewed for several weeks, it had reasonable cause to believe that it was receiving a preference when payments were made upon the indebtedness to it, especially where the president of the bank was familiar with various of the details of the corporation, knew of the difficulties encountered in making its collections and of a threat on that account to wind up its affairs, and knew that in the fall, about the time the payments were made, it was merely selling the cider and vinegar remaining from previous years, without grinding apples as it customarily did at that season, and was aware of discord between the corporation's president and certain of the directors, and of his resignation, at which time it suggested a friendly director to fill a vacancy on the board, which suggestion was adopted.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 250-253, 255-258; Dec. Dig. ☞166.]

3. BANKRUPTCY ☞165—PREFERENCES—TRANSFERS AND PAYMENTS CONSTITUTING.

Where an assignment of accounts by a bankrupt to an indorser on its notes and the subsequent collection of the accounts were for the benefit of the holder of the notes, the transfer was a preference, within the prohibition of Bankr. Act July 1, 1898, c. 541, 30 Stat. 544; it not being necessary that the assignment should be directly to the holder.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 259, 260, 266; Dec. Dig. ☞165.]

4. BANKRUPTCY ☞165—INSOLVENCY—PREFERENCES TO CREDITORS.

Where an assignment of accounts by an insolvent corporation to an indorser on its notes was made for the benefit and advantage of the holder of the notes, such holder received a voidable preference under Stock Corporation Law N. Y. (Consol. Laws, c. 59) § 66, forbidding conveyances or payments by corporations when insolvent, or when insolvency is imminent, with the intent of giving a preference to a particular creditor.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 259, 260, 266; Dec. Dig. ☞165.]

In Equity. Suit by Wilbur B. Grandison, as trustee of the O. L. Gregory Vinegar Company, bankrupt, against the National Bank of Commerce of Rochester. Decree for plaintiff.

Thomas C. Burke, of Buffalo, N. Y. (Henry W. Pottle, of Buffalo, N. Y., of counsel), for complainant.

James M. E. O'Grady, of Rochester, N. Y., for defendant.

HAZEL, District Judge. This action was brought by the trustee in bankruptcy of the O. L. Gregory Vinegar Company, adjudicated a bankrupt March 4, 1910, on an involuntary petition filed by creditors February 15, 1910, against the National Bank of Commerce of Rochester under section 60b of the Bankruptcy Act of July 1, 1898 (30 Stat. 562, c. 541 [U. S. Comp. St. 1913, § 9644]), prior to the amendment of 1910, to recover preferential payments alleged to have been made by the bankrupt while insolvent at different times following October 15, 1909, or within four months of the filing of the petition in bankruptcy; and under sections 67e and 70e of the Bankruptcy Act to recover preferences alleged to be contrary to section 66 of the Stock Corporation Law of the state of New York.

[1] The only questions deemed by me necessary to be passed upon and decided in the action under section 60b of the Bankruptcy Act are: (1) Whether the bankrupt was insolvent, within the meaning of the Bankruptcy Act, at the times specified in the bill, when the claimed preferential payments were made to the bank; (2) whether the bank had reasonable cause at such times to believe that a preference was intended; and (3) whether this court has jurisdiction of the subject-matter and of the person of the defendant. Although the insolvency of the bankrupt at the times specified was earnestly contested, the evidence in its entirety leaves no doubt in my mind that such financial condition prevailed. The findings of fact submitted by counsel for complainant, and filed herewith, relieve me from the necessity of reciting the details establishing the insolvency. The books and papers of the bankrupt were properly received as evidence in support of the claim. *Ernst v. Mechanics' & Metals National Bank of New York* (D. C.) 200 Fed. 295.

[2] The familiarity of the president of the bank with various of the details of the business of the O. L. Gregory Vinegar Company, to which further reference will hereinafter be made, is thought to support the claim that the bank had **reasonable cause to believe** that it was receiving a preference at the time the promissory notes and drafts in question were paid. The evidence fairly indicates that the bank was apprised that the bankrupt was in straitened circumstances on October 15, 1909. The information possessed by the witness Swanton, the president of the bank, regarding the affairs of the bankrupt and its financial condition, was of such character as to put him on reasonable inquiry when the renewal notes held by the bank were paid by Alexander, the president of the bankrupt, who, as the evidence discloses, had indorsed such notes at the request of the bank, and who in consideration of such indorsement subsequently received as collateral security assignments of accounts receivable. The evidence shows that the bank had pressed for payment of the indebtedness, and that discounted notes, 10 in number, and a draft deposited with the defendant, had been protested for nonpayment subsequent to October 15, 1909, and were not renewed until the expiration of several weeks from the time they were protested.

It has been held that where a creditor has repeatedly pressed for payment of his accounts, and checks previously given by the debtor have been dishonored, sufficient notice of the insolvency of his debtor

has been given the creditor. *Pittsburg Plate Glass Co. v. Edwards*, 148 Fed. 377, 78 C. C. A. 191; *Conners v. Bucksport Nat. Bank* (D. C.) 214 Fed. 847. While the cases cited are concerned with protested checks, and make no reference to protested notes, still it seems to me that, where many promissory notes amounting to a relatively large amount of money have been discounted and protested for nonpayment at maturity, cause is given to the holder of such notes to inquire into the financial condition of the debtor before he accepts payment in full to the exclusion of other creditors of the same class. If the bank had made inquiry, it would have known of the insolvency or its imminence at the time the resolution was adopted by the bankrupt assigning to its president the accounts receivable in consideration of his indorsement of the renewal notes.

But there was other evidence to charge the bank with notice of the imminent insolvency of the bankrupt, for example, its knowledge of the difficulties encountered by Alexander in making collections on his trip South, and his threat because of this to wind up the affairs of the company. The defendant also knew, for the knowledge of Mr. Swanton is imputable to it, that the bankrupt did not grind apples in the fall of 1909, as was customary at that season of the year, but merely sold the juice, or cider and vinegar, remaining over from previous years; and it was aware of the discord existing between Mr. Gregory, at that time president of the bankrupt, and certain of the directors, and of his subsequent resignation, at which time it suggested a friendly director to fill a vacancy on the board—a suggestion that was adopted by electing Mr. Dirnberger, the attorney for the defendant in the action brought by the trustee herein against Robertson to recover preferences. These matters, though perhaps not absolutely controlling, are nevertheless indicative of such close relationship between the bank and the bankrupt that it is inferable that the bank had reasonable cause to believe that its customer was insolvent, and that the payment of the notes in question was intended as a preference by which the bank should receive a greater percentage of its debt than was received by other creditors of the same class.

[3] To constitute a preference it was not necessary that the assignment of the accounts receivable should be made directly to the bank. It was enough that the transaction which resulted in the indorsement of the renewal notes and the subsequent collection of the accounts receivable were for the benefit of the bank. Alexander concededly received the assignment of accounts from the bankrupt to secure him as an indorser on the overdue promissory notes held by the defendant. Such a transfer made by an insolvent falls within the prohibition of the Bankruptcy Act. *Crooks v. People's Nat. Bank*, 46 App. Div. 335, 61 N. Y. Supp. 604. This principle is sustained by no less an authority than the Supreme Court of the United States in *Newport Bank v. Herkimer Bank*, 225 U. S. 178, 32 Sup. Ct. 633, 56 L. Ed. 1042. In that case Mr. Justice Hughes, who delivered the opinion of the court, said:

"To constitute a preference, it is not necessary that the transfer be made directly to the creditor. It may be made to another for his benefit. If the bankrupt has made a transfer of his property, the effect of which is to enable

one or his creditors to obtain a greater percentage of his debt than another creditor of the same class, circuity of arrangement will not avail to save it.
* * * It is not the mere form or method of the transaction that the act condemns, but the appropriation by the insolvent debtor of a portion of his property to the payment of a creditor's claim, so that thereby the estate is depleted and the creditor obtains an advantage over other creditors."

It therefore makes no difference that the bankrupt paid the bank through the assignment to its president of the accounts receivable, as long as the arrangement resulted in disposing of the accounts receivable in such a way as to deplete the assets. The Bankruptcy Act does not forbid the taking of money by a bank in payment of a debt in the ordinary course of business, even if it should transpire that at the time of payment the debtor was insolvent; but in this case we are dealing with a different situation. Here, as said, the bank had reasonable cause to believe it was being favored, and nevertheless received payment of its debt, amounting to \$15,216.90, by an arrangement made particularly for its benefit.

The trustee has, in my opinion, proven that preferential payments were made within four months of the filing of the petition, that the bankrupt was insolvent at the time of such payments, and that the effect of the payments was to give to the defendant a greater percentage of its debt than was received by other creditors of the same class, and that reasonable cause existed for belief by the defendant that it was intended to give him a preference.

The objection to the jurisdiction of the court is overruled on the authority of *Gregory v. Atkinson* (D. C.) 127 Fed. 183, and *Parker v. Black* (D. C.) 143 Fed. 560.

[4] I am of the opinion, also, that the preference complained of by the trustee was voidable under section 66 of the Stock Corporation Law of New York, inasmuch as it is shown that the assignments by the bankrupt and Alexander of the accounts receivable were really made for the benefit and advantage of the defendant bank. Section 67e of the Bankruptcy Act gives jurisdiction to this court concurrent with that of the state court to maintain an action to avoid transfers and preferences which are held null and void under the statutes of the state.

A decree may be entered, with costs, requiring a return of such preferences to the trustee, subject to dividends to which the defendant may be entitled on distribution of assets.

GRANDISON V. ROBERTSON et al.

(District Court, W. D. New York. February 15, 1915.)

1. BANKRUPTCY ☞303—PREFERENCES—SETTING ASIDE—SUFFICIENCY OF EVIDENCE.

In a suit by a trustee in bankruptcy to recover alleged preferential payments to private bankers, evidence *held* insufficient to show that they had cause to believe that a preference was intended.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 458–462; Dec. Dig. ☞303.]

2. BANKRUPTCY ☞166—PREFERENCES—PAYMENTS CONSTITUTED.

Bankr. Act July 1, 1898, c. 541, 30 Stat. 544, requires a restoration of preferential payments only where the creditor has reasonable cause to believe that a preference will result from payments made within four months prior to bankruptcy, and does not take away from a banker the right to transact business with a customer in the ordinary way, and he may take renewal notes in extension of credit and receive partial payments of his debt, and during the continuance of the relation with the banker may assume that the bankrupt is solvent and carrying on business in the usual way, and, though it turns out that the bankrupt was insolvent, may receive payment without incurring liability to restore them when bankruptcy intervenes.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 250–253, 255–258; Dec. Dig. ☞166.]

3. BANKRUPTCY ☞164—PREFERENTIAL PAYMENTS—RECOVEERY.

Under Stock Corporation Law N. Y. (Consol. Laws, c. 59) § 66, providing that no conveyance, payment, etc., by any corporation or any officer, director, or stockholder, when the corporation is insolvent or its insolvency is imminent, with the intent of giving a preference to any particular creditor, shall be valid, and that every person receiving by means of any such prohibited act or deed any property of the corporation shall be bound to account therefor to its creditors, stockholders, or other trustees, where the payee of a corporation's notes received payments thereon from accounts, assigned to an indorser on the notes to secure his indorsement. an action could be brought against the payee to recover the payments: the indorser being merely the instrument through which the preferential payments were made.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 267; Dec. Dig. ☞164.]

4. CORPORATIONS ☞544—INSOLVENCY—PREFERENTIAL PAYMENTS—RECOVERY.

Under Stock Corporation Law N. Y. § 66, preferential payments to a creditor of an insolvent corporation may be recovered; it not being necessary that the person receiving the preferential payment should be a stockholder.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2162–2169; Dec. Dig. ☞544.]

5. BANKRUPTCY ☞293—PREFERENCES PROHIBITED BY STATE LAWS—JURISDICTION OF SUIT TO RECOVER PREFERENTIAL PAYMENTS.

Under Bankr. Act July 1, 1898, c. 541, § 67e, 30 Stat. 564 (U. S. Comp. St. 1913, § 9651), providing that all conveyances or transfers of property by a debtor within four months prior to the filing of the petition and while insolvent, which are held null and void as against creditors by the laws of the state, shall be deemed null and void under that act if the debtor be adjudged a bankrupt, that the property shall pass to the assignee and be by him reclaimed for the benefit of creditors, and that for the purpose of such recovery courts of bankruptcy and the state courts shall have concurrent jurisdiction, a United States District Court had jurisdiction of a suit to recover payments by an insolvent corporation,

which were preferential under Stock Corporation Law N. Y. § 66, though they did not constitute preferences within Bankr. Act, § 60b.

[Ed. Note.—For other cases, see *Bankruptcy, Cent. Dig.* §§ 411, 417; *Dec. Dig.* ☞293.]

In Equity. Suit by Wilbur B. Grandison, as trustee of the O. L. Gregory Vinegar Company, bankrupt, against Frederick Robertson and another. Decree for complainant as to the second cause of action.

Thomas C. Burke, of Buffalo, N. Y. (Henry W. Pottle, of Buffalo, N. Y., of counsel), for complainant.

Dirnberger & Augspurger, of Buffalo, N. Y., for defendants.

HAZEL, District Judge. The trustee in bankruptcy of the estate of the O. L. Gregory Vinegar Company has brought an action against the defendants, who are engaged in business at Tonawanda, N. Y., as private bankers, to recover alleged preferential payments made by the bankrupt contrary to an inhibition of the Bankruptcy Act and of section 66 of the Stock Corporation Law of this state. The first cause of action is concerned with the question of whether the defendants had reasonable cause to believe a preference was intended at the time the payments in controversy were made to them.

[1] The proofs show that at different times the defendants received payments aggregating \$6,484.45 on promissory notes of the bankrupt of the value of \$10,000 held by them, from accounts receivable theretofore assigned by the bankrupt to one Alexander to secure him on his indorsements of the notes, from proceeds of discounted notes, and from a certified check on the National Bank of Commerce of Rochester. All the payments in question were made between November 20, 1909, and March 19, 1910, but I think there can be no recovery in this case by the trustee under section 60b of the Bankruptcy Act, as the evidence does not show cause for inquiry by the transferees as to the insolvency of the transferee, or cause for belief that a preference was intended. It is true, as contended by the trustee, that the defendant had information to the effect that in the fall of 1909 the bankrupt was indebted to the National Bank of Commerce of Rochester, that the real estate of the bankrupt was heavily encumbered, and that discord existed between the president of the bankrupt company and one of the directors; but still I think there is an absence of elements upon which to predicate a conclusion that the defendants had reasonable cause to believe that at the time of partial payment of the notes a preference was intended. It is not claimed that defendants were to any extent familiar with the business affairs of the bankrupt. There were no prior transactions between them and the bankrupt as in the case of *Grandison v. National Bank of Commerce of Rochester* (decided this day) 220 Fed. 981, nor had there been any intimacy between the defendants and the officers of the bank, from which it might be inferred that the former had ascertained the financial condition of the latter.

The indisputable evidence shows that in October, 1908, the bankrupt wished to open an account at the private bank of the defendants, and that at the request of one Martin, a director of the bankrupt company

living at Tonawanda, and of one Gregory, who was then its president, the sum of \$5,000 was advanced on the note of the company bearing an individual indorsement, and that later another \$5,000 note, made by the Albion Fruit Products Company and indorsed by the bankrupt, was discounted. Subsequently, when these notes became due, defendants informed Mr. Alexander, who succeeded Gregory as president of the bankrupt, that the account was unsatisfactory, in that not as much business was done with them as had been agreed upon when the account was opened and the said notes discounted; that the bankrupt carried practically no balance, and therefore the notes would have to be paid or a better account kept. Promises to better conditions were made, but in the spring of 1909 the defendants again complained to Alexander that they were not receiving business enough from the bankrupt, and he then offered to indorse the renewal notes in place of Mr. Martin, which offer was accepted. Although payments on notes were subsequently made out of accounts receivable assigned to Alexander by the bankrupt, and collected by him and by the defendants, with whom such accounts were deposited for collection, there is no evidence upon which to found a belief that there existed an arrangement whereby Alexander should indorse the renewal notes and pay them out of the assigned accounts. On the contrary, Alexander in the fall of 1909 optimistically requested that the notes should be renewed by giving demand notes, as he said to defendants that he expected to take them up daily.

It is not shown that the defendants had any knowledge of the manner in which the notes of the Bank of Rochester were paid, but according to the evidence they presumed such payments had been made out of money realized from fire insurance at the time of the destruction of the Albion plant by fire. The account was never questioned by defendants in relation to the ability of the bankrupt to meet its obligations, nor were the details of the business discussed, nor was any statement of assets or liabilities received, from which the insolvency of the bankrupt might be inferred by them. The failure of the bankrupt to promptly pay the notes at maturity is not sufficient to charge the defendants with notice of the impending insolvency.

[2] The Bankruptcy Act does not take away from a banker the right to transact business with his customer in the ordinary way. He may take renewal notes in extension of credit and receive partial payment of his debt, and has the right during the continuance of their relations to presume that his debtor is solvent and carrying on business in the usual way; and if it turns out that the debtor was insolvent the creditor may receive payment without incurring the liability of having to restore such payment when bankruptcy intervenes. The Bankruptcy Act requires a restoration of preferential payments only when the creditor has reasonable cause to believe that a preference will result from such payments made within four months of the bankruptcy. *Studley v. Boylston Nat. Bank*, 229 U. S. 523, 33 Sup. Ct. 806, 57 L. Ed. 1313; *Grant v. Nat. Bank*, 97 U. S. 80, 24 L. Ed. 971; *Paper v. Stern*, 198 Fed. 642, 117 C. C. A. 346; *In re Eggert*, 4 Am. Bankr. Rep. 449, 102 Fed. 735, 43 C. C. A. 1. These authorities, I believe,

are controlling under the evidence of this case, and preclude recovery by the trustee under the provisions of section 60 of the Bankruptcy Act.

[3, 4] A more serious question, however, is presented by the second cause of action set out in the bill, namely, the alleged right of the trustee, under section 66 of the Stock Corporation Law of this state, which includes a provision giving the right to proceed against creditors who have received transfers of property or preferential payments when the corporation was insolvent, to recover the payments made to the defendants herein. Under the state statute such transfers are voidable only when they are made with the intent to give a preference. When it is shown that they were so made, the person receiving the same by means of any prohibited act or deed "shall be bound to account therefor to its creditors or stockholders or their trustees." The contention, therefore, that the action should have been brought against Alexander, to whom the assignment of accounts was directly made, and not against defendants, is unsound. Alexander was the instrument through which the preferential payments were made, and the intention to prefer the defendants over the general creditors is clearly established, notwithstanding any denial of such an intention. The large payments to the National Bank of Commerce of Rochester, aggregating within a comparatively short period of time approximately \$50,000, together with the payments made to these defendants at different times, while no payments were made to the general creditors whose debts, as allowed, aggregated \$21,035.35, would seem to indicate a positive intention to make preferential payments, with a view, no doubt, to enabling Alexander to escape liability on his indorsement of the notes held by the defendants. Such acts by a corporation or its officers are condemned by section 66 of the Stock Corporation Law.

In *Baker v. Emerson et al.*, 4 App. Div. 348, 38 N. Y. Supp. 576, is found a clear construction and interpretation of the statute under consideration, and at the end of the opinion it is stated that:

"The validity of the payment is not made to depend on whether it is made in the ordinary course of business, or on whether the creditor has any reasonable ground to believe the debtor insolvent, but simply on whether there is insolvency, actual or imminent, and an intent to prefer."

See, also, *Cæsar v. Bernard*, 156 App. Div. 724, 141 N. Y. Supp. 659, affirmed 209 N. Y. 570, 103 N. E. 1122, which is thought to practically overrule *Swan v. Stiles*, 94 App. Div. 117, 87 N. Y. Supp. 1089, to which defendants attach importance in support of their claim that recovery cannot be had herein, as it is not shown that the corporation refused to pay the notes. It was not necessary for recovery that the defendants should be stockholders in the insolvent corporation; if they as creditors received a preference, they may be proceeded against for recovery thereof. *Montague v. Hotel Gotham*, 208 N. Y. 442, 102 N. E. 513.

[5] Objection is made that this court is without jurisdiction to maintain the action without the consent of the defendants, but I think the objection is without merit. Section 67e of the Bankruptcy Act substantially authorizes voiding transfers of property made by a debtor while

insolvent within four months of filing the petition in bankruptcy "which are held null and void as against the creditors of such debtor by the laws of the state" in which such property is situate, and that courts of bankruptcy (Bankruptcy Act, § 1, subd. 8, which includes the District Court) and state courts shall have concurrent jurisdiction. This action, it must be remembered, is not brought to set aside fraudulent transfers not creating a preference, nor fraudulent transfers not made within four months of the bankruptcy, which classes of actions are instituted under section 70e of the Bankruptcy Act. *Gregory v. Atkinson et al.* (D. C.) 127 Fed. 183; *Wood v. Wilbert*, 226 U. S. 384, 33 Sup. Ct. 125, 57 L. Ed. 264; *Wright v. Skinner Mfg. Co.*, 162 Fed. 315, 89 C. C. A. 23.

No other questions argued at the bar require special consideration. My conclusion is that, as to the cause of action alleged in the bill under section 60b of the Bankruptcy Act, the trustee cannot recover, but that as to the cause of action under section 66 of the Stock Corporation Law of New York the intent while insolvent to prefer the defendants has been fairly proven, and the complainant may therefore have a decree, with costs, directing the return to the trustee of the amount of such preference, with interest, subject, however, to the dividend to which the defendants will be entitled on distribution of the assets.

DUPLEX METALS CO. v. STANDARD UNDERGROUND CABLE CO.

(District Court, W. D. Pennsylvania. November 23, 1914.)

No. 66.

TRADE-MARKS AND TRADE-NAMES ~~3~~—UNFAIR COMPETITION—USE OF DESCRIPTIVE TERMS.

A complainant *held* to have acquired no exclusive right to the use of the term "copper-clad" as applied to iron or steel wire coated with copper which would support a suit to enjoin its use by another as unfair competition; it appearing that the term, besides being in itself descriptive, was so used by complainant.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. §§ 4-7; Dec. Dig. ~~3~~.]

In Equity. Suit by the Duplex Metals Company against the Standard Underground Cable Company. On final hearing. Decree for defendant.

See, also, 218 Fed. 269.

Philip, Sawyer, Rice & Kennedy, of New York City, and Reed, Smith, Shaw & Beal, of Pittsburgh, Pa., for complainant.

Christy & Christy, of Pittsburgh, Pa., for defendant.

ORR, District Judge. This suit in equity has come to final hearing upon bill, answer, replication, and proofs completed prior to the adoption of the present equity rules. The bill asserts the title to certain letters patent of the United States No. 893,932, issued to plaintiff as assignee of John F. Monnot, for "improvements in copper-clad iron

and steel," and charges the defendant with infringement of that patent. It further asserts the right of the plaintiff to the exclusive use of the word "copper-clad" in connection with the steel wire having a covering of copper sold by the defendant in competition with steel wire having a covering of copper sold by plaintiff, and charges that the defendant was guilty of unfair competition in trade, in that the defendant has used the word "copper-clad" as descriptive of the wire sold by the defendant, in that it has used also in advertising its products a representation of a disc of a very large diameter relatively to the wire, in which disc the plaintiff alleges that it has exclusive rights, and in that the defendant has used a picture of the Singer Building in the city of New York, which was viewed by the public as the home of the plaintiff, and with intent on the part of the defendant to deceive the public, and also in that the defendant has paralleled the advertisements of the plaintiff.

The proceedings, so far as they charge infringement of the patent, were brought to a close on June 25, 1913, by the entry of a decree dismissing the bill of complaint as to that issue. This dismissal was had at the instance of the plaintiff, because after plaintiff's *prima facie* case was made out the plaintiff had ascertained, and the rebuttal testimony of its expert on cross-examination showed, that the defendant's wire was so made that it could not be viewed as an infringement of the patent.

There remained in the case, therefore, the one question as to whether in any of the ways charged in the bill the defendant was guilty of unfair competition. The main contention is that the phrase "copper-clad" was coined by the plaintiff and adopted by it as a fanciful and arbitrary designation for its wire, that the said phrase has been understood by the public as indicating and meaning the plaintiff's wire, and that because the defendant uses the phrase "copper-clad" the public are liable to be and have been deceived.

Before considering whether or not the phrase is an essentially descriptive term, we shall consider whether or not the plaintiff intended that the phrase should be a descriptive one. In the very patent which was for so long the principal object of the litigation, and upon the face of which it appears the plaintiff was the assignee, is this statement by the inventor:

"My invention relates to a process of making clad metals, by which term is meant bodies comprising a core or base of one metal (iron or steel for instance) having united thereto, and preferably inseparably united or welded thereto, a substantial layer or coating of metal, usually an unlike metal (for instance, copper, silver, gold, aluminum, brass, bronze, aluminum bronze, etc.). In particular my invention comprises a process of making clad metal ingots which ingots, when formed, may be rolled, pressed, hammered, or otherwise extended down to rods, sheets, bars, strips, wire, and other commercial or desired forms."

The claims are numerous, and each, except the twenty-first and twenty-third, are for a process of forming clad-metal objects. Other patents by the same inventor and assigned to the plaintiff, to wit, United States patent No. 927,372, and United States patent No. 929,687, relate to the clad metals as stated in each. There is no suggestion in

any of the patents that the word "clad" is used in a different sense from coated or covered. Monnot's earlier patent, being United States patent No. 853,716, issued May 13, 1907, "for a process of producing compound metal bodies," does not use the word "clad," but uses the words "coating" and "coated" as descriptive. That the word "clad," where used in Monnot's patents, was intended to be descriptive, must be the conclusion. Otherwise, we have the situation of an inventor having secured to himself by his patent the process or the product for the limited period provided by law, and further securing to himself the right to the descriptive appellation given by him in his patent to the product for all time to come, after the expiration of the patent. The rights of the public in and to the product or process after the expiration of the patent, therefore, would be exceedingly limited, if the public could not use the descriptive terms used by the inventor in his application and by the government in the patent granted in pursuance thereof.

Again, the evidence discloses that in the early history of the plaintiff company it called its wire product "Monnot's copper-clad wire"; the plaintiff described its product generally as "Monnot metals"; it had several cuts which it used in connection with its products as trademarks, and in none of them does the word "copper-clad" appear. In a pamphlet issued in February, 1910, entitled "Standard Specifications for Hard Drawn Copper-Clad Steel Wire," the plaintiff uses this language:

"(b) Copper-clad steel is manufactured under the trade-mark 'weld-clad,' and each coil of wire shall have attached to it a tag bearing this name and a cut of a billet section."

The foregoing are but brief allusions to a large mass of evidence which constrain the court to hold that plaintiff's use of the phrase "copper-clad" was for purposes of description. From this description the person unacquainted with plaintiff's product would form an opinion that the product of the plaintiff was a wire composed of steel or iron or some other metal having thereon a coat of copper. As a matter of fact both plaintiff and defendant are manufacturing wire of steel clothed or clad with copper.

Apart from the plaintiff's intention to use the phrase as descriptive of its product, the phrase itself is essentially descriptive. The diligence of counsel for the defendant has produced numerous examples of the use of the words "clothed" and "clad" as descriptive terms from the best examples of poetry and prose in the English language. Various compounds of "clad" occur to the mind, all of which are descriptive. In the patent law compounds of clad are found, as, for instance, steel-clad in the case of Steel-Clad Bath Co. v. Mayor (C. C.) 77 Fed. 736; in connection with shoes, as in Brennan v. Bird-Thayer Dry-Goods Co. (C. C.) 99 Fed. 971, 975. It is found in connection with fibre in United States patent to T. Gore, No. 922,418, for "fibre-clad wire rope."

The phrase, then, not only having been used by plaintiff as descriptive, but being in its nature essentially so, the plaintiff cannot have any exclusive right therein. The law on the subject is fully stated by

Justice McKenna in *Standard Paint Co. v. Trinidad Asphalt Co.*, 220 U. S. 446-452, et seq., 31 Sup. Ct. 456, 457 (55 L. Ed. 536):

"Two contentions are made by the paint company: (1) That its trade-mark is a valid one and has been infringed by the asphalt company; (2) that the latter has been guilty of unfair competition. The Court of Appeals decided adversely to both contentions. 163 Fed. 977 [90 C. C. A. 195]. Of the first contention the court said it was clear that the paint company 'sought to appropriate the exclusive use of the term "rubberoid,"' and that its rights were to be adjudged accordingly, and that as the latter, being a common descriptive word, could not be appropriated as a trade-mark, the one selected by the paint company could not be appropriated. The court said: 'A public right in rubberoid and a private monopoly of rubberoid cannot coexist.' The court expressed the determined and settled rule to be: 'That no one can appropriate as a trade-mark a generic name or one descriptive of an article of trade, its qualities, ingredients, or characteristics, or any sign, word, or symbol which from the nature of the fact it is used to signify others may employ with equal truth.' For this cases were cited and many illustrations were given which we need not repeat. The definition of a trade-mark has been given by this court and the extent of its use described. It was said by the Chief Justice, speaking for the court, that 'the term has been in use from a very early date, and, generally speaking, means a distinctive mark of authenticity, through which the products of particular manufacturers or the vendable commodities of particular merchants may be distinguished from those of others. It may consist in any symbol or in any form of words, but as its office is to point out distinctive-ly the origin or ownership of articles to which it is affixed, it follows that no sign or form of words can be appropriated as a valid trade-mark, which, from the nature of the fact conveyed by its primary meaning, others may employ with equal truth, and with equal right, for the same purposes.' *Elgin National Watch Co. v. Illinois Watch Co.*, 179 U. S. 665-673 [21 Sup. Ct. 270, 45 L. Ed. 365]. There is no doubt therefore, of the rule. There is something more of precision given to it in *Canal Co. v. Clark*, 13 Wall. 311-323 [20 L. Ed. 581], where it is said that the essence of the wrong for the violation of a trade-mark 'consists in the sale of the goods of one manufacturer or vendor as those of another, and that it is only when this false representation is directly or indirectly made that the party who appeals to a court of equity can have relief.' A trade-mark, it was hence concluded, 'must therefore be distinctive in its original signification, pointing to the origin of, the article, or it must have become such by association.' But two qualifying rules were expressed, as follows: 'No one can claim protection for the exclusive use of a trade-mark or trade-name which would practically give him a monopoly in the sale of any goods other than those produced or made by himself. If he could, the public would be injured rather than protected, for competition would be destroyed. Nor can a generic name or a name merely descriptive of an article of trade, of its qualities, ingredients, or characteristics, be employed as a trade-mark, and the exclusive use of it be entitled to legal protection,' and, citing *Amoskeag Mfg. Co. v. Spear*, 4 N. Y. Sup. Ct. 599, it was further said that there can be 'no right to the exclusive use of any words, letters, figures or symbols which have no relation to the origin or ownership of the goods, but are only meant to indicate their names or qualities.'

There is nothing in the phrase "copper-clad wire" which has any relation to the origin or ownership of the wire manufactured by the plaintiff. To so hold would give the plaintiff a monopoly which he might have had by his patent if the defendant were an infringer and this the court cannot grant under the evidence in this case.

The defendant is a large producer of wire. The copper-clad wire, which it sells to the public, defendant draws from rods or small billets which have been clad with copper by the Colonial Steel Company, a

corporation which is operating under patents owned by it. The defendant sells its wire as Colonial copper-clad wire. It ships its wire to users as Colonial copper-clad wire from Standard Underground Cable Company. So far as appears, it has not and does not sell any copper-clad wire without indicating that it is the Colonial copper-clad wire, or with any omission or suggestion which would lead the public to believe that it was copper-clad wire made by the Duplex Metals Company the plaintiff. So far, therefore, as the defendant sells copper-clad wire, it is guilty in no way of unfair competition against the defendant, unless the phrase "copper-clad" has acquired a secondary meaning. Plaintiff's patents above cited negative that contention, because the claim of monopoly under the patents destroys the presumption of acquiescence through which the right to the secondary meaning of the phrase could only arise.

In respect to the use by the defendant of the disc complained of in the bill, the conclusion must be reached that the disc is descriptive merely. True, it is not drawn to scale to show the relative thickness of the steel and the copper; nevertheless it appears to be a cross-section of copper-clad wire. No other conclusion can be reached from the evidence than that it is an informative illustration, and intended as such. It was not copied from any design of the plaintiff, or intended to suggest any relation of defendant's with plaintiff's product. The illustration of the Singer Building used by defendant in some advertising matter was not used by defendant in connection with any advertising of copper-clad wire. It was used to advertise the fact that defendant had furnished wire of another quality in the completion of that building. That building during its erection attracted the curious. The representation of it by the defendant is totally unlike that used by the plaintiff. It antedates that of the plaintiff as well.

With respect to the charge that defendant has paralleled and is paralleling the advertisements of the plaintiff, the conclusion must be reached that the contention of the plaintiff has not been sustained by the proofs. In every view of the case, the court fails to find any fraud actual or intended. Without this plaintiff has no standing.

The bill must therefore be dismissed, at plaintiff's costs. Let a decree be drawn.

NEW FICTION PUB. CO. v. STAR CO.

(District Court, S. D. New York. February 15, 1915.)

1. COPYRIGHTS ~~§ 46~~—INFRINGEMENT—FAILURE TO RECORD ASSIGNMENT.

The recording of an assignment of a copyright, as provided for by Act March 4, 1909, c. 320, § 44, 35 Stat. 1084 (Comp. St. 1913, § 9565), is not necessary to the protection of the rights of the assignee against an infringer.

[Ed. Note.—For other cases, see Copyrights, Cent. Dig. § 44; Dec. Dig. ~~§ 46~~.]

2. COPYRIGHTS ~~§ 47~~—ASSIGNMENT OF SPECIAL RIGHTS—CONSTRUCTION.

An assignment of a part of the rights protected by a copyright, as of the right of serial publication, operates merely as a license, and does not carry the right to sue for infringement given to the "copyright proprietor" by Act March 4, 1909, c. 320, § 25, 35 Stat. 1081, as amended by Act Aug. 24, 1912, c. 356, 37 Stat. 489 (Comp. St. 1913, § 9546).

[Ed. Note.—For other cases, see Copyrights, Cent. Dig. § 45; Dec. Dig. ~~§ 47~~.]

3. WORDS AND PHRASES—"SERIAL RIGHTS."

The words "serial rights" are understood to comprehend all publishing rights, including magazine and newspaper publishing rights, and excepting only book, dramatic and scenario rights.

4. COPYRIGHTS ~~§ 36~~—PROTECTION OF COPYRIGHTED WORK—"COMPONENT PARTS."

The phrase "component parts," as used in Act March 4, 1909, c. 320, § 3 (Comp. St. 1913, § 9519), providing that "the copyright provided by this act shall protect all the copyrightable component parts of the work copyrighted," does not mean subdivision of rights, licenses, or privileges, but refers to the separate chapters, subdivisions, acts, and the like of which most works are composed.

[Ed. Note.—For other cases, see Copyrights, Cent. Dig. § 37; Dec. Dig. ~~§ 36~~.]

In Equity. Suit by the New Fiction Publishing Company against the Star Company. On motion to dismiss bill. Motion sustained.

John T. Sturdevant, of New York City, for the motion.

Pace & Stimpson, of New York City (Frank D. Wynn, of New York City, of counsel), opposed.

MAYER, District Judge. The defendant has moved under equity rule 29 to dismiss the bill of complaint, upon the ground that upon the face of the bill no cause of action against defendant is disclosed, and that the court is without jurisdiction to entertain the suit. The parties are New York corporations, with their places of business in the borough of Manhattan, city of New York.

The sole question is whether plaintiff is the assignee of or merely the licensee under a copyright, and, as this question is said to be important, a full statement of the facts as disclosed on the face of the bill seems to be desirable. On July 9, 1913, one Edward Goodman, being the author and proprietor of an unpublished drama entitled "En Deshabille," copyrighted it as provided by the Copyright Act. Before copies of the drama were produced for sale, Goodman entered into an arrangement with plaintiff whereby, as plaintiff claims, he assigned to plaintiff

the "serial rights" in and to the drama. Plaintiff paid Goodman \$50 by check, and Goodman indorsed the check. The check, with its indorsement, is the evidence upon which plaintiff relies in asserting an assignment, and is as follows:

"No. 697.

New York, Dec. 5, 1913.

"The Mutual Bank, 49-51 West 33d Street: Pay to the order of Edward Goodman (\$50 $\frac{00}{100}$) fifty & $\frac{00}{100}$ dollars.

"The New Fiction Publishing Company,
"W. M. Clayton, President."

On the margin of said check:

"The New Fiction Publishing Co., 16 East 33d St., New York."

Indorsed:

"For all serial rights to one act play, En Deshabille. For deposit. Edward Goodman.

"Indorsement correct. The Fifth Avenue Bank of N. Y.

"Received payment through New York Clearing House, Dec. 6, 1913. Addition The Fifth Avenue Bank of New York."

[3] The words "serial rights" have, as plaintiff alleges (and this allegation must be accepted for the purposes of this motion), a definite meaning among publishers, and are understood to comprehend all publishing rights, including magazine and newspaper publishing rights, and excepting only book, dramatic, and moving picture scenario rights.

Prior to the transfer of the "serial rights," viz., about September 16, 1913, Goodman sold to the Managers' Producing Company the right to perform the play on the stage, and thereafter this Managers' Producing Company gave performances at various theaters in the United States and Canada, and, because of the interest aroused by the play, the right to print and publish the drama in a magazine became of value.

Plaintiff is the proprietor of a monthly magazine called "Snappy Stories," and as "En Deshabille" could be readily printed in one issue, it was so printed in the March, 1914, issue. Before that, however, namely, on Sunday, January 18, 1914, and without the consent of Goodman or plaintiff, substantial parts of Goodman's play were published in the New York American, a newspaper owned by defendant.

The allegation is that this publication in the New York American satisfied the public desire to read the play and thereby diminished the sales and profits of plaintiff's magazine. The relief asked for is that prescribed by section 25 of the Copyright Act in cases of infringement, as follows:

"(1) For an injunction restraining the infringement; (2) for destruction of infringing prints and matrices; (3) for an accounting and payment of all profits ensuing from the sale of the copyrighted material; and (4) for a penalty of \$1.00 for each and every infringing copy made or sold by or now in the possession of defendant and the defendant is required to make discovery of the number of such copies made or sold by it and now in its possession."

It is asserted that the March, 1914, issue of "Snappy Stories" was duly copyrighted in February, 1914; but that fact is of no consequence and adds nothing to plaintiff's case, in view of the previous copyright of Goodman.

[1] At the outset, it may be well to clear away some misapprehensions. If the transaction described constitutes an assignment of the

copyright, it was not necessary for the purposes of this cause of action that the assignment should be recorded as provided in section 44 of the act. That section protects subsequent purchasers or mortgagees for value, and is akin in principle to the filing or recording acts, which relate to bills of sale or chattel mortgages. As against infringers, an assignee would have a cause of action, irrespective of the recording provisions of the act.

Further, the check transaction, although informal, clearly shows the intention of Goodman to sell to plaintiff all rights to publish in magazines and newspapers.

[2] So that the sole question, as indicated *supra*, is whether plaintiff is an assignee or licensee. When Goodman obtained his copyright, he acquired the exclusive rights conferred by section 1 of the act, and also the right to assign permitted by section 42. Under the act but one assignment is necessary for absolute protection. Less than an assignment of the entire copyright cannot carry the causes of action (if the right is invaded) which the act accords to the owner or assignee. Mr. Bowker in "Copyright, Its History and Its Law" (Edition 1912) at page 49, aptly states the proposition:

"In respect to the right to limit the use of his work under his sale, gift, loan, grant, lease, etc., for a special purpose, or at a special price, or for a special time, or in a special locality, or to a special person, these powers of limitation, though implied in the grant of copyright, are dependent for their enforcement rather upon the law of contracts than upon copyright law. There can be no such thing as a copyright for a special purpose, or for a special locality, or under other special conditions, for there can be only one copyright, and that a general copyright, in any one work. But specific contracts can be made, enforceable under the law of contracts, as for the sale of a copyrighted book within a certain territory, provided such contracts or limitations are not contrary to other laws. Although record of assignment in the Copyright Office is provided for by the law only for the copyright in general, the separate estates, as a right to publish in a periodical and the right to publish as a book, may be sold and assigned separately, and the special assignment recorded in the Copyright Office, though this does not convey a right to substitute in the copyright notice a name other than that of the recorded proprietor of the general copyright, which can only be changed as specifically provided in the law under recorded assignment of the entire copyright."

That Goodman transferred or licensed to plaintiff only a special or limited right is made especially clear by the fact that he sold the dramatic rights to some one else, and this, obviously, he could not have done, had he divested himself of his copyright by assignment. It must be remembered throughout that the remedies here sought are statutory creations. They have been made drastic to protect authors against wrongful invasions, but they were not intended to be cumulative, so as to subject a defendant to more than one recovery for the redress of one wrong.

Under section 25 of the act, which enumerates the remedies, an infringer, among other things, "shall be liable * * * to pay to the *copyright proprietor* such damages as the *copyright proprietor* may have suffered due to infringement." Yet, if plaintiff's theory were right, the anomalous result would follow that not only plaintiff, but every other licensee of plaintiff, could severally sue the defendant, and

each obtain a separate judgment for one and the same violation of a copyright which no one of them owned, but in respect of which each had only certain special or limited rights.

[4] It is urged, however, that under section 3 of the act the right here claimed is distinctly conferred. That section is as follows:

"Sec. 3. That the copyright provided by this act shall protect all the *copyrightable component parts* of the work copyrighted, and all matter therein in which copyright is already subsisting, but without extending the duration or scope of such copyright. The copyright upon composite works or periodicals shall give to the proprietor thereof *all the rights* in respect thereto which he would have if each part were *individually copyrighted* under this act."

Without intending to construe this section further than necessary for the purposes of this case, it is clear that "component parts" does not mean subdivision of rights, licenses, or privileges, but refers to the separate chapters, subdivisions, acts, and the like of which most works are composed.

Finally, it is said that if the owner of rights such as in the case at bar cannot sue under the act, but is remitted to an appropriate action because of the invasion of its contract rights obtained from the author, then that a valuable protection will be lost to the author as the result of the diminished protection to his transferee. I think I fully appreciate the new situations which the enlarged use of copyrighted works has developed commercially. The motion picture scenario, the daily short story in the newspaper, the growing vogue of the concise one-act play and of the short-story magazine, have all been developments towards specialization, which doubtless render particular rights of increasing importance; but if the statute has not met these new developments, and in this regard I do not express any opinion, the time-worn answer of the courts is that the subject-matter then becomes one for legislative consideration.

An examination of many reported cases fails to disclose a disposition of the precise question at bar, but it may be helpful to refer to Jude's "Liedertafel" Case, L. R. (1907) 1 Ch. 651; Empire City Amusement Co. v. Wilton, 134 Fed. 133.

As the suit cannot be maintained under the Copyright Act, and as diversity of citizenship is lacking, the motion to dismiss the bill is granted, with costs.

NOTE.—It will be understood that I am not passing on the question which would be presented if Goodman were a party plaintiff.

MUTUAL LIFE INS. CO. OF NEW YORK et al. v. PAINTER et al.

(District Court, D. Maryland. March 9, 1915.)

1. REMOVAL OF CAUSES ~~12~~—RIGHT OF REMOVAL—JURISDICTION OF DISTRICT COURT.

Where complainants in a suit originally filed in a Maryland court were citizens of New York, and the substantial defendants were citizens of Florida, so that the suit could not have been originally instituted in the United States District Court for the District of Maryland, it cannot be removed to that court by the defendants, over the objection of complainants.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. §§ 32, 33; Dec. Dig. ~~12~~.]

2. COURTS ~~268~~—JURISDICTION—DISTRICT COURT—RESIDENCE OF DEFENDANTS—“SUIT TO ENFORCE A LIEN.”

A bill by insurance companies asking for an examination of the vital organs of insured, which were in the custody of a clerk of the state court, is not a “suit to enforce a lien” on or claim to specific property, which under Judicial Code (Act March 3, 1911, c. 231, § 57, 36 Stat. 1102, Comp. St. 1913, § 1039), may be brought in the district in which the property is, but is in the nature of a bill for discovery or to preserve testimony, and must be brought, under Judicial Code, § 51 (section 1033), in the district where defendants reside.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 806, 807, 812; Dec. Dig. ~~268~~.]

3. COURTS ~~328~~—JURISDICTION—DISTRICT COURT—AMOUNT IN CONTROVERSY.

If the bill is treated as a bill for discovery, the amount in controversy is the amount in dispute in the cause in which the testimony is to be used; but, if it is regarded as a claim to specific property, the amount in controversy is the value of the property, which is not sufficient to give jurisdiction to the federal court.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 890-896; Dec. Dig. ~~328~~.]

In Equity. Bill by the Mutual Life Insurance Company of New York and others against Martha S. Painter and others for an examination of the organs of a deceased person. On motion by plaintiffs to remand to the state court, after removal to the federal court by the defendants. Motion granted.

Barton, Wilmer & Stewart and Randolph Barton, Jr., all of Baltimore, Md., for plaintiffs.

Arthur L. Jackson, of Baltimore, Md., for defendants.

ROSE, District Judge. In his lifetime Edward O. Painter was the husband of one of the defendants and the father of another. At the time of his death his life was insured for upwards of \$1,000,000. The circumstances of his death were somewhat peculiar. There were other facts which seem to the insurance companies suspicious. The coroner removed from his body the principal vital organs and sent them to a Baltimore chemist. Some litigation over these remains followed in the state courts. Painter v. U. S. Fidelity & Guaranty Co., 123 Md. 301, 91 Atl. 158. By a writ of error the Painters carried the case to the Supreme Court of the United States, where it is now pending.

[1] Early in this litigation the remains were placed in the custody of the defendant Carson, the clerk of the circuit court of Baltimore city. The bill of complaint in the cause now at bar was originally filed in that court. It set up that a settlement was about to be reached between the parties to the preceding litigation, as a result of which the remains would be taken out of the custody of the clerk and would become inaccessible to the plaintiffs. It asked for a chemical and pathological examination under the order of the court and for an injunction forbidding the delivery of the remains to the Painters, or their removal from the jurisdiction of the court. The defendants attempted to remove the case here. The plaintiffs have moved to remand. They are New York corporations. Two of the defendants are citizens of Florida. The third is clerk of the circuit court of Baltimore city and a citizen of Maryland. The defendants say that he is a nominal party only. Even so, the plaintiffs are for jurisdictional purposes to be considered as citizens of New York and the substantial defendants of Florida. Such a case could not, against the objection of the defendants, have been entertained by the United States District Court for the District of Maryland, if it had been there originally brought. Judicial Code, § 51. It could not, therefore, be here removed (*Ex parte Wisner*, 203 U. S. 449, 27 Sup. Ct. 150, 51 L. Ed. 264), unless both sides waived their right to object to such removal (*In re Moore*, 209 U. S. 490, 28 Sup. Ct. 706, 52 L. Ed. 904, 14 Ann. Cas. 1164). That, the plaintiffs have not done.

Judge Cochran, in *Louisville & Nashville R. Co. v. Western Union Telegraph Co.* (D. C.) 218 Fed. 91, held that the decision in the *Wisner Case* was inadvertently made, and that its authority has been now so shaken, in consequence of the repudiation by the Supreme Court of the principle upon which it was based, that it is no longer to be accepted as an expression of the present view of the court which made it. He thinks that that tribunal will welcome an opportunity to review what it there said. It has little chance to overrule or even to explain any of its decisions limiting removability. District Judges follow what they understand it to have decided. From their action in remanding cases no appeal lies. If the Supreme Court wishes to review what it said in the *Wisner Case*, Judge Cochran has apparently opened a way. Until it has done so, it would seem unnecessary and unwise for any other District Judge to follow him. As a rule much greater harm is done by refusing to remand a case, which it is ultimately determined should have been remanded, than by remanding one, jurisdiction over which might properly have been retained.

[2] It follows that it must be held that the case at bar is not removable, unless it be one which is excepted from the provisions of section 51 of the Judicial Code. Defendants say that it is, and that it comes under the special provisions of section 57, which permit a suit to enforce a lien upon or a claim to, or to remove any incumbrances or lien or cloud upon the title to any real or personal property to be brought in the district within which such property is.

Bills similar to the one in this case have naturally been rare, but they have not been unknown. It has never been supposed that they sought to enforce a lien upon, or assert a claim to, the remains of the deceased.

They have been assumed to be bills for discovery or to perpetuate testimony. *Griesa v. Mutual Life Ins. Co.*, 169 Fed. 509, 94 C. C. A. 635. As such they are ordinarily subject to the provisions of section 51.

[3] The amount in controversy in such a proceeding is the value of the thing in dispute in the cause in which the testimony is to be used. On the other hand, if this is a suit to enforce a lien upon or a claim to the specific organic remains now in the custody of the defendant Carson as clerk of the state court, the amount in controversy could not exceed their value, and that is presumably nothing. So that, if this is a case under section 57, the amount in controversy is insufficient to permit this court to exercise jurisdiction.

The motion to remand must be granted, at the cost of Mrs. and Miss Painter, who caused the transcript of record to be here filed.

THE LACKAWANNA.

(District Court, W. D. New York. February 18, 1915.)

1. SALVAGE ~~27~~—SUIT TO RECOVER COMPENSATION—ESTOPPEL.

An offer by a voluntary salvor, without contract, to accept a stated sum for the service, if not accepted, does not conclude him from asking a more liberal compensation, when compelled to sue.

[Ed. Note.—For other cases, see *Salvage*, Cent. Dig. §§ 65, 66; Dec. Dig. ~~27~~.]

2. SALVAGE ~~37~~—LIABILITY OF CARGO TO CONTRIBUTE—NEGLIGENCE OF VESSEL.

While, in general, ship and cargo must proportionately bear salvage expenses, where there is a common peril, yet, where the salvage services are rendered necessary by the ship's negligence or unseaworthiness, the cargo may be relieved from contribution, and the vessel bound for the entire expense.

[Ed. Note.—For other cases, see *Salvage*, Cent. Dig. §§ 92, 94-102; Dec. Dig. ~~37~~.]

In Admiralty. Suit by the Reid Wrecking Company, Limited, against the steamer Lackawanna. On exceptions to report of special master. Overruled, and decree for libelant.

Holding, Masten, Duncan & Leckie, of Cleveland, Ohio, for libelant. Brown, Ely & Richards, of Buffalo, N. Y., for claimant.

HAZEL, District Judge. [1] The facts, which are undisputed, are stated in the opinion of the special master, and need not be here restated. The exceptions filed by libelant and respondent to the award by the special master of \$750 for volunteer salvage services are overruled. I was inclined at first to think the amount should be reduced, in view of the fact that the libelant, in rendering his bill for such salvages, placed the amount which he was willing to accept as payment in full at \$500; but, as the bill was not paid by respondent, it now seems to me that the libelant is not concluded in this proceeding from asking a more liberal compensation, especially as there was no contract for the payment of a specified sum for the services. The Ca-

manche, 8 Wall. 448, 19 L. Ed. 397. In explanation of the increased demand there was evidence that at the time of sending the bill libelant was not informed of the extent of the danger to which the steamer was subjected and from which she was rescued. It also appears that in engaging in the said salvage services the tugboat James A. Reid became liable in the sum of \$250 for damages sustained by a schooner which she was towing, and which she abandoned when she perceived the peril of the steamer Lackawanna and went to her assistance.

[2] The respondent has also excepted to the determination of the special master that the steamship alone was liable for the salvage services rendered while she was aground. The contention is that, as she and her cargo both were imperiled, the salvage services were rendered for the benefit of both, and both should proportionately pay therefor; but that, as the proceeding is in rem against the ship only, the recovery can be for only the ship's proportion of the salvage services rendered. For reasons hereinafter stated, however, the exception is not sustained.

To float the vessel after she was grounded the evidence shows that it was necessary merely to patch her and pump her out. No portion of her cargo had to be lightered, the particular services rendered being specified in an agreement between her master and the libelant. It is the general rule, where a vessel is aground and it is necessary to unload her cargo in order to float her, that both the vessel and the cargo are regarded in law as imperiled, and that the salvage services in such circumstances are performed in the common interest and for the common benefit, and accordingly the payment therefor must be borne by both; but there are well-recognized exceptions to this rule, for instance, after a vessel is unloaded and her cargo delivered, there is no longer a community of interest, and the vessel alone is obliged to bear the expense of being floated. The St. Paul (D. C.) 82 Fed. 104. So, also, is there an exception where the stranding does not endanger the cargo, as in cases where the vessel is grounded on the beach or shore. In such a situation it often happens that, though there may be danger of damage to the ship, there is no danger to the cargo, and hence the latter should not be held liable for services rendered in releasing the ship. The Alcona (D. C.) 9 Fed. 172; The L'Amerique (D. C.) 35 Fed. 835. See, also, International Navigation Co. v. Atlantic Mutual Ins. Co. (D. C.) 100 Fed. 304.

In the case at bar the respondent urges that the vessel was in danger of breaking in two by reason of the washing of the sand from under her, and the consequent straining and weakening, and that therefore the cargo, consisting of shingles, copper, flour, bran, and middlings, was also imperiled, and should accordingly assist the vessel in the payment of salvage expenses. I think there is force in this contention, for a community of interest or a common peril, such as would afford a right to contribution and general average, is not thought to mean equal danger, and therefore I think the cargo, though not in equal danger with the vessel, was nevertheless not relieved from contribution for salvage services. Willcox, Peck & Hughes v. American Smelting & Refining Co. (D. C.) 210 Fed. 89. But, notwithstanding

the foregoing, there is nevertheless a reason for relieving the cargo from such expenditure.

It is asserted that the salvage services in their entirety were made necessary by the fact that the steering gear of the Lackawanna was defective, as a result of which she came into collision with the barge Chieftain. The Circuit Court of Appeals has sustained this view. The Lackawanna, 210 Fed. 262, 127 C. C. A. 80. Although, generally speaking, the ship and cargo must proportionately bear the salvage expenses where there is a common peril, yet, where the salvage services are rendered necessary by the ship's negligence, the cargo may be relieved from contribution and the vessel bound for the entire expense. International Navigation Co. v. Atlantic Mutual Ins. Co., *supra*; The Irrawaddy, 171 U. S. 187, 18 Sup. Ct. 831, 43 L. Ed. 130. The employment of the tug James A. Reid by the master of the Lackawanna to assist in floating her was an employment for salvage services, and no doubt gave rise to a maritime lien on the ship. If the salvors had elected to proceed against both the vessel and cargo, and had recovered against them both, the cargo, in my opinion, because of the unseaworthiness of the vessel or her negligent navigation, could have recovered from the vessel the amount for which it was held liable to the claimant. The Wildcroft, 201 U. S. 378, 26 Sup. Ct. 467, 50 L. Ed. 794; Strang, Steel & Co. v. Scott, 14 App. Cas. 601.

None other of the exceptions requires special attention. They are all overruled.

N. K. FAIRBANKS CO. v. OGDEN PACKING & PROVISION CO.

(District Court, D. Utah. June 22, 1914.)

No. 372.

1. TRADE-MARKS AND TRADE-NAMES ~~59~~—**INFRINGEMENT—SIMILARITY IN NAMES.**

The registered trade-mark, "Cottolene," under which plaintiff was selling a substitute for lard, was infringed by the adoption and use of the name "Chefolene" for a similar product, sold in competition with plaintiff's product, as there was a sufficient similarity in sound to have a substantial tendency to confuse purchasers, and the uneducated and inexperienced might well be misled by the similarity, without heedlessness.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. §§ 101, 102; Dec. Dig. ~~59~~.]

2. TRADE-MARKS AND TRADE-NAMES ~~59~~—**INFRINGEMENT—SIMILARITY IN NAMES.**

A trade-mark is infringed, if the name selected for a product similar to that sold under such trade-mark substantially lessens the value of the property right in the trade-mark.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. §§ 101, 102; Dec. Dig. ~~59~~.]

3. TRADE-MARKS AND TRADE-NAMES ~~59~~—**INFRINGEMENT—SIMILARITY IN NAMES.**

Any doubt as to whether the similarity between a registered trade-mark and a trade-name subsequently adopted for a similar product will mislead purchasers should be resolved against the party selecting such

similar name with knowledge of the existence of the trade-mark, since, having a wide range of selection, it approximated the trade-mark.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. §§ 101, 102; Dec. Dig. ~~59~~59.]

In Equity. Suit by the N. K. Fairbanks Company against the Ogden Packing & Provision Company. Decree for plaintiff.

Archibald Cox, of New York City, for complainant.
Smith & McBroom, of Salt Lake City, Utah, for respondent.

MARSHALL, District Judge. [1] The plaintiff manufactures and sells a substitute for lard, which is principally composed of cotton seed oil and oleostearine, and is by it called "Cottolene." It adopted the word "Cottolene" as a trade-name of the product, and duly registered it as its trade-mark under the act of Congress. It has expended large sums of money in introducing and advertising its lard substitute under this name, and its ownership thereof as a valid trade-mark is admitted by the defendant. The defendant also manufactures a lard substitute of substantially the same descriptive properties as that of the plaintiff, and sells it in competition with the plaintiff's product for the same uses. The defendant commenced this manufacture and sale long after the plaintiff originated and registered its trade-mark, and at first called its substitute by the descriptive name "Compound." The plaintiff began a systematic attempt to popularize "Cottolene" in Ogden, Utah, where the defendant was conducting its business; and thereafter the defendant selected the name of "Chefolene" for its product, and under this name sold it in competition with the plaintiff. The price at which it was sold to the trade permitted the retail dealer to make a larger profit by selling Chefolene than if he sold Cottolene, so that he had an interest to substitute the one for the other. This suit was then brought to enjoin the use of the name "Chefolene" in connection with a lard substitute, under the contention that it colorably imitated the plaintiff's trade-mark and was an infringement.

[2, 3] Unfair competition is not claimed, because the defendant's labels and packages are distinctive in appearance, size, and inscription. The two products cannot be confused, unless through mere similarity of the names. The plaintiff's trade-mark, "Cottolene," is a valuable part of its good will, in which it has a property right. If the name selected by the defendant for its product substantially lessens the value of the plaintiff's right, it is an infringement. The two names have a certain similarity in sound and appearance. The ideas connoted by them are, however, different. The plaintiff's trade-mark was evidently selected to suggest the substances compounded by it; The defendant's name, omitting the suffix, the use to be made of the product. The suffix of each is identical, and I am inclined to the opinion that there is a sufficient similarity in sound to have a substantial tendency to confuse a purchaser, and make it practicable to substitute one for the other. It is not a question of confounding the two products,

if placed in juxtaposition, or if there was a conscious effort to discriminate between them.

A certain proportion of the ultimate purchasers of such a lard substitute will be found among the uneducated and inexperienced, to whom the two names will convey no idea, except as they are associated with the product bought, and who, without heedlessness, may well be misled. Any doubt as to this should be resolved against the defendant, for it had a wide range of selection, and, knowing the existence of the plaintiff's trade-mark, approximated it. It is difficult to avoid the conclusion that it was intended by this approximation to obtain an advantage through the plaintiff's efforts to popularize Cottolene, so far, at least, as to convey to the purchaser the idea that Chefolene was a similar article, intended and adapted to the same uses. This, in itself, was not unlawful; but it imposed the duty to use care to so discriminate the two names that a purchaser could not be deceived. The argument for the defendant that the distinction between the roots of the two words is so patent that the similarity of endings cannot confuse is ingenious, but hardly persuasive. This is doubtless true with a limited number of purchasers, who would readily associate the root with the idea suggested; but the plaintiff's good will is not so restricted, and must be protected in its broader field.

The cases are numerous in which names, differing as radically as the two here, have been held the one to be an infringement of a trade mark in the other. As illustrations: The names Mojava and Momaja, American Grocery Co. v. Sloan (C. C.) 68 Fed. 539; Cotoleo and Cottolene, N. K. Fairbanks Co. v. Central Lard Co. (C. C.) 64 Fed. 133; Cellonite and Celluloid, Celluloid Mfg. Co. v. Cellonite Mfg. Co. (C. C.) 32 Fed. 101; Saponio and Sapolio, Enoch Morgan's Sons v. Ward, 152 Fed. 691, 81 C. A. 616, 12 L. R. A. (N. S.) 729; Bovina and Boviline, Lockwood v. Bostwick, 2 Daly (N. Y.) 521; Sartoris and Sorosis, Little v. Kellam (C. C.) 100 Fed. 353.

The plaintiff is entitled to the usual decree for an injunction and an accounting; and it will be so ordered.

JUDSON v. KNIGHTS OF THE MACCABEES OF THE WORLD.

(District Court, W. D. New York. November 13, 1914.)

1. REMOVAL OF CAUSES ~~17~~—WAIVER OF RIGHT—VOLUNTARY APPEARANCE.

A defendant's voluntary appearance in the state court and admission of service, without the personal service of summons, though a waiver of its right to object to the court's jurisdiction over its person, was not a waiver of its right to remove the cause to the federal court.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. § 10; Dec. Dig. ~~17~~.]

2. REMOVAL OF CAUSES ~~3~~—EFFECT OF STATE LAWS.

A state statute providing that if any foreign insurance company, admitted to transact business in the state, removed a case to the United States court, its license should be revoked, did not prevent the removal of an action against an insurance company involving an insurance contract, as the statute was no part of the contract, and, moreover, was unen-

forceable, as opposed to public policy and the statutes of the United States.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. §§ 4, 5; Dec. Dig. ~~3~~3.]

Action by George D. Judson against the Knights of the Maccabees of the World. On motion to remand to the state court. Motion denied.

Judson, Holley & Caton, of Lockport, N. Y., for plaintiff.
Love & Keating, of Buffalo, N. Y., for defendant.

HAZEL, District Judge. [1] I have examined the cases relating to the different reasons for remanding causes to the state court, and I am satisfied that in this case the defendant had the right of removal. The application was seasonably made, and within the time prescribed by the statutes of the United States. The defendant entered a voluntary appearance; that is, the attorneys for the defendant filed a notice of appearance, and without personal service of summons voluntarily appeared and admitted service. Such appearance was doubtless a waiver of a right to object to the jurisdiction of the person of the defendant, but was not a waiver of the right of removal to this court.

The more important questions argued at the bar are whether the amount in controversy exceeds the sum of \$3,000, and whether, in view of the Insurance Law of this state in force since 1910, there is vested in plaintiff a legal right to have this action determined in the Supreme Court of this state. I agree with Judge Pooley, who considered the question on motion for removal under section 29 of the Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1095 [Comp. St. 1913, § 1011]), that the right to be protected in this case arises out of the policy of insurance and the amount which the defendant obligated itself to pay on the death of the plaintiff, namely, \$5,000. This was the value of the object to be gained in bringing suit, and not merely the amount of the premiums paid by the assured. There are many adjudications thus declaring the rule. Seemingly contrary views, as expressed for instance, in actions brought by taxpayers to restrain, an issue of bonds, are inapplicable and depend upon another principle. See Hutchinson v. Beckham, 118 Fed. 399, 55 C. C. A. 333.

[2] Nor do I think there is any merit in the claim that the defendant is concluded from removing this case on account of its license to do business in this state. That portion of the statute providing that if any foreign insurance company, admitted to transact business in this state since May, 1880, removes a case to the United States court, its license shall be revoked, was not a part of the insurance contract, and, indeed, in my judgment, is unenforceable, as opposed to public policy and in conflict with the statutes of the United States. See Doyle v. Continental Insurance Co., 94 U. S. 535, 24 L. Ed. 148.

It is not thought necessary to pass upon any of the other questions argued at the bar.

The motion to remand is denied.

MEMORANDUM DECISIONS

BOWERS v. POST. (Circuit Court of Appeals, Seventh Circuit. January 29, 1915.) No. 2100. In Error to the District Court of the United States for the Eastern Division of the Northern District of Illinois. William B. Jarvis, of Chicago, Ill., for plaintiff in error. Joseph W. Moses, of Chicago, Ill., for defendant in error. Before BAKER, SEAMAN, and KOHLSAAT, Circuit Judges.

PER CURIAM. In *Bowers v. Post*, 209 Fed. 660, the District Court stated fully and accurately the issues of fact and law that are now presented on this writ of error. The grounds of decision there reported are impregnable, we believe, and the judgment is accordingly affirmed.

CULLEN v. ARMSTRONG et al. (Circuit Court of Appeals, Fourth Circuit. February 2, 1915.) No. 1301. Appeal from the District Court of the United States for the District of Maryland, at Baltimore, in Bankruptcy; John C. Rose, Judge. F. Leonard Wailes, of Salisbury, Md. (S. A. Williams, of Bel Air, Md., on the brief), for appellant. Alonzo L. Miles, of Salisbury, Md., for appellees. Before KNAPP and WOODS, Circuit Judges, and WAD-DILL, District Judge.

PER CURIAM. The decree appealed from is affirmed for the reasons stated in the opinion of the District Judge, reported in 209 Fed. 704. Affirmed.

HULL v. DICKS. (Circuit Court of Appeals, Fifth Circuit. February 22, 1915.) No. 2398. Petition to Superintend and Revise from the District Court of the United States for the Southern District of Georgia; Emory Speer, Judge. William H. Barrett, of Augusta, Ga., for petitioner. B. B. McCowen, of Augusta, Ga., for respondent. Before PARDEE, Circuit Judge, and NEW-MAN and MEEK, District Judges.

PER CURIAM. The following question, to wit: "Where a resident citizen of Georgia has been duly adjudicated a bankrupt and dies after such adjudication and after the appointment, qualification and partial administration of the trustee, is the estate vested in the trustee under section 70 of the Bankruptcy Law of 1898 (Act July 1, 1898, c. 541, 30 Stat. 565 [Comp. St. 1913, § 9654]), chargeable under section 8 of the same law, or otherwise, with the allowance for a year's support of the widow and minor children, as provided in the laws of Georgia?"—having been certified to the Supreme Court, and having been answered in the affirmative (235 U. S. 584, 35 Sup. Ct. 152, 59 L. Ed. —), and, the same being decisive of this case, the petition for revision is denied.

PULLMAN CO. v. MILLER. (Circuit Court of Appeals, Second Circuit. February 18, 1915.) No. 151. In Error to the District Court of the United States for the Western District of New York. C. P. Williamson, of New York City, for plaintiff in error. Before LACOMBE, WARD, and ROGERS, Circuit Judges.

PER CURIAM. Judgment affirmed in open court.

ROBERTS et al. v. CHERRY CHEER CO. (Circuit Court of Appeals, Eighth Circuit. February 12, 1915.) No. 4334. Appeal from the District Court of the United States for the Eastern District of Missouri; David P. Dyer, Judge. Suit by the Cherry Cheer Company against Ezekiel M. Roberts, in which Ezekiel M. Roberts and another filed a cross-complaint. From a decree in favor of complainant, the defendant and cross-complainants appeal. Af-

firmed. A. R. Russell, of St. Louis, Mo. (Frumberg & Russell, of St. Louis, Mo., on the brief), for appellants. Luke E. Hart and Paul Bakewell, both of St. Louis, Mo., for appellee. Before SANBORN, HOOK, and CARLAND, Circuit Judges.

PER CURIAM. Upon a consideration of the record and the arguments and briefs of counsel, the court is of the opinion that the decree below was right, and it is affirmed.

WILLIAMS et al. v. UNITED STATES. (Circuit Court of Appeals, Eighth Circuit. March 8, 1915.) No. 4272. Appeal from the District Court of the United States for the Eastern District of Oklahoma; Ralph E. Campbell, Judge. Napoleon B. Maxey, of Muskogee, Okl., for appellants. W. P. Z. German, Sp. Asst. U. S. Atty., of Muskogee, Okl. (D. H. Linebaugh, U. S. Atty., of Muskogee, Okl., on the brief), for the United States. Before ADAMS and CARLAND, Circuit Judges and AMIDON, District Judge.

AMIDON, District Judge. This is a suit brought by the United States to cancel a power of attorney executed by a full-blood Choctaw Indian. The power of attorney is identical, in its provisions and the persons named as agents, with the instrument that was involved in Williams v. White et al., 218 Fed. 797, 134 C. C. A. 485, decided by this court November 10, 1914. The trial court held the instrument to be void. The decision is affirmed on the authority of the case referred to.

END OF CASES IN VOL. 220